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US IMMIGRATION & NATIONALITY LAW

APRIL 2007 IMMIGRATION UPDATE

Posted on April 2, 2007 by Cyrus Mehta

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2. **USCIS Reminds Applicants of New Filing Procedures Effective April 2** - Effective April 2, 2007, all Forms I-129 and I-539 are to be filed directly with the California Service Center or the Vermont Service Center, whichever is applicable.
3. **H-2B Cap Reached** - USCIS has received a sufficient number of petitions to reach the H-2B cap for the final six months of fiscal year 2007.
4. **USCIS Announces Extension Stickers for Certain Honduran, Nicaraguan, Salvadoran TPS Re-Registrants** - Certain Hondurans, Nicaraguans, and Salvadorans will have the opportunity to have an extension sticker affixed to their EAD while USCIS completes their TPS application.
5. **New Guidance Issued on National Interest Waivers and Adjustment Applications for Physicians in Underserved Areas** - Among other things, physicians with an approved NIW petition will no longer be restricted to a specific time period in which to fulfill the medical service requirement.
6. **FOIA 'E-Delinquents' Include DOL, ICE** **-** A new report finds that, 10 years after passage of the Electronic FOIA Amendments, several federal agencies fall short of the law.
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new wave of globalization.

9. **Resources on the Web** - Web sites provide information on the latest legislative and prosecutorial developments.

Details...

1. **H-1B Rush Begins; Reform Bill Introduced in House; Other Developments**
   April 2, 2007, marks the start of the annual H-1B rush. Last year, the cap was reached by May 26 and all indications are that it will be reached as early as April 3 this year. A random selection process may be employed for the overflow if applications received by U.S. Citizenship and Immigration Services (USCIS) exceed the limit on a particular day.

   Also, a USCIS interoffice field memorandum noted that the Department of Labor (DOL) Web site through which labor condition applications (LCAs) are requested has occasionally been unable to print a copy of the certified LCA after completion of the certifying process. The USCIS guidance instructs officers to accept H-1B petitions filed without a copy of the certified LCA for the FY 2008 cap if the filings are accompanied by screen prints from the DOL Web site showing that the LCAs were in fact certified on March 30, 2007 (or any other date on which USCIS can verify with DOL that the DOL LCA Web site malfunctioned). The screen print must display the ETA case number, the petitioner EIN, and the employer name. Before final adjudication of the petitions, USCIS may require copies of the certified LCAs. The memorandum is posted at http://www.uscis.gov/files/pressrelease/FY08H1B_NoLCA033007.pdf .

   Bipartisan legislation introduced in the House of Representatives on March 22, 2007, would lift the H-1B cap from the current 65,000 to 115,000, with market-based automatic increases up to 180,000. The "Security Through Regularized Immigration and a Vibrant Economy (STRIVE) Act of 2007" (H.R. 1645) also would eliminate visa limits on foreign workers with advanced U.S. degrees in science, technology, engineering, or math (STEM). Certain "extraordinary ability" workers in science and business would find it easier to obtain permanent residence (“green cards”) under the legislation.

   The new legislation also would establish an H-2C temporary visa, valid for

three years and renewable for another three. Under the H-2C visa, employers would be required to attempt to hire U.S. workers first and would be barred from hiring new immigrant workers in areas with high unemployment rates for workers with no education beyond high school. The H-2C visa program would have an initial cap of 400,000, adjusted yearly based on market fluctuations, and would include labor rights and protections, such as visa portability and competitive wage protections.

The new bill also would create a new guestworker program under a conditional nonimmigrant visa for eligible undocumented workers and their spouses and children in the U.S., valid for six years. Such workers, if they qualify, would have the opportunity to apply for permanent residence and eventual "earned citizenship," but would have to wait at the back of the line for green cards and would have to pay a hefty fine. Among other things, to gain earned citizenship, a worker in most cases would need to meet a "legal reentry" requirement, whereby the worker would "reboot" his or her status by leaving the U.S. and returning.

Also, the new legislation calls for an electronic work authorization verification system for employers. The bill also incorporates the DREAM Act of 2007 and the AgJOBS Act of 2007.

Passage of the House bill remains uncertain. Some Republicans condemned the bill as an amnesty program for illegals. Discussions between Republican lawmakers in the Senate and the White House could lead in a different direction. Sen. Arlen Specter (R-Pa.) is reportedly heading a group of Republicans who are drafting a competing set of proposals in consultation with the White House. The Bush administration released a new immigration reform plan on March 29, 2007, that would also include a temporary guest worker program under a new "Z" visa program, renewable every three years after payment of a large fine each time. Under the administration's plan, undocumented workers would need to register for temporary status within six months of the bill's passage for the worker to receive consideration for legal status.

