

# LitwinLaw Update

December 1, 2010

## Headlines:

- **1. DOS Discusses Upcoming Employment Visa Number Priority Cut-Off Dates** - It is unlikely that any cut-off dates will be set in the employment first preference during the coming months.
- **2. USCIS Issues Reminder on New Fees, Q&A on New Fee Schedule; Makes Corrections, Clarifications** - The new [fee schedule](#) for immigration-related applications and petitions took effect on November 23, 2010.
- **3. Do's and Don'ts, Tips on SSN "No-Matches" Released** - The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices issued do's and don'ts for employers and employees on Social Security Number "no-matches"
- **4. USCIS Revises I-129 Petition Form; Imposes New Export Control Certification** - The new version includes fee increases. Export control is now a very important factor.
- **5. DOL Hits H-2A Employer With \$1.3 Million in Back Wages, \$136,500 in Fines** - The Department of Labor's Wage and Hour Division assessed the fines against a Georgia company for violating provisions of the H-2A temporary agricultural worker program.
- **6. DOS Final Rule Revises Exchange Student Regs** - DOS is revising existing secondary school student regulations and is adopting a new training requirement for all organizational representatives who place and/or monitor students with host families.
- **7. ETA Extends Comment Period on H-2B Wage Methodology Rule** - The agency has extended the comment period until November 12, 2010.
- **8. DHS Extends TPS Designation for Somalia** - DHS has extended the designation of Somalia for TPS through September 17, 2012.

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## Details...

### 1. DOS Discusses Upcoming Employment Visa Number Priority Cut-Off Dates

The Department of State's Visa Bulletin for December 2010 notes that it is unlikely that any cut-off dates will be set in the employment first preference

during the coming months. It also appears unlikely that it will be necessary to establish a cut-off date other than those already in effect for the employment second preference category. Cut-off dates continue to apply to the China and India second preference categories due to heavy demand.

Based on current indications of demand, the Department said the "best case scenarios" for cut-off date movement each month are:

#### Employment Second:

- China: none to two weeks
- India: no movement

#### Employment Third:

- Worldwide: three to six weeks
- China: one to three weeks
- India: none to two weeks
- Mexico: although continued forward movement is expected, no specific projections are possible now
- Philippines: three to six weeks

The Department noted that the above ranges are estimates based on current demand patterns, and will be subject to possible fluctuations during the coming months.

The December 2010 Visa Bulletin is available at [http://travel.state.gov/visa/bulletin/bulletin\\_5197.html](http://travel.state.gov/visa/bulletin/bulletin_5197.html).

## **2. USCIS Issues Q&A on New Fee Schedule; Makes Corrections, Clarifications**

The new [fee schedule](#) for immigration-related applications and petitions took effect on November 23, 2010. Applications or petitions postmarked or otherwise filed on or after this date must include the new fee or they will be rejected.

USCIS published the new fee schedule in the Federal Register on September 24, 2010, following a review of public comments received after publication of the proposed rule this past summer. The new fee schedule increases application and petition fees by an average of about 10 percent but does not increase the naturalization application fee.

USCIS issued a related Q&A that notes, among other things, that if mailed through a courier service, the date the item is entered into the courier's service system is considered the postmark date.

Meanwhile, the American Immigration Lawyers Association (AILA) reported on November 19, 2010, that USCIS has confirmed that a receipt notice from a courier service or overnight mailing service will be considered a "postmark" for fee determination purposes.

USCIS has also corrected the new fee for refugee travel documents. As discussed in the preamble to the final rule, the agency had determined that the fee for a refugee travel document for an adult age 16 or older should match the fee charged for the issuance of a passport to a U.S. citizen (\$110 plus a \$25 execution fee). Accordingly, USCIS intended to reduce the fee for filing an Application for Travel Document, Form I-131, for refugees to \$135 for an adult age 16 or older. The final rule inadvertently listed a fee of \$165 for the I-131 refugee travel document for an adult age 16 or older. No other changes were made under this correction.

The Q&A is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=67b73dc5cb93b210VgnVCM100000082ca60aRCRD&vgnnextchannel=5b33aca797e63110VgnVCM1000004718190aRCRD>. The

USCIS alert is available at

<http://www.aila.org/content/default.aspx?docid=33665>. The correction notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-28719.pdf>. A table listing the old and new fees is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=92c5e116de9eb210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. The final rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-23725.pdf>.

