



JANUARY 2008 IMMIGRATION UPDATE

Posted on January 4, 2008 by Cyrus Mehta

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has been necessary to retrogress the India employment second preference cut-off date because of continued heavy applicant demand.

- **9. [Around the States: Illinois, Arizona, REAL ID/WHTI Update](#)** - In the void created by Congress's lack of action on comprehensive immigration reform, states are not sitting idly by.
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Details...

1. Rhetoric on Support for Science Doesn't Match Reality of Appropriations

The appropriations bill (H.R. 2764) signed into law by President Bush on December 26, 2007, included what some observers are calling meager funding for advances in scientific research rather than the more substantial increases that had been expected. "hat began as a year of soaring rhetoric in support of science seems likely to end with agency officials and research advocates shaking their heads and wondering what went wrong," said the American Association for the Advancement of Science (AAAS).

The White House had promoted the "America Creating Opportunities To Meaningfully Promote Excellence In Technology, Education, And Science Act (America COMPETES)" Act, signed into law in August 2007, as, among other things, a comprehensive strategy to "attract the world's best and brightest workers." The new appropriations package, however, "makes moot the double-digit hikes authorized for research, education and training, and investment in innovation spelled out" in America COMPETES, said AAAS.

There was some advance warning that funding might not rise to meet expectations raised by the earlier legislation and accompanying rhetoric. In a White House statement issued in August in conjunction with President Bush's signing of America COMPETES, Mr. Bush said he was "concerned that the legislation include excessive authorizations and new duplicative programs." The statement noted that the bill created over 30 new programs that were "mostly duplicative or counterproductive," including a new Department of Energy agency to fund late-stage technology development "more appropriately left to the private sector," and that the bill provided "excessive authorization for existing programs." Accordingly, the August statement noted that the President would "request funding in his 2009 budget for those authorizations that support the focused priorities of the , but will not propose excessive or

duplicative funding based on authorizations in the bill."

"Riding the Rising Tide: A 21 st Century Strategy for U.S. Competitiveness and Prosperity," a report by the Alliance for Science & Technology Research in America (ASTRA) released in December 2007 shortly before the appropriations legislation was signed into law, provides a 14-point action program. ASTRA recommends , among other things, that the U.S. "strengthen efforts to attract top foreign students and Ph.D.-level professionals in science, engineering and technology. This includes developing a national strategic plan for recruiting top international students, scientists, engineers and technologists, and evaluating the U.S. immigration system to remove barriers to these talented individuals migrating to the U.S." This approach, ASTRA said, "should include incentives to attract leading foreign-born scientists, engineers, and technologists, including public funding for their research if they migrate to and carry out that research in the United States."

The ASTRA report is available at

<http://www.aboutastra.org/pdf/ASTRARisingTide121107.pdf> . An ASTRA

statement about the appropriations legislation is available at

http://www.aboutastra.org/latest_news/12-18-2007_funding.asp . AAAS's

statement is available at

<http://sciencenow.sciencemag.org/cgi/content/full/2007/1218/1> . The August

2007 White House statement is available at

<http://www.whitehouse.gov/news/releases/2007/08/20070809-6.html> .

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2. Department of State To Begin Issuing Passport Cards

To be "responsive to the needs and concerns of the border communities and to facilitate the travel of border community residents," the Department of State has finalized a proposed rule issued in October 2006 providing for a card-format passport as a less expensive and more portable alternative to the passport book.

The final rule explains that the passport card does not need to be signed in order to be valid, whereas the passport book requires a signature to be valid. In addition, it makes clear that those requesting and eligible for a no-fee passport will receive a passport in book form only.

The Department said it received over 4,000 comments regarding the proposed

rule. Among those submitting comments were four members of Congress; the governments of Canada and two of its provinces (Manitoba and New Brunswick); a Native American government (Haudenosaunee Confederation, New York); and dozens of city, county, and municipal governments. Also represented were the U.S. Postal Service, the Air Transport Association, over two dozen technology companies and privacy interest groups, five tourism interest groups, and three offshore drilling concerns.

