

LitwinLaw Update

January 1, 2009

- **1. DHS Issues Interim Rule on I-9 Verification Documents** - The interim rule, among other things, requires that all documents presented during the verification process be unexpired. This is important information for persons who are responsible for monitoring I-9 compliance. The rule goes into effect on February 9th, 2009.
- **2. Company Agrees To Pay Largest Settlement Ever in Worksite Enforcement Case** - IFCO, the largest pallet management services company in the U.S., has agreed to pay \$20.7 million in civil forfeitures and penalties for employing undocumented workers.
- **3. US-VISIT Expanded To Nearly All Noncitizens** - The population of those subject to US-VISIT requirements has been expanded to nearly all non-U.S. citizens, including lawful permanent residents, with some exceptions. This rule is effective on January 19th, 2009.
- **4. U.S. Chamber of Commerce Challenges Legality of E-Verify Requirement for Federal Contractors** - The U.S. Chamber of Commerce filed a lawsuit against the DHS challenging the legality of requiring federal contractors to begin using E-Verify by January 15.
- **5. New York Documents Designated for Western Hemisphere Travel Initiative** - DHS has designated enhanced driver's licenses and identity documents issued by New York State as acceptable identity and citizenship documents for entering the U.S. at land and sea ports of entry.
- **6. DHS Issues Final Rule, Notice on H-2B Temporary Nonagricultural Workers** - DHS has amended its H-2B regulations regarding temporary nonagricultural workers and their U.S. employers. The rule goes into effect on January 18th, 2009.
- **7. EADs Extended for Salvadoran TPS Beneficiaries** - USCIS announced an automatic extension of the validity of Employment Authorization Documents (EADs) for eligible Salvadoran TPS beneficiaries for six months, through September 9, 2009.

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Details...

1. DHS Issues Interim Rule on I-9 Verification Documents

The Department of Homeland Security (DHS) is amending its regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers for employment authorization verification (Form I-9). The interim rule, effective February 9, 2009:

- requires that all documents presented during the verification process be unexpired;
- eliminates List A identity and employment authorization documentation forms I-688, I-688A, and I-688B (Temporary Resident Card and outdated Employment Authorization Cards);
- adds foreign passports containing certain machine-readable immigrant visas to List A;
- adds to List A as evidence of identity and employment authorization valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), along with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI ; and
- makes technical updates.

The DHS noted that it issues temporary I-551 stamps to legal permanent residents (LPRs) on either unexpired foreign passports or the Arrival-Departure Record (Form I-94), to serve as temporary documentation of LPR status while they wait for the actual Form I-551. Although the regulations refer to temporary I-551 "stamps," the DHS noted that the Department of State has been affixing machine-readable immigrant visas (MRIVs) that contain a pre-printed temporary I-551 notation in the foreign passports of those immigrating to the U.S. for several years. The pre-printed temporary I-551 notation is triggered after the bearer is admitted to the U.S. as an LPR. To update the regulations to reflect this alternate temporary I-551 document, this rule modifies the reference in List A [8 CFR 274a.2(b)(1)(v)(A)(3)] to temporary I-551 stamps on unexpired foreign passports to include pre-printed temporary I-551 notation on MRIVs. Because the pre-printed notation is not included on the I-94, this rule does not make any changes to regulatory references to temporary I-551 stamps on I-94s.

The rule also updates the list of acceptable documents and receipts by including "Form I-94A" next to each reference to the I-94 because the I-94A is nearly identical to the I-94 except that all fields are computer-generated rather than annotated by hand.

The interim rule also replaces the term "employment eligibility" with "employment authorization." The amended I-9 form reflecting these and other form-related changes was published as an attachment to this rule for "informational purposes." USCIS' Web site still has the version of the I-9 form that was revised June 5, 2007.

The interim rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-29874.pdf>. Questions and answers are available at http://www.uscis.gov/files/article/I9_qa_12dec08.pdf.

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2. Company Agrees To Pay Largest Settlement Ever in Worksite Enforcement Case

After a large worksite enforcement operation conducted by U.S. Immigration and Customs Enforcement (ICE), IFCO Systems North America, headquartered in Houston, Texas, and the largest pallet management services company in the U.S., has agreed to pay \$20.7 million in civil forfeitures and penalties over four years for employing undocumented workers at its plants.

The settlement amount includes \$2.6 million in back pay and penalties relating to IFCO's overtime violations with respect to 1,700 of its pallet workers. IFCO is also paying \$18.1 million in civil forfeitures that will be available to support future law enforcement activities.

