

LitwinLaw Update

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Headlines:

- **1. Not-So-Good Vibrations? USCIS Implements Business Verification Program** - VIBE (Verification Initiative for Business Enterprises) is intended to provide USCIS with an alternative means of verifying the financial viability of companies petitioning to employ foreign workers.
- **2. USCIS Redesigns Green Card** - USCIS will replace green cards already in circulation as individuals apply for renewal or replacement.
- **3. USCIS Revises Employment Authorization Document** - The EAD now includes a machine-readable zone on the back of the card.
- **4. State Dept. Raises Consular Fees for Nonimmigrant Visas and BCCs** - The interim final rule, effective June 4, 2010, also reopens the comment period on the raised fees for an additional 60 days.
- **5. Can Immigration Law Be REPAIred? Some Senators Think So** - Under the Democrats' REPAIR (Real Enforcement with Practical Answers for Immigration Reform) proposal, a green card would be available immediately to foreign students with an advanced degree from a U.S. institution in a field of science, technology, engineering, or mathematics with an offer of employment from a U.S. employer in a related field.
- **6. DHS Eliminates Paper Arrival/Departure Form for VWP Participants** - Automated processing for U.S. airports will be activated on a rolling basis over the next several months.
- **7. State Dept. Updates Student and Exchange Visitor Visa Guidance** - Visa appointments for students and exchange visitors should be provided on a priority basis, and admission to a lesser known academic institution, a community college, or an English language program is not in itself a reason for refusal.
- **8. State Dept. Proposes Expanded Safety Measures for Secondary School Exchange Programs** - Calling for an accelerated timetable for the proposed rule and the comment period, the Department noted that a number of recent incidents with respect to student placement and oversight demand immediate attention.

- **9. USCIS Extends TPS Designations for Honduras, Nicaragua** - The extension of the TPS designation of both countries is effective July 6, 2010, and will remain in effect through January 5, 2012; the re-registration period ends on July 6, 2010.

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Details...

1. Not-So-Good Vibrations? USCIS Implements Business Verification Program

U.S. Citizenship and Immigration Services' (USCIS) Office of Public Engagement held an information-sharing session on May 27, 2010, in Washington, DC, on a Web-based tool provided under a USCIS contract with Dun & Bradstreet, Inc., that the agency said "will help bring uniformity and consistency to the processing of employment-based immigrant and nonimmigrant petitions." During the session, Service Center Operations staff provided a presentation of the "VIBE" program, which is being implemented this year at Service Centers.

VIBE (Verification Initiative for Business Enterprises) is intended to provide USCIS with an alternative means of verifying the financial viability of companies petitioning to employ foreign workers, along with other information about the company, such as the type of business and number of employees. USCIS announced in September 2009 that the contract had been awarded to Dun & Bradstreet for \$35.5 million. A USCIS synopsis issued in April 2009 notes that:

...the Government requires licensing terms that allow the information provided to be retained in adjudicator files in perpetuity. Further, this information may be viewed and used by other Government agencies for legal proceedings, such as court hearings or similar administrative hearing activities related to granting or denying immigration benefits. It has also been determined through market research that industry does not provide warranty terms regarding the accuracy of information provided. The Government may potentially use the information in a court of law, as such, it must be supportable.

The award notice is available at

https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=43fee0e75bdb345ad3010794271abd2b&_cview=1. A related letter from USCIS

Director Alejandro Mayorkas to Sen. Charles Grassley is available at <http://www.nationofimmigrants.com/wp-content/uploads/2009/12/Mayorkas%20letter%20to%20Grassley%20re%20H-1B%20visa%20fraud.pdf>. A blog commentary on the VIBE program is available at <http://blogs.ilw.com/angelopaparelli/2009/12/bad-bad-bad-immigration-vibrations-from-uscis.html>.

2. USCIS Redesigns Green Card

U.S. Citizenship and Immigration Services (USCIS) announced on May 11, 2010, that it has redesigned the Permanent Resident Card, commonly known as the green card, to incorporate several major new security features. The card will be colored green.

