

# LitwinLaw Update

February 1, 2011

## Headlines:

- **1. H-1B Cap Reached for FY 2011** - January 26, 2011 was the "final receipt date" for new H-1B specialty occupation petitions requesting an employment start date in FY 2011. The next H-1B petitions can be filed on 04/01/2011 for start date of 10/01/2011.
- **2. USCIS Revises I-9 Manual for Employers** - The handbook includes expanded guidance on lawful permanent residents, refugees and asylees, and acceptable documents for employees in TPS. This "must have" handbook is available at [www.uscis.gov/files/form/M-274.pdf](http://www.uscis.gov/files/form/M-274.pdf).
- **3. Visa Numbers Move Slowly** - Priority dates in several employment-based categories moved ahead, although not by much overall.
- **4. USCIS Releases Pending Employment-Based Adjustment of Status Inventory** - The report shows how many pending adjustment of status (green card) applications in each preference classification have priority dates in a given month and year.
- **5. ICE Announces New I-9 Compliance Inspection Center, Partnership With Tyson Foods; Audits Increase** - Fifteen additional auditors will focus their efforts on major investigations of the largest companies.
- **6. E-Verify Update: USCIS Updates Web Interface, Launches Newsletter; House Hearings Soon** - USCIS has made changes to its E-Verify Web interface, and has launched a newsletter on E-Verify developments.
- **7. State Dept. Announces New Passport Forms Starting March 1** - Applicants should continue to use the current forms to submit a passport application before that date.
- **8. House Holds Hearing on Worksite Enforcement Issues** – Testifying on the panel were Kumar Kibble, ICE Deputy Director, and others.
- **9. DHS Adds New Countries to H-2A, H-2B Programs; Drops Indonesia** - Of the 53 countries on the list, 15 were designated for the first time this year.
- **10. IRS Publishes W-4 Instructions for Nonresident Aliens** – The IRS has modified the instructions on the W-4 for nonresidents to reflect restrictions on their filing status, the limited number of exemptions allowed, and the standard deduction.
- **11. USCIS Issues Policy Memo Disallowing Concurrent Filings for Special Immigrant Religious Workers** - Any I-485 where the underlying basis for adjustment is an I-360 petition for a special immigrant religious worker must be filed based on an approved I-360 petition.
- **12. USCIS Releases H-1B, H-2B Cap Counts** - ABIL recommends filing petitions now.

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**Details...**

**1. H-1B Cap Reached for FY 2011**

U.S. Citizenship and Immigration Services (USCIS) announced on January 26, 2011, that it has received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2011.

USCIS noted that January 26, 2011, is the "final receipt date" for new H-1B specialty occupation petitions requesting an employment start date in FY 2011. The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 65,000. Properly filed cases will be considered received on the date that USCIS physically receives the petition, not the date that the petition was postmarked. USCIS said it will reject cap-subject petitions for new H-1B specialty occupation workers seeking an employment start date in FY 2011 that arrive after the final receipt date.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on January 26, 2011. USCIS will reject all remaining cap-subject petitions not randomly selected and will return the accompanying fee.

USCIS noted that it will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted toward the FY 2011 H-1B cap. Accordingly, USCIS will continue to accept and process petitions filed to:

- extend the amount of time a current H-1B worker may remain in the U.S.;
- change the terms of employment for current H-1B workers;
- allow current H-1B workers to change employers; and
- allow current H-1B workers to work concurrently in a second H-1B position.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields such as scientists, engineers, or computer programmers.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=7fd9b9138c9cd210VgnVCM100000082ca60aRCRD&vgnnextchannel=b56db6f2cae63110VgnVCM1000004718190aRCRD>.

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## 2. USCIS Revises I-9 Manual for Employers

U.S. Citizenship and Immigration Services (USCIS) has revised its *Handbook for Employers: Instructions for Completing Form I-9 (M-274)*. Revised as of January 5, 2011, the handbook includes expanded guidance on lawful permanent residents, refugees and asylees, and acceptable documents for employees in temporary protected status (TPS).