Following a tip to ICE in February 2005 that undocumented workers at an IFCO plant in Albany, New York, were observed ripping up their W-2 forms, on April 19, 2006, ICE agents, in concert with other federal and state authorities, conducted a worksite enforcement action at over 40 IFCO pallet plants in 26 states, which resulted in the detention of 1,182 undocumented workers. The U.S. Attorney's Office in New York has prosecuted several IFCO managers and employees for criminal offenses associated with the employment of those workers. To date, nine IFCO managers and employees have entered guilty pleas related to such criminal conduct. Four managers are currently pending trial on a felony indictment in the U.S. District Court in the Northern District of New York and the investigation of IFCO employees is continuing. The IFCO settlement agreement concerns only the liability of the

corporation and does not address any pending or possible future criminal charges against individual employees, ICE noted.

ICE found that several IFCO managers and employees harbored and transported undocumented workers, and encouraged and induced them to remain in the U.S. as pallet workers. An analysis of the payroll information IFCO submitted to the Internal Revenue Service (IRS) and the Social Security Administration (SSA), and the hiring patterns and practices at IFCO, suggested to ICE that from 2003 through April 2006, as many as 6,000 undocumented workers were employed at IFCO pallet plants.

IFCO received repeated notices from the SSA and others, dating back to at least 2000, of irregularities in the social security numbers used for employment purposes by many of its pallet workers. ICE found that IFCO failed to take significant measures to verify the social security numbers of these workers, and in 2004 and 2005, failed to make any effort to address the use of invalid social security numbers by numerous pallet employees. Investigative entities further concluded that at 30 of IFCO's pallet plants, the company owed back wages to piece-wage pallet workers, the vast majority of whom were undocumented. Under the settlement agreement, ICE noted, IFCO acknowledged and accepted responsibility for the unlawful conduct of its managers and employees, as described in the agreement. The agreement includes a compliance and reporting program intended to prevent the employment of undocumented workers at IFCO plants in the future. The company will take remedial actions in hiring, such as using the E-Verify online work authorization verification system for all new hires, and will verify the social security numbers of all IFCO employees through SSA.

ICE's announcement is at <http://www.ice.gov/pi/nr/0812/081219albany.htm>.

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3. US-VISIT Expanded To Nearly All Noncitizens

The Department of Homeland Security has published a final rule, effective January 18, 2009, that expands the population of those who will be subject to US-VISIT requirements to nearly all non-U.S. citizens, including lawful permanent residents. Exceptions include Canadian citizens seeking short-term admission for business or pleasure under B visas and individuals traveling on A and G visas, among others. Those subject to US-VISIT may be required to provide finger scans, photographs, or other biometric identifiers upon arrival in the U.S. Currently, noncitizens arriving at a U.S. port of entry with a nonimmigrant visa, or those traveling without a visa

under the Visa Waiver Program, are subject to US-VISIT requirements with certain limited exceptions.

The final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-30095.pdf>.

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4. U.S. Chamber of Commerce Challenges Legality of E-Verify Requirement for Federal Contractors

Under new regulations, federal contractors and subcontractors will be required to begin using the E-Verify online work authorization verification system starting January 15, 2009. The U.S. Chamber of Commerce filed a lawsuit on December 23, 2008, against the Department of Homeland Security (DHS) that challenges the legality of that requirement.

Joining the Chamber as co-plaintiffs in the lawsuit, filed in the U.S. District Court for the District of Maryland, were the Associated Builders and Contractors, the Society for Human Resources Management, the American Council on International Personnel, and the HR Policy Association.

Robin Conrad, executive vice president of the National Chamber Litigation Center (NCLC), the Chamber's public policy law firm, said, "the Administration can't use an Executive Order to circumvent federal immigration and procurement laws. Federal law explicitly prohibits the secretary of Homeland Security from making E-Verify mandatory or from using it to reauthorize the existing workforce."

The Chamber's lawsuit challenges the government's use of an Executive Order coupled with federal procurement law to make E-Verify mandatory for federal contractors with projects exceeding \$100,000 and for subcontractors with projects exceeding \$3,000. The Chamber also challenged expanding E-Verify to require the reauthorization of existing workers.

"The DHS intends to expand E-Verify on an unprecedented scale in a very short timeframe, and to impose liability on government contractors who are unable to comply," said Randy Johnson, vice president of Labor, Immigration and Employee Benefits at the Chamber. "Given the current economy, now is not the time to add more bureaucracy and billions of dollars in compliance costs to America's businesses."

The Chamber is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The American Immigration Lawyers Association (AILA), among

others, applauded the Chamber's challenge. Charles H. Kuck, president of AILA, noted, "The idea of using an Executive Order to go beyond clear federal immigration and procurement laws and to impose liability on government contractors who are unable to comply is simply misguided and unlawful."