A Senate vote on immigration reform may take place in June. Senate majority leader Harry Reid (D-Nev.) reportedly stated that the Senate immigration debate may be slated for the last two weeks of May. Hearings are expected in the House shortly. If legislation does not pass by the end

of 2007, many expect that it will be difficult to move it forward in the 2008 presidential election year.

Compete America, a coalition of corporations, educators, research institutions, and trade associations, endorsed key provisions of the House bill, including updating the employment-based green card cap and exempting key categories of professional; creating exemptions from employment-based immigrant visa and H-1B caps for foreign students receiving an advanced degree from a U.S. university, as well as for foreign professionals who have earned advanced STEM degrees at foreign universities; updating the cap on H-1B visas for highly educated temporary workers; and creating a new student visa category to allow U.S. STEM degree holders who have a job offer to transition directly from student visa to green card . Compete America's statement is available at http://www.competeamerica.org/news/alliance_pr/20070322_strive.html .

On March 7, 2007, at a hearing before the Senate Committee on Health, Education, Labor and Pensions, Microsoft Corporation Chairman Bill Gates recommended an increase in the H-1B cap and streamlining the green card process for highly skilled workers. He lamented the current state of the U.S.'s "obsolete immigration system," recommended changes in STEM education in the U.S., and expressed concerns about the dissuasion of foreign students from studying in the U.S. by the immigration system and new security measures. "Unfortunately, America's immigration policies are driving away the world's best and brightest precisely when we need them most," he said. Mr. Gates predicted that if current trends continue, a significant percentage of all scientists and engineers in the world will be working outside of the U.S. by 2010.

Mr. Gates noted that the number of H-1B visas available "runs out faster and faster each year." The current cap of 65,000 "is arbitrarily set and bears no relation to U.S. industry's demand for skilled professionals," he said, noting that for fiscal year 2007, the H-1B supply "did not last even eight weeks into the filing period, and ran out more than four months before that fiscal year even began." For fiscal year 2008, Mr. Gates noted, H-1Bs are expected to run out in April, the first month that it is possible to apply for them. "This means that no new H-1B visas -- often the only visa category available to recruit critically needed professional workers -- will be available for a nearly 18-month period," he warned.

Moreover, this year, for "the first time in the history of the program, the supply will run out before the year's graduating students get their degrees. This means that U.S. employers will not be able to get H-1B visas for an entire crop of U.S. graduates. We are essentially asking top talent to leave the U.S." He noted similar trends with the employment-based green card categories. Among other things, Mr. Gates called for "expedit the path to permanent resident status for highly skilled workers." He said, " If Social Security is the dreaded third rail of politics, immigration is its downed electrical wire: a problem everyone knows about, but no one's sure how to fix, so they just walk away." Mr. Gates's testimony is available at http://help.senate.gov/Hearings/2007_03_07/Gates.pdf .

Meanwhile, a coalition of organizations has released a set of visa policy recommendations, posted online at http://www.nafsa.org/press_releases.sec/press_releases.pg/coalitionvisarecs07_2 . The policy proposals emphasize the important role that visa policy plays in both the security of the U.S. and its capacity to attract the best talent from other countries. The coalition includes the Alliance for International Educational and Cultural Exchange, the Coalition for Employment Through Exports, the Heritage Foundation, NAFSA: Association of International Educators, and the National Foreign Trade Council.

USCIS's announcement about the fiscal year 2008 H-1B application process is available at http://www.uscis.gov/files/pressrelease/H1B_Update.pdf . Information about completing and submitting Form I-129 (Petition for a Nonimmigrant Worker) petitions to USCIS for FY 2008 H-1B cap cases is available at http://www.uscis.gov/files/pressrelease/H1B_I129Info_032707.pdf .

An overview of the STRIVE Act is available at http://flake.house.gov/UploadedFiles/STRIVE%20Overview.pdf . The full text of the lengthy bill is available at http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1645.IH: .

Testimony from Emilio Gutierrez, USCIS Director, at a hearing on March 27, 2007, on immigration reform and temporary workers before the House Subcommittee on Homeland Security is available at http://www.uscis.gov/files/pressrelease/27mar07.pdf .

A new report on guestworker programs by the Southern Poverty Law Center that recommends visa portability, wage protections, and requiring the Department of Labor to promulgate regulations for H-2B workers that are comparable to the H-2A regulations, is available at http://www.splcenter.org/legal/guestreport/index.jsp .

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2. **USCIS Reminds Applicants of New Filing Procedures Effective April 2**
U.S. Citizenship and Immigration Services (USCIS) has issued a reminder to applicants that, effective Monday, April 2, 2007, all Forms I-129 (Petition for a Nonimmigrant Worker) and I-539 (Application to Change/Extend Nonimmigrant Status) are to be filed directly with the California Service Center or the Vermont Service Center, whichever is applicable. USCIS has released two separate filing charts for the forms to assist applicants in determining the direct filing location for their petition or application. Applicants are responsible for filing the forms with the correct Service Center and should verify that they are using the correct filing address by referring to the instructions on the relevant form.