The following is a summary of key changes in the revised handbook:

- **Employees With TPS**

TPS is a temporary immigration benefit that allows foreign nationals from designated countries to reside and work in the United States for a temporary period of time. The Department of Homeland Security (DHS) may extend a country's TPS designation and issue a Federal Register notice to automatically extend expiring employment authorization documents (EADs) for TPS beneficiaries. Thus, a TPS beneficiary may choose to present an EAD that is expired on its face so long as it has been automatically extended. The challenge to employers is how to determine whether a TPS beneficiary's expired EAD is valid as a List A document.

The handbook now provides guidance on how to identify a TPS EAD, how to determine whether the DHS has issued an automatic extension of expiring EADs, and how to explain that the TPS status was extended on the Form I-9 (Employment Eligibility Verification).

- **J-1 Exchange Visitors & F-1 Students, including F-1s Changing to H-1B Status ("The Cap Gap")**

The handbook provides a detailed explanation on how to complete the I-9 for those individuals in J-1 exchange visitor status and F-1 and M-1 student status. Additionally, the handbook explains how to complete the I-9 for F-1 students who are changing status to H-1B and are eligible for a "cap-gap"

extension of status and employment authorization. The handbook confirms that the student's employment authorization will remain valid through September 30 of the calendar year for which the H-1B is filed, so long as the student's H-1B status will begin on October 1. Additionally, the handbook advises that an employer must re-verify a student's Form I-20 (Certificate of Eligibility for Nonimmigrant (F-1) Student Status). The I-20 must show that the cap-gap extension was endorsed by the student's designated school official. Re-verification must be done no later than October 1.

- **H-1B Employees Changing Employers (Portability)**

The handbook now states that an employee in valid H-1B status who changes (ports) to a new employer can begin to work with the new employer *upon filing* an H-1B petition with USCIS. The prior version of the handbook required the porting H-1B employee to obtain a Form I-797 (Receipt Notice) from USCIS before beginning work with the new employer. This approach created considerable delay because it often takes USCIS weeks to issue the official I-797.

The new version of the handbook explains that a porting H-1B employee may begin employment by presenting his or her Form I-94/I-94A (Arrival-Departure Record) issued for employment with the previous employer, along with his or her foreign passport, as a List A document. The employer should write "AC21" on the I-9, record the date that the new H-1B petition was submitted to USCIS in the margin next to Section 2 of the I-9, and attach documentation as specified in the handbook.

- **Extensions of Status**

The handbook explains that an employee with a petition for extension of status timely filed before the employee's work authorization expires is eligible for continued work authorization for up to 240 days beyond the expiration date of the authorization as long as the extension remains pending. The handbook provides a detailed explanation of how to complete the I-9 and the documentation to be attached for individuals in E-1, E-2, H-1B, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1 and TN status who have timely filed extensions with the same employer.

Where an H-1B extension is timely filed and the extension remains pending, the employer should write "240-Day Ext." and record the date the employer submitted the Form I-129 (Petition for a Nonimmigrant Worker) to USCIS in the margin of the I-9 next to Section 2.

Additionally, the handbook expands upon what documentation should be added to the I-9. Previously, the employer was advised to attach only the I-

797. Now, the handbook adds that the employer should keep the following documents with the I-9 in this situation:

1. A copy of the new I-129 that was filed for the extension;
2. Proof of payment for the filing of the new I-129; and
3. Evidence that the new I-129 was mailed to USCIS.
4. After the extension is filed, USCIS will issue a receipt notice (Form I-797(C)), which should also then be added and kept with the I-9.

When the extension of stay is approved, the employer should record in Section 3 the document title, number, and expiration date listed. The handbook adds that the employer must give the employee the I-94A, which is evidence of the employee's employment authorized nonimmigrant status.

- **Interruptions in Employment**

The handbook now provides guidance to employers who are uncertain about whether a new I-9 is required after an employee has experienced a brief interruption in employment. The handbook provides examples of situations which include "continuing employment," such as maternity or paternity leave, leaves of absence, transfer from one business unit to another business unit of the same employer, or the same employer at another location. An employer is not required to complete a new I-9 in these situations so long as there is a reasonable expectation of employment at all times.

- **Electronic Retention of Forms I-9 and Documentation of Electronic Storage Systems**

The handbook offers expanded guidance to employers who use paper, electronic systems, or a combination of paper and electronic systems to keep I-9 forms. Employers must follow certain guidelines, outlined in the handbook, should they choose to keep their I-9s in an electronic generation or storage system. One requirement is that an employer must maintain and make available upon request complete descriptions of the electronic generation and storage system and the indexing system that permit the identification and retrieval of documents and records maintained. Employers who are currently using, or contemplating the future use of, an electronic retention system should review the information outlined in the handbook and consult their Alliance of Business Immigration Lawyers (ABIL) attorney for guidance.