### **3. Do's and Don'ts, Tips on SSN "No-Matches" Released**

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices recently issued the following do's and don'ts for employers on Social Security Number "no-match" letters. These are letters issued by the Social Security Administration (SSA) to employers stating that information supplied to the SSA does not match SSA records.

#### DO:

1. Recognize that name/SSN no-matches can result because of simple administrative errors.
2. Check the reported no-match information against your personnel records.
3. Inform the employee of the no-match notice.

4. Ask the employee to confirm his/her name/SSN reflected in your personnel records.
5. Advise the employee to contact the SSA to correct and/or update his or her SSA records.
6. Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
7. Follow the same procedures for all employees regardless of citizenship status or national origin.
8. Periodically meet with or otherwise contact the employee to learn and document the status of the employee's efforts to address and resolve the no-match.
9. Submit any employer or employee corrections to the SSA.

DON'T:

1. Assume the no-match conveys information regarding the employee's immigration status or actual work authority.
2. Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
3. Attempt to immediately reverify the employee's employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice.
4. Follow different procedures for different classes of employees based on national origin or citizenship status.
5. Require the employee to produce specific documents to address the no-match.
6. Ask the employee to provide a written report of SSA verification.

The document is available at

<http://www.justice.gov/crt/osc/pdf/publications/SSA/Employers.pdf>. A

similar document for employees is available at

<http://www.justice.gov/crt/osc/pdf/publications/SSA/Employees.pdf>. A

related FAQ is available at

<http://www.justice.gov/crt/osc/pdf/publications/SSA/FAQs.pdf>.

Also, the National Employment Law Project issued "Top 10 Tips for Employers" on Social Security no-match letters. The tips are available at [http://www.nilc.org/immsemplymnt/ssa-nm\\_toolkit/top\\_ten\\_tips\\_11-07-07.pdf](http://www.nilc.org/immsemplymnt/ssa-nm_toolkit/top_ten_tips_11-07-07.pdf), and are linked to a National Immigration Law Center "No-Match Letter Toolkit" available at [http://www.nilc.org/immsemplymnt/ssa-nm\\_toolkit/index.htm](http://www.nilc.org/immsemplymnt/ssa-nm_toolkit/index.htm).

#### **4. USCIS Revises I-129 Petition Form; Imposes New Export Control Certification**

U.S. Citizenship and Immigration Services (USCIS) has issued a new version

of the Petition for a Nonimmigrant Worker (Form I-129) to include the new fee increases. USCIS will accept previous versions of the form until December 22, 2010. Beginning on December 23, 2010, USCIS will only accept the revised form and will reject previous versions.

Among other changes, the revised I-129 form requires employers who are sponsoring foreign nationals for certain work visas to certify that they have made an export licensing determination regarding each employee sponsored. More specifically, employers must certify that they have evaluated the applicable export control regulations and have determined whether the employee will require an export license to perform the job.

Under the Department of Commerce's export control regulations, the release of technical information to a foreign national is deemed an "export" to that person's country of origin. That remains true even if the foreign national is lawfully employed. Compliance with this "deemed export rule" can be complex. Consult your Alliance of Business Immigration Lawyers attorney to determine how to comply.

Instructions and a link to the revised form (<http://www.uscis.gov/files/form/i-129.pdf>) are available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f56e4154d7b3d010VgnVCM10000048f3d6a1RCRD>.

## **5. DOL Hits H-2A Employer With \$1.3 Million in Back Wages, \$136,500 in Fines**

The Department of Labor's Wage and Hour Division (WHD) is assessing J&R Baker Farms LLC of Ellenton, Georgia, \$1,311,644 in back wages owed to 244 workers and \$136,500 in fines for violating provisions of the H-2A temporary agricultural worker program.

WHD found that the vegetable farm allegedly failed to provide at least 75 percent of the hours promised in the work contract. WHD is asking an administrative law judge to order the farm to pay \$1,311,644 in back wages to 148 U.S. workers and 96 H-2A workers and pay a fine of \$122,000.

The investigation also discovered that the farm failed to provide a copy of the H-2A work contract at the time of recruitment to 29 U.S. workers who performed the same type of work as the H-2A workers. The Department is recommending a fine of \$14,500 for that offense.

A press release announcing the findings is available at <http://www.dol.gov/opa/media/press/whd/WHD20101532.htm>.

## **6. DOS Final Rule Revises Exchange Student Regs**

In a final rule effective November 26, 2010, the Department of State is revising existing secondary school student regulations regarding the screening, selection, school enrollment, orientation, and quality assurance monitoring of exchange students, host families, and field staff. The Department also is adopting a new training requirement for all organizational representatives who place and/or monitor students with host families.