All four members of Congress, as well as technology, security, and privacy groups, said they were concerned about the choice of "vicinity read" radio frequency identification (RFID) technology for the passport card. The opinion expressed by many commenters was that vicinity read technology is not as secure as the proximity read technology currently used in the U.S. e-Passport because it could result in the unauthorized reading of information that could lead to identity theft and tracking of U.S. citizens by terrorists or the government. Several commenters mentioned a 2006 Government Accountability Office review of the US-VISIT program, which reported a low read rate using this type of technology and a statement in the report that it should not be used for identifying people, only for tracking goods. A private company that designs, manufactures, and markets both vicinity and proximity read technology chips commented that the choice of vicinity read technology could have the unexpected result of compromising the security of U.S. borders while severely affecting the personal privacy of United States citizens. They also questioned whether vicinity read technology would necessarily improve border crossing times.

The Department said that the vast majority of such comments "reflected an improper understanding of the business model that WHTI is designed to meet and how the technology selected would actually be implemented." Vicinity-read RFID technology "should allow CBP officers to quickly obtain information about the border crosser and perform terrorist watch list checks while they are still awaiting a personal inspection and to read multiple cards simultaneously." To ensure compatibility and interoperability with the Department of Homeland Security's border management system, and to secure "significant travel facilitation advantages," the Department of State said it will produce the passport card using vicinity RFID technology. "The operational concept that this rule promulgates should enable information about a border crosser to be queued while they are awaiting their interviews with the border officers, rather

than waiting until they are face-to-face with the officer to provide their personal information," the Department said, adding that this approach "is designed to substantially reduce wait times at the border, which was the key driver in development of the WHTI passport card business case."

The Department explained that the vicinity RFID electronic chip contains only one item of information: a unique identifying number that has meaning only inside the secure CBP computer system. No other form of personally identifiable information, such as name, date of birth, Social Security number, or place of birth, will be stored electronically on the passport card or transmitted through RFID. All personal information will be contained in Department of Homeland Security systems and will be accessible only by authorized personnel through secure networks, the Department said. Upon receipt of the passport card number, the border crosser's personal information will be downloaded from the CBP system and provided to the CBP officer. The CBP officer will then interview the individual, verify identity, and determine the appropriate action to take.

All card holders will also be issued a protective sleeve for the card, which prevents transmission of the card's unique identifying number. Additionally, use of the passport card is not mandatory. Border crossers who would prefer to use traditional passports may continue to do so, the Department said.

Many comments also discussed the technology solution in the e-passport, whose business model is different from that of the WHTI, the Department said. In the e-passport case, a different technology solution was selected that enables transfer of personal information in a secure, encrypted, manner. The technology solution for e-passports does not meet the business model for the specific WHTI application, so it was not selected, the Department noted.

The final rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-25422.pdf> .

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3. Revised I-9 Verification Forms Now Required

U.S. Citizenship and Immigration Services (USCIS) reminded employers that they should have transitioned to using the revised Employment Eligibility Verification Form (I-9). The revised I-9, which includes the revision date (*Rev.*

06/05/07)N printed on the lower right corner of the form, is now the only version valid for use. Effective December 26, 2007, employers who fail to use the revised form will be subject to applicable penalties.

The revised form is available at <http://www.uscis.gov/files/form/i-9.pdf> , and accompanying instructions are at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> . The "Handbook for Employers, Instructions for Completing the Form I-9" is available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf> . The reminder is available at <http://www.uscis.gov/files/pressrelease/FormI9Reminder112307.pdf> .