- **E-Verify and Federal Contractors**

The previous version of the handbook offered guidance to employers regarding participation in E-Verify and the corresponding I-9 responsibilities, such as maintaining a photograph of a List B document. The new version of the handbook provides additional guidance to federal contractors about their responsibilities under the amended Federal Acquisition Regulation (FAR) related to employment eligibility verification. The handbook explains that the regulation requires contractors with a federal contract that contains a FAR E-Verify clause to use E-Verify for their new hires and all employees (existing and new) assigned to the contract. The handbook also states that where an employee working for a FAR employer undergoes a name change and the employer chooses to verify existing employees by updating existing I-9 forms, a new I-9 must be completed.

- **Questions and Answers Section**

The handbook has expanded its Questions and Answers (Q&A) section to provide clarification to employers in a variety of situations related to the I-9, including the following helpful information:

- A Native American tribal document is acceptable as both a List B and List C document, and no other documents need be presented. For a current list of tribes recognized by the U.S. federal government, employers may visit the website of the Bureau of Indian Affairs at <http://www.bia.gov>. A Certificate of Indian Status does not constitute an acceptable Native American tribal document and may not be accepted for I-9 purposes.
- An employer may accept a Social Security Card that has not been signed as a valid List C document.
- An employee may present an unexpired I-94 card notated with work-authorized status in two situations: (1) as a List A document along with his or her foreign passport; or (2) as a List C document demonstrating work authorization from USCIS.
- Employers may accept documents bearing a different name than that which the employee has indicated in Section 1 of the I-9, so long as the documents reasonably relate to the employee. The employer may want to attach a brief memo to the I-9 detailing the employee's reason for the name discrepancy, including copies of any supporting documentation the employee chooses (but is not required) to provide.

The revised handbook for employers is available at

<http://www.uscis.gov/files/form/m-274.pdf>.

For more information on the updated employer handbook or on potential changes to your I-9 policies and procedures, contact your ABIL attorney.

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### **3. Visa Numbers Move Slowly**

The Department of State has released the Visa Bulletin for February 2011. Priority dates in several employment-based (EB) categories moved ahead, although not by much overall. For example, the third preference "Other Workers" worldwide category advanced from April 22, 2003, to May 1, 2003. The Mexico third preference category advanced from April 15, 2003, to July 8, 2003. Many categories remain Current.

It had been initially reported that the India EB-2 category was Current, but the Visa Office corrected that erroneous information. The India second preference priority date remains at May 8, 2006.

The February 2011 Visa Bulletin is available at [http://travel.state.gov/visa/bulletin/bulletin\\_5228.html](http://travel.state.gov/visa/bulletin/bulletin_5228.html).

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### **4. USCIS Releases Pending Employment-Based Adjustment of Status Inventory**

U.S. Citizenship and Immigration Services (USCIS) has released a report of the agency's total pending inventory of applications for employment-based green cards (Form I-485, Application to Register Permanent Residence or Adjust Status). USCIS also has posted five other reports by country of chargeability (China, India, Mexico, Philippines, and All Other Chargeability).

The "Pending Employment-Based Form I-485 Report" shows how many pending adjustment of status (green card) applications in each preference classification have priority dates in a given month and year.

Because of historically higher demand for visas from China, India, Mexico, and the Philippines, each of those countries has its own separate report.

The January 2011 report is available at <http://www.uscis.gov/USCIS/statistics/Employment%20Based%20I-485%20Pending%20Inventory%20as%20of%20January%202005,%202011.pdf>. For more information, see the USCIS Q&A at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCD&vgnnextoid=5e170e6bcb7e3210VgnVCM100000082ca60aRCRD>

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## **5. ICE Announces New I-9 Compliance Inspection Center, Partnership With Tyson Foods; Audits Increase**

On January 20, 2011, U.S. Immigration and Customs Enforcement (ICE) announced the creation of an employment compliance inspection center in Crystal City, Virginia. At the center, 15 auditors will support ICE's worksite enforcement strategy by helping agency field offices around the country expedite employment authorization verification (Form I-9) audits of businesses selected for inspection by ICE. Currently, ICE employs 137 full-time auditors. The 15 additional auditors will focus their efforts on major investigations of the largest companies, ICE Director John Morton said.