The redesigned card includes optical media to store biometrics identification data; and holographic images, laser engraved fingerprints, and high-resolution micro-images intended to make the card "nearly impossible" to reproduce. Tighter integration of the card design with personalized elements is intended to make it difficult to alter the card if stolen. Radio Frequency Identification (RFID) capability will allow Customs and Border Protection officers at ports of entry to read the card from a distance and compare it immediately to file data. A preprinted return address will enable the easy return of a lost card to USCIS.

USCIS said it will replace green cards already in circulation as individuals apply for renewal or replacement.

USCIS's announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=79bd3893c4888210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A fact sheet is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=34233893c4888210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ab8c3893c4888210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A brief history of the green card, including how it became known as the "green card" and the various color and other changes throughout its history, is available at <http://www.aila.org/content/default.aspx?docid=3460>.

3. USCIS Revises Employment Authorization Document

U.S. Citizenship and Immigration Services (USCIS) announced on May 25, 2010, that it has revised the Employment Authorization Document (EAD) (Form I-766) to incorporate the addition of a machine-readable zone on the back of the card.

USCIS began issuing the revised EADs on May 11, 2010. USCIS also removed the two-dimensional bar code on the back of the card and moved the informational box of text to just beneath the magnetic stripe on the card. The revised card retains all of its existing security features.

USCIS's announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=12f0e37359fc8210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

4. State Dept. Raises Consular Fees for Nonimmigrant Visas and BCCs

The Department of State has published an interim final rule, effective June 4, 2010, that raises from \$131 to \$140 the fee charged for processing an application for most non-petition-based nonimmigrant visas (Machine-Readable Visas or MRVs) and adult Border Crossing Cards (BCCs). The rule also provides new tiers of the application fee for certain categories of petition-based nonimmigrant visas and treaty trader and investor visas (all of which are also MRVs). Finally, the rule increases the \$13 BCC fee charged to Mexican citizen minors who apply in Mexico, and whose parent or guardian already has a BCC or is applying for one, by raising that fee to \$14 by virtue of a congressionally mandated surcharge that went into effect in 2009.

The rule reopens the comment period on these fees for an additional 60 days. Written comments must be received by July 19, 2010. The Department will consider any further comments, and whether to make changes to the rule in response to them, before publishing a final rule.

The interim final rule is available at

<http://edocket.access.gpo.gov/2010/pdf/2010-12125.pdf>.

5. Can Immigration Law Be REPAIRed? Some Senators Think So

Several Democratic senators recently announced a 26-page "framework of concrete bipartisan ideas" for immigration reform, called REPAIR (Real Enforcement with Practical Answers for Immigration Reform). The proposal by Sens. Harry Reid (D-Nev.), Richard Durbin (D-Ill.), Charles Schumer (D-N.Y.), Patrick Leahy (D-Vt.), Dianne Feinstein (D-Cal.), and Robert Menendez (D-N.J.), calls for increasing enforcement, border security, and verification resources and efforts, along with expanded employment measures. Under the proposal, a green card (permanent residence) would be "immediately available" to foreign students with an advanced degree from a U.S. institution in a field of science, technology, engineering, or mathematics who has an offer of employment from a U.S. employer in a related field. To address the fact that "workers from some countries face unreasonably long backlogs that have no responsiveness to America's economic needs," the proposal eliminates the per-country employment immigration caps. Also, the EB-5 program would be made permanent and adapted to increase foreign investment in the U.S.

Among other things, the proposal would create a new "BELIEVE" (Biometric Enrollment, Locally-stored Information, and Electronic Verification of Employment) system and a provisional H-2C visa for nonseasonal, nonagricultural workers. Workers in the H-2C program would be permitted to earn lawful permanent residence if they met "sufficient integration metrics to demonstrate that they have successfully become part of the American economy and society."

The proposal would amend current law regarding H-1B employer application requirements to: (1) revise wage determination requirements; (2) require Internet posting and description of employment positions; (3) increase U.S. worker displacement protections; (4) apply certain requirements to all H-1B employers rather than just to H-1B dependent employers; (5) prohibit employer advertising that makes a position available only to, or gives priority to, H-1B nonimmigrants; and (6) limit the number of H-1B and L-1 employees that an employer of 50 or more workers in the U.S. may hire. The proposal also would authorize the Department of Labor to investigate applications for fraud, and conduct H-1B compliance audits.