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5. New York Documents Designated for Western Hemisphere Travel Initiative

Effective December 2, 2008, the Department of Homeland Security has designated enhanced driver's licenses and identity documents (EDLs) issued by the state of New York as acceptable identity and citizenship documents for entering the U.S. at land and sea ports of entry. U.S. citizens possessing these EDLs will be permitted to present the EDLs, in lieu of passports, as acceptable documents under the Western Hemisphere Travel Initiative (WHTI) when entering the U.S. at land and sea ports of entry.

On October 27, 2007, the Secretary of Homeland Security and the Governor of New York signed a Memorandum of Agreement (MOA) to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border crossing purposes. Under the terms of the agreement between DHS and the State of New York, New York will only issue EDLs to U.S. citizens. EDLs also may be issued as photo identification cards to non-drivers.

The notice is available at <http://edocket.access.gpo.gov/2008/pdf/E8-28535.pdf>.

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6. DHS Issues Final Rule, Notice on H-2B Temporary Nonagricultural Workers

The Department of Homeland Security (DHS) has amended its H-2B regulations regarding temporary nonagricultural workers and their U.S. employers. The final rule, effective January 18, 2009, generally removes the requirement for H-2B petitioners to state on petitions the names of prospective H-2B workers who are outside the U.S. The rule also reduces the waiting period from six months to three months for an H-2B worker who has reached his or her maximum three-year period of stay in H-2B nonimmigrant status before such person may seek an extension of nonimmigrant stay, change of status, or readmission to the U.S. in any H or L nonimmigrant status.

The rule also adjusts the definition of "temporary services or labor," which is generally defined as a period of one year but could be for a specific one-time need of up to three years. The rule also eliminates the DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. The rule also prohibits H-2B petitioners from requesting an employment start date on the Petition for a Nonimmigrant Worker (Form I-129) that differs from the date of need listed on the approved temporary labor certification. The final rule requires H-2B petitioners to notify the DHS when the H-2B worker fails to report for work, is terminated before completing the work for which he or she was hired, or absconds from the worksite.

The final rule also precludes employers from passing the cost of recruiter fees charged by a petitioner, agent, facilitator, recruiter, or similar employment service to prospective H-2B workers as a condition of an offer of H-2B employment. Under this rule, however, employers and H-2B workers may agree that certain transportation costs and government-imposed fees be borne by H-2B workers, if the passing of such costs to these workers is not prohibited under the Fair Labor Standards Act or any other statute.

Employers who fail to meet the H-2B conditions or who willfully make material misrepresentations on an H-2B petition may be precluded from approval for a period of up to five years of any H (except H-1B1), L, O, or P-1 nonimmigrant visa petition, or any immigrant visa petition described in section 204 of the INA.

Nationals from the following countries are eligible to participate in the H-2B visa program:

Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; and United Kingdom.

Finally, this rule establishes a pilot exit control program for certain H-2B workers, by requiring them to report their departures at designated ports of entry. U.S. Customs and Border Protection (CBP) published a notice in the Federal Register describing the procedures and requirements for participation in this pilot program at <http://edocket.access.gpo.gov/2008/pdf/E8-29787.pdf>.

The DHS also published a separate notice, effective January 18, 2009, announcing the manner in which H-2B petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of

nonagricultural workers in H-2B nonimmigrant status or job placement fee information. Among other things, the notice sets forth the procedures for H-2B petitioners to notify USCIS when:

- an H-2B worker fails to report to work within five work days of the employment start date on the H-2B petition;
- when the temporary labor or services for which H-2B workers were hired is completed more than 30 days early; or
- when the H-2B worker absconds from the worksite or is terminated before the completion of the temporary labor or services for which he or she was hired.

Regulations require H-2B petitioners to retain evidence of such notification sent to USCIS for a one-year period.

The text of the final rule is available at <http://edocket.access.gpo.gov/2008/E8-30094.htm>. The notice is available at <http://edocket.access.gpo.gov/2008/E8-30098.htm>. Another notice announcing the list of eligible H-2B countries is at <http://edocket.access.gpo.gov/2008/E8-30114.htm>.

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7. EADs Extended for Salvadoran TPS Beneficiaries

USCIS announced an automatic extension of the validity of Employment Authorization Documents (EADs) for eligible Salvadoran TPS beneficiaries for six months, through September 9, 2009. Initially, the expiration date for Salvadoran EADs was March 9, 2009. USCIS has automatically extended the EAD validity period to allow for the agency to process and re-issue new EADs for such beneficiaries.