A proposed requirement to conduct FBI fingerprint-based criminal background checks will not be implemented now. The agency said it continues to examine that proposed requirement and a subsequent final rule will be forthcoming.

The final rule governs the designated exchange visitor programs under which foreign secondary school students (ages 15 to 18 1/2) may study in the U.S. at accredited public or private secondary schools for an academic semester or year while living with American host families or residing at accredited U.S. boarding schools.

Compliance with a new requirement for a mandated training module for local coordinator training will not be required until the development of an online training platform is completed and launched, which is anticipated to be in January 2011. A subsequent Federal Register notice will be published when that occurs.

The final rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-27200.pdf>.

## **7. ETA Extends Comment Period on H-2B Wage Methodology Rule**

On October 5, 2010, the Department of Labor's Employment and Training Administration (ETA) issued a proposed rule governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of related obligations of employers. The proposed rule provided a comment period through November 4, 2010. The agency extended the comment period for an additional 8 days, to November 12, 2010.

The proposed rule would revise the methodology by which the Department calculates the H-2B prevailing wage. It would establish that the prevailing wage will be the highest of: (1) wages established under an agreed-upon collective bargaining agreement (CBA); (2) a wage rate established under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA) for that occupation in the area of intended employment; and (3) the

arithmetic mean wage rate established by Occupational Employment Statistics (OES) for that occupation in the area of intended employment. The employer would be required to pay its workers at least the highest of the prevailing wage as determined by the National Processing Center (NPC) (currently the National Prevailing Wage Center), the federal minimum wage, the state minimum wage, or the local minimum wage.

The proposed rule also would eliminate the use of the current four-tiered wage structure that differentiates wage tiers by level of experience, education, and supervision required to perform the job duties. The Department proposes instead a single OES wage level for H-2B job opportunities based on the arithmetic mean of the OES wage data for the job opportunities in the area of intended employment.

The Department anticipates further rulemaking that will address other aspects of the H-2B temporary worker program. Interested persons are invited to submit written comments on the proposed rule by November 12, 2010, using one of the methods set forth in the extension notice, which is available at <http://edocket.access.gpo.gov/2010/pdf/2010-27602.pdf>.

## **8. DHS Extends TPS Designation for Somalia**

The Department of Homeland Security (DHS) has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of March 17, 2011, through September 17, 2012. DHS determined that an 18-month extension is warranted because conditions in Somalia prompting the TPS designation continue to exist. Armed conflict in Somalia is ongoing. Due to that conflict and "other extraordinary and temporary conditions," requiring the return of eligible individuals with TPS to Somalia "would pose a serious threat to their personal safety," the agency said.

The notice also sets forth procedures necessary for nationals of Somalia (or those having no nationality who last habitually resided in Somalia) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Somalia and whose applications have been granted or remain pending. Certain nationals of Somalia (or those having no nationality who last habitually resided in Somalia) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

USCIS will issue new EADs with a September 17, 2012, expiration date to eligible TPS beneficiaries who timely re-register and apply for EADs. The 60-

day re-registration period begins November 2, 2010, and will run until January 3, 2011.

The USCIS notice is available at

<http://edocket.access.gpo.gov/2010/pdf/2010-27613.pdf>. A related Q&A is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1dffae8ac980c210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. Additional information on TPS for Somalians can be found at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=928f3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=928f3e4d77d73210VgnVCM100000082ca60aRCRD>.

## **New Publications and Items of Interest**

Foreign student enrollment increases; mostly from China. The Institute of International Education, with support from the Department of State, released *Open Doors Report on International Educational Exchange 2010*, which notes that foreign student enrollments in the U.S. increased by 3 percent, to 690,923 students, during the 2009-2010 academic year. This year's growth was primarily driven by a 30% increase in Chinese student enrollment in the United States to a total of nearly 128,000 students, or more than 18% of the total international student population. This makes China the leading sending country, the report said. Students from India increased by 2% to a total of nearly 105,000. Indian students represent 15% of all international students in U.S. higher education. The most notable decline was in Japanese students.

California was the top host state, and New York City was the top host city. Business and management, and engineering, remained the top two fields of study.

NAFSA: Association of International Educators and several other entities recently conducted a "snapshot" online survey on related issues. The survey asked educators to indicate whether they had seen a change in new enrollments from selected sending countries. The results indicate that new enrollments from China are increasing significantly, with 58% of institutions reporting increases and only 14% reporting declines (the rest reported level enrollments).