From fiscal year 2009 to the present, ICE initiated I-9 inspections of 3,769 businesses across the U.S. Last year, ICE audited 2,200 companies, the largest number of audits the agency has conducted in a year.

ICE also announced the same day that Tyson Foods, Inc., is the newest member of the agency's nationwide program designed to encourage businesses to collaborate with ICE and use hiring best practices to ensure that they are maintaining a lawful workforce. Tyson Foods Senior Vice President and Chief Human Resources Officer Ken Kimbro and ICE Director John Morton signed the "ICE Mutual Agreement between Government and Employers" (IMAGE) agreement during a ceremony at ICE headquarters.

Tyson Foods, Inc., which employs almost 100,000 people at locations throughout the U.S., is the first major food company to become a full member of ICE's IMAGE program. The voluntary program allows businesses to partner with ICE as part of their efforts to maintain an authorized workforce and protect themselves from the use of fraudulent identity documents by current or prospective employees. ICE said this program complements ICE's worksite enforcement strategy, which focuses on holding accountable employers that knowingly hire unauthorized workers to minimize operating costs and boost profits.

To become certified, Tyson was subject to an I-9 audit and other checks by ICE. The company met other IMAGE requirements with programs it already has in place. For example:

- Tyson conducts regular self-assessments or internal audits of its hiring activities. The company also uses an independent outside company to conduct its own audits of the company's hiring practices.
- Tyson voluntarily participates in the online government employment verification program known as E-Verify. The company also voluntarily uses the "Social Security Number Verification Service."
- Tyson trains all of its employment managers on the hiring process, proper completion of the I-9, and document examination and fraud detection.

ICE initiated the IMAGE program in 2006. All IMAGE members must participate in the Department of Homeland Security (DHS) E-Verify employment eligibility verification program, which provides an automated link to the Social Security Administration database and DHS immigration records.

Upon enrollment in and commitment to the IMAGE Best Employment Practices, program participants are deemed "IMAGE certified," a designation DHS and ICE say will become an industry standard. IMAGE also provides employers free training on the I-9 process, fraudulent document detection, and building a solid immigration compliance model.

The press release announcing the new inspection center and the partnership with Tyson Foods is available at <http://www.ice.gov/news/releases/1101/110120washingtndc.htm>.

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## **6. E-Verify Update: USCIS Updates Web Interface, Launches Newsletter; House Hearings Soon**

U.S. Citizenship and Immigration Services (USCIS) has made the following changes to its E-Verify Web interface:

- added U.S. Passport Photo Matching, a new feature that uses data and photos from the U.S. passport system to assist in the verification process
- changed the title "Designated Agent" to "E-Verify Employer Agent"
- updated the following USCIS publications:
  - E-Verify User Manual for Employers
  - E-Verify User Manual for Federal Contractors
  - E-Verify User Manual for E-Verify Employer Agent

- E-Verify Quick Reference Guide for Employers
- E-verify Quick Reference Guide for E-Verify Employer Agent

USCIS has also launched *E-Verify Connection*, a newsletter on E-Verify developments. The first issue is available at <http://www.uscis.gov/USCIS/Verification/E-Verify/Publications/E-Verify-Connection.pdf>. You may join the newsletter distribution list by e-mailing "subscribe" to [E-VerifyOutreach@dhs.gov](mailto:E-VerifyOutreach@dhs.gov).

For more information on these developments, see <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=04db32802cbc8210VgnVCM100000082ca60aRCRD&vgnnextchannel=04db32802cbc8210VgnVCM100000082ca60aRCRD>.

In related news, Florida recently began requiring certain state agencies and contractors to use E-Verify, while Rhode Island has rescinded its E-Verify requirement for state contractors.

Also, Rep. Elton Gallegly (R-Cal.) will chair the U.S. House of Representatives' Subcommittee on Immigration Policy and Enforcement. Observers had expected Rep. Steve King (R-Iowa) to be appointed instead, but he is now vice chairman. Rep. Gallegly is considered by many observers to be hawkish on immigration but less controversial than Rep. King. Among other things, Rep. Gallegly was instrumental in creating the pilot program that led to E-Verify. He is expected to hold hearings on E-Verify soon.