   USCIS said that the center where an applicant files a petition will generate the receipt notice and adjudicate the case. Compliance with the revised filing instructions "will ensure timely intake and case processing," USCIS said.

   USCIS's reminder notice is available at http://www.uscis.gov/files/pressrelease/I129andI539filing_033007.pdf , and the filing charts for the forms are available at http://www.uscis.gov/portal/site/uscis/ menuitem. af9bb95919f35e66f614176543f6d1a/?vgnextoid=3df261151e821110VgnVCM1000000ecd190aRCRD& vgnextchannel=fe529c7755cb9010VgnVCM10000045f3d6a1RCRD (Form I-129) and http://www.uscis.gov/portal/site/uscis/menuitem. 5af9bb95919f35e66f614176543f6d1a/? vgnextoid=2eede945cbc21110VgnVCM1000000ecd190aRCRD &vgnextchannel=fe529c7755cb9010VgnVCM10000045f3d6a1RCRD (Form I-539).

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3. **H-2B Cap Reached**
   U.S. Citizenship and Immigration Services (USCIS) announced on March 23, 2007, that it has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the final six months of fiscal year 2007. March 16, 2007, is the "final receipt date" for new H-2B worker petitions requesting employment start dates before October 1, 2007. The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 33,000 H-2B workers for the second half of FY 2007. USCIS will reject petitions for new H-2B workers seeking employment start dates before October 1, 2007, that arrived after March 16, 2007.

   Petitions for both current and returning H-2B workers do not count toward the congressionally mandated biannual H-2B cap, USCIS noted. To qualify as a returning worker, the worker must have counted against the H-2B numerical cap between October 1, 2003, and September 30, 2006. USCIS said it would reject petitions received after the final receipt date that contain a combination of returning workers and workers subject to the H-2B cap. Petitioning employers will receive partial approvals for those who qualify as returning workers if otherwise approvable.

   USCIS will continue to process petitions filed to:

   - Extend the stay of a current H-2B worker in the U.S.;
   - Change the terms of employment for current H-2B workers and extend their stay;
   - Allow current H-2B workers to change or add employers and extend their stay; or
   - Request eligible H-2B "returning workers."

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4. **USCIS Announces Extension Stickers for Certain Honduran, Nicaraguan, Salvadoran TPS Re-Registrants**
   U.S. Citizenship and Immigration Services (USCIS) announced on March 9, 2007, that certain Hondurans, Nicaraguans, and Salvadorans eligible for temporary protected status (TPS) re-registration, who have an application pending with USCIS and are awaiting an employment authorization document (EAD), will receive a letter giving them the opportunity to have an extension sticker affixed to their EAD while USCIS completes their TPS

application.

USCIS said it will not issue a Federal Register notice automatically extending previously issued EADs further for this group. Applicants should not appear at USCIS district offices to seek an extension sticker or an interim EAD. Instead, USCIS will mail eligible TPS re-registrants a letter instructing them to proceed to a USCIS Application Support Center (ASC) to receive the short-duration extension sticker.

Those who receive the sticker while USCIS continues processing their applications will receive an extension valid through June 2007 for I-9 employment authorization verification purposes. USCIS began mailing letters giving eligible re-registrants the opportunity to appear at an ASC to receive the extension sticker beginning on March 5, 2007. One can verify an applicant's continuing status and employment authorization by using the case receipt number to check USCIS Case Status Online at https://egov.immigration.gov/cris/jsps/index.jsp , or by calling the USCIS National Customer Service Center at 1-800-375-5283.

USCIS said it recognizes that the automatic extension of existing EADs expired on Friday, January 5, 2007, for Honduras and Nicaragua and on March 9, 2007, for El Salvador. USCIS said it is working diligently to produce and mail the letters giving eligible re-registrants the opportunity to appear at an ASC to receive the extension sticker in the coming days "to minimize any lapse in documentation of employment authorization" for those TPS beneficiaries who have not received a renewal EAD.

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5. **New Guidance Issued on National Interest Waivers and Adjustment Applications for Physicians in Underserved Areas**
   U.S. Citizenship and Immigration Services (USCIS) has established interim procedures for adjudicating national interest waiver (NIW) immigrant petitions and related adjustment of status applications filed on behalf of physicians practicing in medically underserved areas or at facilities operated by the Department of Veterans Affairs (VA), in light of the U.S. Court of Appeals for the Ninth Circuit's decision in *Schneider v. Chertoff*. Among other things, physicians with an approved NIW petition will no longer be restricted to a specific time period in which to fulfill the medical service requirement.