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4. Department of State Expands Fingerprinting and Name Checks

The Department of State has issued a final rule on documentation of nonimmigrants entering the U.S. Specifically, the Department has begun performing fingerprint and name checks on all visa applicants except those falling within a narrow range of exceptions. Fingerprints are now required of all visa applicants except those under the age of 14 or over the age of 79 and certain diplomats and officials. Beginning on January 1, 2008, the cost of such checks will be included in visa fees, including the fees for non immigrant visas. The final rule is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-25417.pdf> .

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5. Oral Declarations of Citizenship No Longer Sufficient At Land, Sea POEs

Citizens of the United States, Canada, and Bermuda entering the U.S. at land or sea ports-of-entry (POEs) must establish their identity and citizenship to the satisfaction of a U.S. Customs and Border Protection (CBP) officer. Under current CBP procedures, such individuals may provide any proof of identity and citizenship. Although most individuals provide documentary evidence of citizenship, such as a passport or birth certificate, individuals currently may be admitted on an oral declaration, depending on the circumstances. Effective January 31, 2008, however, all travelers will be expected to present documents

proving citizenship (such as a birth certificate), and government-issued documents proving identity (such as a driver's license), when entering the U.S. through land and sea POEs. CBP retains its authority to request additional documentation when warranted and to make appropriate individual exceptions.

For more on the new requirements, see

http://travel.state.gov/travel/cbpmc/cbpmc_2223.html .

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6. State Dept. Issues Final Rule on Exchange Visitor Program Sanctions, Terminations

Effective January 22, 2008, the Department of State is adopting as final, with "minor edits," its proposed rule on exchange visitor program sanctions and terminations as published on May 31, 2007.

The rule included two new grounds for sanctions or terminations: actions that may compromise national security or undermine U.S. foreign policy objectives. The Department also eliminated the requirement that it find alleged violations to be willful or negligent before imposing sanctions. "Since knowledge and ability to comply and remain in full compliance with the regulations are fundamental requirements of sponsor designation, it is essentially irrelevant whether a sponsor violates regulations willfully, negligently, or even inadvertently," the Department noted. "Violations, whether or not willful or negligent, may harm the national security or the public diplomacy goals of the United States, or pose a threat to the health, safety or welfare of program participants, and the Department must have the capacity to respond appropriately. Moreover, the process set forth in the revised sanctions regulations provides that a sponsor being sanctioned may submit a statement in opposition to or mitigation of the proposed sanction."

The supplementary information to the final rule, which was published on December 20, 2007, and is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-24650.pdf> , includes a number of comments received on the proposed rule, along with the Department's responses.

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7. Fees Raised for Nonimmigrant, Immigrant Visa Applications; BCCs

The Department of State has published an interim final rule, effective January 1, 2008, that raises from \$100 to \$131 the fee charged to process an application for a nonimmigrant machine-readable visa (MRV) and Border Crossing Card (BCC) and increases the immigrant visa fee by \$20, to \$355. Applicants who paid the prior \$100 application fee before January 1 will be processed only if they are scheduled and appear for a visa interview on or before January 31. Applicants who paid the prior \$100 application fee and appear for visa interviews after January 31, 2008, must pay the difference (\$31) before they will be interviewed. The Department said it is adjusting the fees "as an emergency measure to ensure that sufficient resources are available to meet the costs of processing nonimmigrant and immigrant visas in light of increased security measures put in place since 2004 and fee collection mandates on behalf of the Federal Bureau of Investigation." The primary reason for increasing the fees, the Department noted, is that in January 2008, the Department "will begin paying fees to the FBI for checking the fingerprints against the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and for running visa applicant names through Security Advisory Opinion (SAO) processes." The estimated total increase in cost for nonimmigrant visa applicants is \$310 million (\$31 per applicant, with an estimated 10,000,000 applicants). The estimated total increase in cost for immigrant visa applicants is \$14 million (\$20 per applicant, with an estimated 700,000 applicants).

The full text of the interim final rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01>

jan20071800/edocket.access.gpo.gov/2007/pdf/E7-24646.pdf . The

Department's related notice is available at

<http://www.state.gov/r/pa/prs/ps/2007/dec/97384.htm> .