"I say to my Republican colleagues, work with us to fix this broken system, don't just say no," Sen. Reid pleaded. Although Senate Democrats called the outline bipartisan, Republicans criticized the proposal. Sens. Lindsey Graham (R-S.C.) and Jon Kyl (R-Ariz.) said in a statement that "Congress should focus on border security first." Rep. John Boehner (R-Ohio) called the proposal a "cynical ploy to try to engage voters, some segment of voters, to show up in this November's elections."

House Speaker Nancy Pelosi (D-Cal.) said, "If there is going to be any movement in this regard, it will require presidential leadership." President Barack Obama was quoted as saying that there may "not be an appetite" to pass immigration reform in Congress this year.

The proposal is available at <http://media.washingtonpost.com/wp-srv/politics/documents/REPAIRProposal.pdf?sid=ST2010042905051>.

6. DHS Eliminates Paper Arrival/Departure Form for VWP Participants

On May 20, 2010, the Department of Homeland Security (DHS) announced the elimination of the paper arrival/departure form (Form I-94W) for authorized travelers from Visa Waiver Program (VWP) countries. Following a seven-month pilot program on Air New Zealand flights from Auckland to Los Angeles International Airport, the use of paper I-94W forms will be eliminated for VWP travelers with an approved Electronic System for Travel Authorization (ESTA) arriving in the U.S. at all airports by the end of this summer. U.S. Customs and Border Protection (CBP) will activate automated processing for U.S. airports on a rolling basis over the next several months.

Applying for an ESTA became mandatory on January 12, 2009, for all nationals of VWP countries before boarding a carrier to travel by air or sea to the U.S. This requirement does not affect U.S. citizens returning from overseas or citizens of VWP countries traveling on a valid U.S. visa.

CBP recommends that VWP travelers submit ESTA applications as soon as they begin making travel plans. ESTA applications may be submitted at any time before travel. ESTAs are valid for two years or until the applicant's passport expires. CBP has received more than 19 million ESTA applications from citizens of VWP countries.

The DHS announcement is available at http://www.dhs.gov/ynews/releases/pr_1274366942074.shtm.

7. State Dept. Updates Student and Exchange Visitor Visa Guidance

The Department of State has released a cable updating guidance to the field for student and exchange visitor visa applications. The cable reminds posts that visa appointments for students and exchange visitors should be provided on a priority basis. Admission to a lesser known academic

institution, a community college, or an English language program is not in itself a reason for refusal, the cable notes, but all applicants should be able to explain their school choice and educational plan. "Which school a student chose is not nearly as important as why he/she chose it. "

The cable urges posts to report suspect schools. The cable also notes that Summer Work and Travel Program participants should return from their programs in time for the beginning of fall classes, even though the Department of Homeland Security allows them a 30 day grace period before they have to leave the U.S. The cable also provides clarification on flight training, study incidental to visits for pleasure, and the Student and Exchange Visitor Information System (SEVIS).

The cable also notes that the Bureau of Consular Affairs continues to receive complaints that some consular officers are unreceptive to applications from prospective community college students. This is at odds with Consular Affairs policy, the cable notes.

The cable is available at

<http://travel.state.gov/pdf/ExchangeVisitorVisaUpdate-April2010.pdf>.

8. State Dept. Proposes Expanded Safety Measures for Secondary School Exchange Programs

The Department of State (DOS) has proposed new program administration requirements for the secondary school student exchange program. The proposed regulations govern DOS-designated exchange visitor programs under which foreign secondary school students (ages 15 to 18½) may study in the U.S. at accredited public or private secondary schools for an academic semester or an academic year while living with American host families or residing at accredited U.S. boarding schools. The Department proposes to amend existing regulations regarding the screening, selection, school enrollment, orientation, and quality assurance monitoring on behalf of student participants; and the screening, selection, orientation, and quality assurance monitoring of host families and field staff.