The American Immigration Lawyers Association has published a fact sheet on Rep. Gallegly, available at <http://www.aila.org/content/default.aspx?docid=34122>.

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## **7. State Dept. Announces New Passport Forms Starting March 1**

The Department of State has announced that new passport forms will be available on March 1, 2011. The Department advises that applicants should continue to use the current forms to submit a passport application before that date. Travel.State.Gov and all passport facilities will make the new forms available on March 1, 2011.

The passport forms that are being updated as of March 1 are:

- Form DS-11: *Application for a U.S. Passport*
- Form DS-82: *U.S. Passport Renewal Application for Eligible Individuals*

- Form DS-4085: *Application for Additional Visa Pages or Miscellaneous Passport Services*
- Form DS-5504: *Application for a U.S. Passport (Name Change, Data Correction, Limited Passport Replacement)*
- Form DS-3053: *Statement of Consent or Special Circumstances: Issuance of a Passport to a Minor under Age 16*

For more information, see

[http://www.travel.state.gov/passport/passport\\_1738.html](http://www.travel.state.gov/passport/passport_1738.html).

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## **8. House Holds Hearing on Worksite Enforcement Issues**

On January 26, 2011, the House of Representatives' Subcommittee on Immigration Policy and Enforcement held a hearing on worksite enforcement issues. Testifying on the panel were Kumar Kibble, Deputy Director of U.S. Immigration and Customs Enforcement (ICE); Mark Krikorian, Executive Director, Center for Immigration Studies; Michael Kutler, INS Senior Special Agent, and Daniel Griswold, Director, Center for Trade Policy Studies, Cato Institute.

Mr. Kibble noted that in fiscal year 2010, ICE initiated a record 2,746 worksite enforcement investigations, more than doubling the number of cases initiated in FY 2008. He said ICE is prioritizing the criminal prosecution of employers "who knowingly hire undocumented workers, abuse and exploit their workers, engage in the smuggling or trafficking of their alien workforce, or facilitate document or benefit fraud." He noted that over the past two years, the Department of Homeland Security "has engaged in record enforcement" and has removed more people in 2009 and 2010 "than in any point in the history of our country, including more than 195,000 criminal aliens last year."

The full hearing testimony is available at

[http://judiciary.house.gov/hearings/hear\\_01262011.html](http://judiciary.house.gov/hearings/hear_01262011.html).

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## **9. DHS Adds New Countries to H-2A, H-2B Programs; Drops Indonesia**

The Department of Homeland Security (DHS), in consultation with the Department of State (DOS), has identified 53 countries whose nationals will be eligible to participate in the H-2A (temporary agricultural) and H-2B

(temporary nonagricultural) programs for the coming year. Of those countries, 15 were designated for the first time this year.

With limited exceptions, USCIS approves petitions only for nationals of countries designated to participate in the H-2A and H-2B programs. A new list of eligible countries was published in a Federal Register notice on January 18, 2011 (<http://edocket.access.gpo.gov/2011/pdf/2011-646.pdf>); the designations are valid for one year from the date of publication.

Effective January 18, 2011, nationals from the following countries are eligible to participate in the H-2A and H-2B programs: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu.

Of these countries, the following were designated for the first time this year: Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

DHS and DOS have determined that Indonesia does not warrant a renewed designation as a participating country in the H-2A and H-2B programs for 2011.

The new list does not affect the status of individuals who currently hold valid H-2A or H-2B status. A national from a country that is not on the list may be the beneficiary of an approved H-2A and H-2B petition if the Secretary of Homeland Security determines, in her sole and unreviewable discretion, that it is in the U.S. interest.

The USCIS notice is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=88404e9c7c08d210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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## **10. IRS Publishes W-4 Instructions for Nonresident Aliens**

The Internal Revenue Service has revised "Supplemental Form W-4 Instructions for Nonresident Aliens." The IRS has modified the instructions on the W-4 for nonresidents to reflect restrictions on their filing status, the limited number of exemptions allowed, and the standard deduction. Nonresident aliens must follow special instructions when completing Form W-4, Employee's Withholding Allowance Certificate, available at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>, for compensation paid to such individuals as employees performing dependent personal services in the U.S. Compensation for dependent personal services includes amounts paid as wages, salaries, fees, bonuses, commissions, compensatory scholarships, fellowship income, and similar designations for amounts paid to an employee.