USCIS said it is implementing the *Schneider* decision nationwide not only to ensure immediate compliance with the decision in cases within the jurisdiction of the Ninth Circuit, but also to ensure consistent adjudication of all NIW physician cases nationwide. The interim guidance will be followed by amended regulations to give regulatory effect to the *Schneider* decision, USCIS said.

In addition, although not mandated by *Schneider*, USCIS is expanding the fields of medical specialty that may qualify physicians for NIWs by accepting petitions on behalf of physicians who provide "specialty care." USCIS said it will adjudicate and approve NIW petitions for physicians who work in geographic areas that are designated by the Secretary of Health and Human Services as having a shortage of medical specialists for the Physicians Scarcity Area (PSA) program.

Also, the Conrad State 30 Program, established to address the shortage of qualified physicians in medically underserved areas, has been extended until June 1, 2008.

The *Schneider* guidance is available at http://www.uscis.gov/files/pressrelease/SchneiderIntrm012307.pdf . The Conrad State 30 announcement is available at http://www.uscis.gov/files/pressrelease/ConradExtnsn012907.pdf .

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6. **FOIA 'E-Delinquents' Include DOL, ICE**
   The National Security Archive at George Washington University has released a new report finding that 10 years after passage of the Electronic Freedom of Information Act (FOIA) Amendments, several federal agencies fall short of the law. The Department of Labor was cited for having no central reading room and no required documents available, and a lack of FOIA Web sites for several components. Immigration and Customs Enforcement had no dedicated FOIA page, very limited guidance, and no required documents.

   Meredith Fuchs, the Archive's general counsel, said, "Public access on the Web to government information is the only long-term solution to the backlogs and delays that undermine the FOIA today. This audit plus Congressional oversight should provide a wake-up call to the agencies."

Ms. Fuchs testified on March 14, 2007, before the Senate Judiciary Committee in support of a new FOIA reform bill. Her testimony is available at http://www.gwu.edu/~nsarchiv/news/20070314/Testimony%20of%20Meredith%20Fuchs%20Senate%20Judiciary%20March%2014%20FOIA.pdf . The report is available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm.

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7. **New GAO Report Outlines US-VISIT Challenges**
   The U.S. Government Accountability Office (GAO) has issued a report analyzing challenges that continue to face the US-VISIT program. The GAO noted that US-VISIT has improved the Department of Homeland Security's (DHS's) ability to process visitors and verify identities upon entry, but found that management controls in place to identify and evaluate computer and other operational problems at land ports of entry were insufficient and inconsistently administered. In addition, the GAO noted, a biometric exit capability is not yet available. The GAO said that DHS continues to face longstanding US-VISIT management challenges and future uncertainties.

   The GAO recommended that critical acquisition management processes be established and followed to ensure that program capabilities and expected mission outcomes are delivered on time and within budget. Such processes include, the GAO said, effective project planning, requirements management, contract tracking and oversight, test management, and financial management. Until these issues are addressed, the risk of US-VISIT continuing to fall short of expectations is increased, the GAO concluded. The report, "Homeland Security: US-VISIT Faces Operational, Technological, and Management Challenges" (GAO-07-632T), is available at http://www.gao.gov/new.items/d07632t.pdf .

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8. **Immigrants Driving Globalization, Report Finds**
   A new report on the future of small business, authored by the Institute for the Future, finds that immigrant entrepreneurs will drive a new wave of globalization, and that U.S. immigration policy and the outcome of the current immigration debates will affect how this segment performs over

the next decade.

The "Intuit Future of Small Business Report" is available at http://www.intuit.com/futureofsmallbusiness/ (see pages 8 and 9 for information on immigrant entrepreneurs).

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9. **Resources on the Web**
   Roll Call and GalleryWatch have launched Congress Now!, an online source of legislative news. The newsletter for CongressNow! will appear in mid-afternoon, five days per week, and will feature news, analysis, and information on committee markups. Breaking news will be posted to CongressNow.com throughout the day and sent via e-mail alerts. These features are available free to congressional staff and members of Congress, and by subscription otherwise, at http://www.congressnow.com/subscribe . See http://www.gallerywatch.com/CN_release_031907.pdf for more information.

   GovTrack provides a hyperlinked version of the Congressional Record for the current session, at http://www.govtrack.us/congress/recordindex.xpd . Custom "monitors" of subject areas to track, such as bills in Congress, may be set up at http://www.govtrack.us/users/aboutmonitors.xpd.

   The latest Transactional Records Access Clearinghouse (TRAC) data tool, covering the five-year period through the end of November 2006, notes that criminal immigration charges by federal prosecutors have declined substantially in the last year. TRAC documents trends for the overall number of prosecutions filed and convictions obtained under U.S. immigration law in federal districts around the country. U.S. District Court judges who handled the largest number of immigration cases are also highlighted. For this and many other immigration reports by TRAC, see http://trac.syr.edu/immigration/reports/ .

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