A press release that includes a discussion of the results, and related links, is available at <http://www.iie.org/en/Who-We-Are/News-and-Events/Press-Center/Press-Releases/2010/2010-11-15-Open-Doors-International-Students-In-The-US>.

GAO report on closed civil criminal cases involving fraud and abuse against H-2B workers. The Government Accountability Office (GAO) recently released a report, "H-2B Visa Program: Closed Civil Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse." The GAO reviewed 10 closed cases over the last five years that involved H-2B employers and recruiters who violated various labor laws or settled allegations of violations outside of court. Violations included employers failing to pay promised wages, overtime, or both; employers charging H-2B workers exorbitant fees; and employers and recruiters submitting fraudulent documentation to government officials. For example, in one case H-2B workers became indebted to their employer through a series of arbitrary charges. The employer then forced workers to take second jobs at local fast food restaurants to pay these debts. GAO personnel found that most recruiters they called or visited posing as prospective H-2B employers and workers did not encourage the GAO's undercover agents to violate program rules. Of the 18 recruiters in multiple states the GAO contacted, H-2B recruiters on three calls provided suggestions on how to circumvent program rules, such as providing "good excuses" to help "weed out" prospective U.S. workers or recouping costs through "off-the-book" transactions to avoid restrictions on pay deductions. Additionally, the GAO found that H-2B workers contacted during the site visits to their housing locations were generally pleased with their living and working conditions. However, at one location the H-2B workers were afraid to speak with outside individuals for fear of retaliation from their employer.

The GAO report is available at <http://www.gao.gov/new.items/d101053.pdf>.

New packet for naturalized U.S. citizens. U.S. Citizenship and Immigration Services announced that all new citizens will receive a U.S. Citizenship Welcome Packet during their naturalization oath ceremony. Along with practical information on applying for a U.S. passport, establishing and obtaining Social Security records, getting involved in the local community, and petitioning for family members, the packet includes a congratulatory letter from the President; a flier on important information for new citizens; the *Citizen's Almanac*, a pocket-size edition of the Declaration of Independence and the U.S. Constitution, a passport application, a naturalization certificate holder, and a voter's guide to federal elections.

Naturalization rates among IRCA immigrants. The Department of Homeland Security's Office of Immigration Statistics has released a fact sheet, "Naturalization Rates Among IRCA Immigrants: A 2009 Update." The fact sheet presents various statistics on those who immigrated to the U.S. under the Immigration Reform and Control Act of 1986 (IRCA). Among other things, the data show that immigrants who obtained permanent residence

through IRCA provisions had lower rates of naturalization than immigrants who obtained status through other provisions. The fact sheet is available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca-natz-fs-2009.pdf>.

J-1 final rule guidance. The American Immigration Council's International Exchange Center has released a practice advisory on the final rule for J-1 trainee and intern programs, available at [http://www.internationalexchangecenter.org/sites/default/files/images/Practice\\_Advisory\\_Final\\_rule.pdf](http://www.internationalexchangecenter.org/sites/default/files/images/Practice_Advisory_Final_rule.pdf). The practice advisory notes that the significant changes under the final rule include:

1. Clarification of the required academic background for interns.
2. Elimination of the requirement that sponsors must obtain a Dun & Bradstreet report on all host companies.
3. Clarification that social work falling under Public Administration and Social Service Professions is allowed; clinical social work is not allowed.
4. Clarification that dental services are not allowed.
5. Elimination of training or internships for counter help positions.
6. Clarification that telephone interviews are appropriate when video conferencing is not available for the purpose of screening English language proficiency.

Immigration, offshoring and jobs. The National Bureau of Economic Research has published "Immigration, Offshoring and American Jobs." The paper predicts that while cheaper offshoring reduces the share of natives among less skilled workers, cheaper immigration reduces the share of offshored jobs. Moreover, since both phenomena have a positive "cost-savings" effect, they may leave unaffected, or even increase, total native employment of less-skilled workers. The paper also predicts that offshoring will push natives toward jobs that are more intensive in communication-interactive skills and away from those that are manual and routine-intensive. The authors tested their predictions on data for 58 U.S. manufacturing industries over the period 2000-2007 and found evidence that immigration has a positive net effect on native employment, while offshoring has no effect on it. They also found that offshoring has pushed natives toward more communication-intensive tasks and has pushed immigrants away from them. The paper is available at <http://www.nber.org/papers/w16439> to eligible entities or subscribers.

## **Government Agency Links**

*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/processTimesDisplay.do>

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/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html)