The revised Notice 1392 is available at <http://www.irs.gov/pub/irs-pdf/n1392.pdf>.

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## **11. USCIS Issues Policy Memo Disallowing Concurrent Filings for Special Immigrant Religious Workers**

In January 2011, U.S. Citizenship and Immigration Services released a policy memorandum dated November 9, 2010, which states that any Form I-485 (Application to Register Permanent Residence or Adjust Status) where the underlying basis for adjustment is an I-360 petition for a special immigrant religious worker must be filed based on an approved I-360 petition. USCIS service centers and offices (including the lockboxes) must reject any Forms I-485, I-765 (Application for Employment Authorization), or I-131 (Application for Travel Document) filed concurrently with or based on a pending I-360 petition seeking the special immigrant religious worker classification.

The new guidance was issued pursuant to a decision by the U.S. Court of Appeals for the Ninth Circuit (*Ruiz-Diaz v. United States*, No. 09-35734 (9th Cir. Aug. 20, 2010)). The memo notes that any I-485 based on an I-360 religious worker petition filed before November 9, 2010, will be accepted and adjudicated pursuant to the guidelines established in an earlier memorandum issued on August 5, 2009 (Memorandum HQDOMO AD09-45, "Clarifying Guidance on the Implementation of the District Court's Order in *Ruiz-Diaz v. United States*, No C07-1881RSL (W.D. Wash. June 11, 2009)").

The new memo is available at  
[http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Ruiz-Diaz\\_Policy\\_Memo.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Ruiz-Diaz_Policy_Memo.pdf).

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## **12. USCIS Releases H-2B Cap Count**

For the H-2B temporary nonagricultural category, the cap is 66,000 per fiscal year, with 33,000 allocated in the first half of the year and 33,000 in the second half. As of January 21, 2011, USCIS had approved 36,275 beneficiaries (with 1,414 pending) for the first half of FY 2011, and had approved 7,315 so far for the second half (with 3,446 pending). USCIS noted that the estimated number of beneficiaries needed to be included on petitions filed with USCIS to reach the H-2B cap will always be higher than the actual cap, to allow for withdrawals, denials, and revocations.

The H-2B cap count and related information is available at  
<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>.

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

GAO report on E-Verify. The U.S. Government Accountability Office (GAO) has published "Employment Verification: Federal Agencies Have Taken Steps To Improve E-Verify, But Significant Challenges Remain." The GAO found that since June 2008, U.S. Citizenship and Immigration Services (USCIS) has taken several steps to improve the accuracy of the E-Verify system, including expanding the number of databases queried through E-Verify and instituting quality control procedures. As a result, the GAO noted, USCIS data indicate that E-Verify immediately confirmed about 97.4 percent of almost 8.2 million newly hired employees as work authorized during fiscal year 2009, compared to 92 percent from fiscal year 2006 to the second quarter of fiscal year 2007.

However, the GAO found that E-Verify errors persist. Also, if an authorized employee's name is recorded differently on various authorizing documents, the E-Verify system is to issue a tentative nonconfirmation (TNC) for the employee. Because such TNCs are more likely to affect foreign-born employees, the GAO said, they can lead to the appearance of discrimination. USCIS has not disseminated information to employees advising them of the importance of consistently recording their names on documentation provided

to employers, and the GAO concluded that doing so could help USCIS ensure data accuracy. Furthermore, the GAO said that E-Verify remains vulnerable to identity theft and employer fraud.

The GAO found that USCIS has taken steps to minimize risks to the privacy of personal information for new employees who are processed through E-Verify, but that employees are limited in their ability to identify the source of errors and to determine how to correct information in DHS databases that may have led to an erroneous TNC. To identify and access the source of the incorrect data, the GAO noted, employees must use methods such as Privacy Act requests, which, in fiscal year 2009, took an average of 104 days to process. DHS officials acknowledged that the current process for employees to correct their records could be improved and said the agency is discussing ways to provide employees with better access to relevant information.