Via the proposed rule, DOS is soliciting public comments regarding these proposed changes, which the agency said are intended "to address the need for greater clarity in current existing regulatory language," and "to better protect the health, safety, and welfare of these participants [through] enhanced clarity of existing regulations." Due to the academic calendar and the screening and selection cycle for the secondary school student program,

the comment period of this proposed rule has been set at 30 days, ending on June 2, 2010.

"Concerns regarding the safety and welfare of [the] secondary school student population necessitate a shorter comment period," DOS said. "To provide sponsors with sufficient time to prepare for implementation of changes in program administration to be effective in the academic year 2011/2012, the Department would like to accelerate this rulemaking."

DOS noted that although a majority of the Department's nearly 28,000 annual exchanges of secondary school students result in positive experiences for both the exchange students and the U.S. host families, a number of recent incidents with respect to student placement and oversight "demand the Department's immediate attention."

Without elaborating on the incidents, DOS outlined 16 measures that the agency believes will enhance the safety and welfare of foreign secondary school students studying in the U.S. The measures include requiring photographs of potential host family homes; personal character references for host family applicants; confirmation of host family incomes by program sponsors using objective information; and expanding background checks of adult host family members to include a Federal Bureau of Investigation (FBI)-based criminal background check and a check of the National Sex Offender Registry.

DOS noted that Congress's Child Safety Pilot Program, which provides youth-serving volunteer organizations with access to the FBI's criminal history database, has found that of the nearly 69,000 volunteers screened during the pilot, more than 6 percent had criminal records of concern, and more than 41 percent of those with criminal records of concern had committed crimes in states other than where they were applying to volunteer, meaning that only a nationwide check would have caught those records.

The proposed rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-10168.pdf>.

9. USCIS Extends TPS Designations for Honduras, Nicaragua

U.S. Citizenship and Immigration Services (USCIS) announced on May 5, 2010, that temporary protected status (TPS) designations for Honduras and Nicaragua would be extended for 18 months. The extension of the TPS designation of both countries is effective July 6, 2010, and will remain in

effect through January 5, 2012. The 60-day re-registration period began May 5, 2010, and will remain in effect until July 6, 2010.

Re-registration is limited to persons who previously registered for TPS under the previous designations and whose applications have been granted or remain pending. Certain nationals of Honduras and Nicaragua (or those having no nationality who last habitually resided in those countries) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. New employment authorization documents (EADs) with a January 5, 2012, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs.

Given the timeframes involved with processing TPS re-registration applications, USCIS noted that all re-registrants may not receive new EADs until after their current EADs expire on July 5, 2010. Accordingly, USCIS is automatically extending the validity of EADs issued under the TPS designation of Nicaragua for 6 months, through January 5, 2011, and the notices explain how TPS beneficiaries and their employers may determine which EADs have been automatically extended.

The Honduras TPS extension notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-10620.pdf>. The Nicaraguan TPS extension notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-10619.pdf>. USCIS Q&A's are available for Honduras at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=5b66ec90d8668210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> and for Nicaragua at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=69c3ec90d8668210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. Guidance on late initial registration is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=867c46d56a388210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

New Publications and Items of Interest

Dr. Sunil Mithas and Dr. Henry C. Lucas, Jr., professors at the University of Maryland, have authored a study published by the Institute for Operations Research and the Management Sciences, "Are Foreign IT Workers Cheaper? U.S. Visa Policies and Compensation of Information Technology

Professionals." The study finds that foreign IT professionals (those without U.S. citizenship and those without H-1B or other work visas) actually earn a salary premium when compared to U.S. citizen IT professionals when controlling for human capital attributes. The article is available from <http://www.informs.org/>.

The Department of Labor has released a new online advisor to help employers and others understand how to comply with requirements under the H-1B visa program. The advisor describes the program's standards and provides detailed information about employers' and workers' rights and responsibilities. It outlines notification requirements, monetary issues, worksite issues, recordkeeping duties, worker protections, and enforcement issues. The advisor focuses solely on compliance with the requirements enforced by the Department's Wage and Hour Division. It does not review the process for participating in the program or for invoking H-1B visa portability.

The Department's announcement is available at <http://www.dol.gov/opa/media/press/asp/oasp20100563.htm>. The advisor is available at <http://www.dol.gov/elaws/h1b.htm>.

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