USCIS announced on September 24, 2008, that it would extend through September 9, 2010, TPS status for nationals of El Salvador who have already been granted TPS. Salvadoran nationals (and people having no nationality who last habitually resided in El Salvador) who had been granted TPS must have re-registered for the 18-month extension during the 90-day re-registration period that ended on December 30, 2008. TPS does not apply to nationals of El Salvador who entered the U.S. after February 13, 2001.

Details on the automatic extension of the EADs, including the application requirements and procedures, were published on December 15, 2008, at <http://edocket.access.gpo.gov/2008/pdf/E8-29511.pdf>.

New Publications and Items of Interest

U.S. Citizenship and Immigration Services Ombudsman reports. USCIS' Ombudsman released several reports in December:

- *Observations on the E-Verify Experience in Arizona & Recommended Customer Service Enhancements* found that mid-sized and large employers appear relatively satisfied with the speed and accuracy of E-Verify. Smaller employers, however, expressed varying levels of concern with user-friendliness. Also, the report found that confusion remains about the exact timing and the specific processes that employers and employees must follow after E-Verify returns a Tentative Nonconfirmation (TNC) determination. Apart from these operational observations, the Ombudsman found that USCIS outreach and education efforts have been well received by system users, but may not be reaching smaller-sized employers that represent 50 percent of the existing private U.S. payroll. The Ombudsman recommends that USCIS:
 1. Simplify the language used in all E-Verify instructions and supporting documentation.
 2. Make all registration and operational documents publicly available online for review by prospective E-Verify end users and employees.
 3. Ensure that USCIS' education and outreach efforts reach small business communities.
 4. Develop and add a tickler/calendar system in E-Verify that can issue timely prompts to employers to advise them of their next appropriate course of action for each specific open and unresolved TNC.
 5. Announce as a stated goal an intention to replace the current Form I-9 employment authorization verification process for employers that voluntarily use E-Verify.

The E-Verify report is available at http://www.dhs.gov/xlibrary/assets/cisomb_everify_recommendation_2008-12-22.pdf.

- *Study and Recommendations on Naturalization Oath Ceremonies* recommends, among other things, that USCIS should provide new citizens information on how to contact the Social Security Administration to prevent employment eligibility verification

problems, given the increased utilization of E-Verify. The naturalization report is available at http://www.dhs.gov/xlibrary/assets/cisomb_naturalization_recommendation_2008-12-16.pdf.

- *Improving the Processing of "Schedule A" Nurse Visas* recommends that USCIS adjust its normal procedures for processing Schedule A nurse applications. Specifically, USCIS should separate and prioritize, as well as centralize, its process for these applications in accordance with Congress's expressed concern about the national nursing shortage and to ensure consistent adjudication of applications. In addition, the Ombudsman suggested that USCIS may wish to consider establishing points of contact with the Department of Labor (DOL) on the processing of Schedule A nurse applications as partners hoping to achieve the same goal: the expeditious processing of Schedule A nurse applications.

The Ombudsman recommends that USCIS (1) separate and prioritize Schedule A green card nurse applications so that they can be expedited, without the requirement of a written request, upon immigrant visa availability; and (2) centralize Schedule A nurse applications at one designated USCIS service center to facilitate more efficient and consistent processing of Schedule A applications.

Additionally, the Ombudsman suggests that USCIS regularly communicate with DOL and develop points of contact at DOL to discuss concerns and direct inquiries regarding the processing of nurse immigration applications.

The nurse report is available at http://www.dhs.gov/xlibrary/assets/cisomb_ead_recommendation_36.pdf.

USCIS Ombudsman questions and answers from teleconferences. The Ombudsman's office has made available notes on the following topics from its teleconferences:

- How is USCIS Working for You?
- USCIS Refunds: How Is the Process Working for You?
- The K3 Visa Family Unification Process: How Is It Working for You?
- N-648 Medical Waivers - How Are They Working For You?
- Questions and Answers on The New Naturalization Test

- USCIS Receipting Delay - How Does This Affect You?
- Temporary Worker Visas
- E-Verify in Arizona - How is it Working for Your Business?
- Visas for Nurses: How Does This Impact Your Medical Facility?
- USCIS Summer 2007 Application Surge: How Is It Affecting You Now?
- CIS Ombudsman's 2008 Annual Report: Your Questions and Comments
- U Visa: One Year After the Interim Final Rule
- Teleconference on Biological Relationship Testing: Opportunities and Challenges

The links to notes from these teleconferences are available at http://www.dhs.gov/xabout/structure/gc_1171038701035.shtm (scroll down).

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Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

USCIS Service Center processing times online:
<https://egov.uscis.gov/cris/jsps/ptimes.jsp>

Department of Labor processing times and information on backlogs:
<http://www.foreignlaborcert.doleta.gov/times.cfm>

Department of State Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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