The GAO also noted that USCIS and the Social Security Administration (SSA) have taken actions to prepare for possible mandatory implementation of E-Verify for all employers nationwide by addressing key practices for effectively managing E-Verify system capacity and availability and coordinating with each other in operating E-Verify. However, the GAO found that USCIS' lifecycle cost estimates for E-Verify do not reliably depict current costs (i.e., they do not include all costs associated with maintaining and operating E-Verify) and that SSA's estimates do not consider the risk associated with changes in SSA's E-Verify workload. Without taking steps to increase reliability and reduce risks, the agencies are at increased risk of not securing sufficient resources to effectively execute program plans in the future, the GAO said.

Meanwhile, on January 18, 2011, House Judiciary Committee Chairman Lamar Smith (R-Tex.) issued a statement on the GAO report. He said that E-Verify is a "remarkably effective tool" and a "very successful program," and noted that the House is scheduled to hold a hearing to discuss ways to improve and expand the program "to better protect jobs for legal workers."

The full report is available at <http://www.gao.gov/new.items/d11146.pdf>. Rep. Smith's statement is available at [http://judiciary.house.gov/news/2011/jan/110118\\_gao1.html](http://judiciary.house.gov/news/2011/jan/110118_gao1.html).

GAO report on H-1B program. The U.S. Government Accountability Office (GAO) has published "H-1B Visa Program: Reforms Are Needed To Minimize the Risks and Costs of Current Program." The GAO found that demand for new H-1B workers is largely driven by a small number of employers. From 2000 to 2009, over 14 percent of all initial petitions were submitted by cap-exempt employers, the GAO said, and only a few employers (fewer than 1 percent) garnered over one-quarter of all H-1B approvals.

Most interviewed companies said the H-1B cap and program created costs but were not factors in their decisions to move research and development overseas. The 34 H-1B employers GAO interviewed reported that the cap created some additional costs, although its impact depended on the size and maturity of the company. For example, in years when visas were denied by the cap, most large firms reported finding other (sometimes more costly) ways to hire their preferred job candidates. On the other hand, small firms were more likely to fill their positions with different candidates, which they said resulted in delays and occasional economic losses, particularly for firms in rapidly changing technology fields.

Limitations in agency data and systems hinder tracking the cap and H-1B workers over time. The total number of H-1B workers in the U.S. at any one time, and information about the length of their stay, is unknown, the GAO said. The agency concluded that the H-1B program, as currently structured, may not be used to its full potential and may be detrimental in some cases. The report offers several matters for congressional consideration, including that Congress re-examine key H-1B program provisions and make appropriate changes as needed. The GAO also recommends that the Departments of Homeland Security and Labor take steps to improve efficiency, flexibility, and monitoring of the H-1B program.

The full report is available at <http://www.gao.gov/products/GAO-11-26>. Highlights are available at <http://www.gao.gov/highlights/d1126high.pdf>.

National Agricultural Workers Survey data. The Department of Labor's Employment and Training Administration has released National Agricultural Workers Survey data for fiscal years 1989-2009. The survey contains information from 52,479 in-person interviews with hired crop farm workers. The interviews were conducted in 467 counties and 40 states between October 1, 1988, and September 30, 2009. The document describes the data and provides analysis tips.

The notice is available at [http://wdr.doleta.gov/directives/corr\\_doc.cfm?docn=2974](http://wdr.doleta.gov/directives/corr_doc.cfm?docn=2974). The document is available at [http://wdr.doleta.gov/directives/attach/TEN/ten2010/TEN\\_21-10.pdf](http://wdr.doleta.gov/directives/attach/TEN/ten2010/TEN_21-10.pdf), and additional information and the data are available for downloading at <http://www.doleta.gov/agworker/naws.cfm>.

SEVIS/SEVP schools and statistics. U.S. Immigration and Customs Enforcement (ICE) has updated the list of approved schools under the Student and Exchange Visitor (SEVP) program. The list is available at <http://www.ice.gov/doclib/sevis/pdf/ApprovedSchools.pdf>. A clickable map is available at <http://www.ice.gov/sevis/map/approvedschoolsmap.htm>. The latest quarterly review, "SEVIS By The Numbers," a statistical breakdown of

the Student and Exchange Visitor Information System's performance and trends in foreign student representation in U.S. academic and exchange programs, is available at [http://www.ice.gov/doclib/sevis/pdf/quarterly\\_report\\_ending\\_sept2010.pdf](http://www.ice.gov/doclib/sevis/pdf/quarterly_report_ending_sept2010.pdf).

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## **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)