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8. India Second Preference Cut-Off Date Retrogresses

The Department of State announced that, for January, it has been necessary to retrogress the India employment second preference cut-off date because of continued heavy applicant demand for numbers by U.S. Citizenship and Immigration Services for adjustment of status cases. The Department said it is likely that the annual limit for this category will be reached within the next few months, at which time the category would become "unavailable" for the

remainder of fiscal year 2008.

The January 2008 Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3897.html .

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9. Around the States: Illinois, Arizona, REAL ID/WHTI Update

In the void created by Congress's lack of action on comprehensive immigration reform, states are not sitting idly by. The following is an update on key developments around the nation.

Illinois . In September, the Department of Homeland Security (DHS) filed a lawsuit in federal court to declare invalid an Illinois statute, the "Right to Privacy in the Workplace Act," that effectively forbids Illinois employers from enrolling in the DHS's E-Verify (employment authorization verification) system. According to the DHS, the statute was to become effective on January 1, 2008, but in papers filed with the court on December 13, 2007, the state agreed not to enforce it until the DHS's lawsuit against the state is resolved. It also disclosed that the Illinois legislature is considering a bill to address the legal issues raised in the suit.

The DHS said it will communicate with each of the Illinois employers enrolled in E-Verify to let them know that they may continue using E-Verify without fear of a state enforcement action on January 1. The state's decision also allows employers planning to enroll in E-Verify to do so without the threat of state enforcement against them.

In a motion filed with the DHS, the state requested a 60-day stay of the lawsuit so that the Illinois legislature would have an opportunity to consider proposed changes in the Illinois statute. Secretary of Homeland Security Michael Chertoff said, "I remain hopeful that Illinois will amend its law so that Illinois employers can continue to utilize this valuable tool without the need for further litigation."

The DHS's statement is at http://www.dhs.gov/xnews/releases/pr_1197585316378.shtm .

Arizona . The *Washington Post* termed Arizona the "new ground zero" in the debate over undocumented immigration in an editorial published on December 26, 2007. Arizona passed a law, effective January 1, 2008, prescribes sanctions for companies that knowingly hire undocumented workers. On a second

offense, the company's business license would be revoked, which Arizona Governor Janet Napolitano has called a corporate "death penalty." The *Post* said the Arizona law may become "a test case for how much pain a state is willing to endure, and inflict, in the name of ridding itself of a population that contributes enormously to its economic growth and prosperity." The *Post* noted that an estimated 9 to 12 percent of Arizona's 3 million workers are undocumented. The law is reportedly being challenged by business associations and others in court.

According to "Immigrants in Arizona: Fiscal and Economic Impacts," a study by Judith Gans of the University of Arizona, the total state tax revenue attributable to immigrant workers in 2004 was an estimated \$2.4 billion (about \$860 million for naturalized citizens plus about \$1.5 billion for noncitizens). Balanced against estimated fiscal costs of \$1.4 billion (for education, health care, and law enforcement), the net 2004 fiscal impact of immigrants in Arizona was positive by about \$940 million. The 2004 total economic output attributable to immigrant workers was about \$44 billion (\$15 billion for naturalized citizens and \$29 billion for noncitizens). This output included \$20 billion in labor and other income and resulted in approximately 400,000 full-time-equivalent jobs. The study did not distinguish between authorized and unauthorized workers. The study, which includes demographics and other details about immigrant workers in various industries in Arizona, is available at http://udallcenter.arizona.edu/programs/immigration/publications/immigrants_in_arizona.pdf.

WHTI/REAL ID update . Meanwhile, on December 6, 2007, the DHS and Arizona signed a Memorandum of Agreement (MOA) to enhance the security of state driver's licenses, to offer a Western Hemisphere Travel Initiative (WHTI)-compliant document to U.S. citizen residents and to pledge future compliance with the requirements of the REAL ID Act.

The Arizona agreement is much like those established with the states of Washington, Vermont, and New York earlier this year, the DHS said. The state of Arizona will develop a technologically enhanced driver's license that will securely validate the identity and U.S. citizenship of Arizona residents who voluntarily apply and qualify. The enhanced driver's license, which is proposed to be accepted for border-crossing purposes under WHTI, is expected to be slightly more expensive than a standard Arizona driver's license and will require proof of citizenship, identity, and residence. The enhanced document also will

be aligned to comply with REAL ID over time. The DHS, in turn, will provide the technology and data-sharing specifications to facilitate the use and verification of the enhanced driver's license at a port of entry.

In addition, Arizona has pledged to become compliant with REAL ID as soon as practicable, the DHS said. The agency plans to issue soon the REAL ID final rule, which is intended to strengthen identification through both physical security features and a secure issuance process. Arizona's REAL ID-compliant license would be available to U.S. citizen residents who do not wish to obtain an enhanced driver's license.

REAL ID establishes minimum standards for state-issued driver's licenses and identification cards in compliance with the REAL ID Act of 2005. The requirements include security features that must be incorporated into each card; verification of information provided by applicants to establish their identity and lawful status in the United States; and physical security standards for locations where licenses and identification cards are issued. A REAL ID driver's license will be required in order to access a federal facility, board federally-regulated commercial aircraft, and enter nuclear power plants.

The DHS and the Department of State expect the date of full WHTI implementation to be in the summer of 2008, at which time U.S. citizens traveling between the U.S. and Canada, Mexico, Central and South America, the Caribbean, and Bermuda by land or sea will be required to present a valid U.S. passport or other acceptable document. The precise implementation date will be formally announced with at least 60 days' notice, the DHS said in a statement at http://www.dhs.gov/xnews/releases/pr_1196971699639.shtm .

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10. DHS Publishes Semiannual Regulatory Agenda

The Department of Homeland Security (DHS) has published its semiannual regulatory agenda, which is a summary of all current and projected rulemakings, reviews of existing regulations, and completed actions of the DHS.

Among the upcoming actions, the DHS and the Department of Labor's Employment and Training Administration (DOL) plan to propose changes "to reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States." The DHS is considering the elimination of the substitution of beneficiaries on permanent labor

certifications, among other options. In addition, the DHS is proposing to reduce further the likelihood of the submission of "malafide" Forms I-140, Immigration Petitions for Alien Worker, which the DHS defines as employment-based petitions "that are supported by fraudulent or stale labor certification applications," by proposing a 45-day period for employers to file approved permanent labor certifications in support of I-140 petitions with the DHS after the issuance of an approved labor certification by the DOL. The notice of proposed rulemaking is targeted for publication in March 2008.

Also targeted for publication in March 2008 is a notice of proposed rulemaking that will modify DHS regulations governing the established Student and Exchange Visitor Information System (SEVIS) I-901 and the Student and Exchange Visitor Program (SEVP) certification fees to defray actual costs of related SEVP operating expenses. The proposed rule also would establish a fee to defray SEVP operating expenses related to oversight and recertification of SEVP-certified schools.

Portions of the DHS's semiannual regulatory agenda are available at <http://a257.g.akamaitech.net/7/257/2422/10dec20070800/edocket.access.gpo.gov/ua071210/pdf/ua071008.pdf> . The federal government is moving agencies' full regulatory agendas online. Because publication in the Federal Register is mandated, the DHS's printed agenda entries include regulatory actions that are in the agency's regulatory flexibility agenda, in accordance with the Regulatory Flexibility Act, because they are likely to have a significant economic impact on a substantial number of small entities. Printing of these entries, however, is limited to fields that contain information required by the Act's agenda requirements. For more information on the full regulatory agendas, see <http://www.reginfo.gov/public/do/eAgendaMain> .

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