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US IMMIGRATION & NATIONALITY LAW

FEBRUARY 2008 IMMIGRATION UPDATE

Posted on February 1, 2008 by Cyrus Mehta

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1. Federal Contractors Must Use E-Verify, White House Orders - Under a new executive order, federal contractors must check the immigration status of their current and future employees through the E-Verify online employment authorization verification system.

2. CBP Issues Tips for U.S.-Canadian Border Travelers - With the onset of summer travel, U.S. Customs and Border Protection recently released tips for cross-border travelers between the U.S. and Canada.

3. USCIS To Issue Two-Year EADs for Certain LPR Applicants - The two-year EAD is available to certain pending adjustment applicants who are currently unable to adjust status because an immigrant visa number is not available.

4. USCIS Issues Supplemental Guidance on Processing Petitions Affected by AC21 and ACWIA - USCIS plans to incorporate all previous still-applicable guidance into forthcoming rulemaking relating to various AC21 and ACWIA statutory provisions.

5. USCIS Offers Premium Processing Service for Certain Immigrant Worker Petitions - USCIS will make available Premium Processing Service for designated I-140 petitions filed for H-1B nonimmigrant workers who are reaching the end of their sixth year in H-1B nonimmigrant status.

6. U.S., U.K. Border Agencies Agree to Expedite Travel Between Nations - The International Expedited Traveler Initiative will integrate CBP's Global Entry program with the British registered traveler program.

7. Homeland Security Tech Undersecretary, Others Warn of Skills Crisis - The U.S. workforce is "in crisis" because of insufficient numbers of students going into math and science fields.

8. DOL Audits Labor Cert Applications Filed By Fragomen - The Department of Labor has decided to conduct an audit of all permanent labor certification applications filed by Fragomen, Del Rey, Bernsen & Loewy, LLP.

9. Court Rules Del Monte Cannot Avoid Liability for Wage Violations of Contractor - A federal court ruled that Fresh Del Monte Produce Southeast, Inc., is liable for worker wage violations by a labor contractor.

10. State Dep't Issues Final Rule To Offer Electronic Nonimmigrant Visa Applications - The Department has developed and introduced an electronic application process for nonimmigrant visas to eventually replace the current application process.

11. USCIS Closing Tijuana, Hong Kong Field Offices - USCIS released details on where applications will be forwarded and processed.

12. Federal Court Enjoins Oklahoma From Enforcing State Immigration Law - The judge found that it was "substantially likely" that Oklahoma's law is preempted by federal immigration law.

13. State Dept. Releases Information on Employment Second and Third Preference Availability for July - The employment third preference will become unavailable in July.

14. Diversity Visa Lottery Results Announced - Those selected will need to act on their immigrant visa applications quickly.

Details...

1. Federal Contractors Must Use E-Verify, White House Orders

President Bush issued an executive order on June 9, 2008, requiring that Federal contractors check the immigration status of their current and future

employees through the E-Verify online employment authorization verification system.

The order states that "adherence to the general policy of contracting only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce will promote economy and efficiency in Federal procurement."

The text of the executive order is available at http://www.whitehouse.gov/news/releases/2008/06/print/20080609-2.html.

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2. CBP Issues Tips for U.S.-Canadian Border Travelers

With the onset of summer travel, U.S. Customs and Border Protection (CBP) recently released tips for cross-border travelers between the U.S. and Canada.

U.S. and Canadian citizens are now required to present proof of citizenship and identity to enter the U.S. at land and sea ports of entry. This may include a passport, trusted traveler program card (NEXUS), or birth certificate with a driver's license. Travelers 18 and under may present just a birth certificate. A passport has been required for all travelers entering and departing the United States by air since January 2007.

CBP also reminded U.S. lawful permanent residents that the I-551 form (green card) is acceptable for land and sea travel into the U.S.

CBP's tips include:

- **Tip #1 ‰ÞIT** Travelers should familiarize themselves with the "Know Before You Go" section of the CBP Web site to avoid fines and penalties associated with the importation of prohibited items. "Know Before You Go" brochures are also available at border ports of entry.
- **Tip #2 ‰ÞIT** Travelers should prepare for the inspection process before arriving at the inspection booth. Individuals should have their crossing

documents available for the inspection and they should be prepared to declare all items acquired abroad. In addition, individuals should end cellular phone conversations before arriving at the inspection booth.

- **Tip #3 ‰bIT** Members of the traveling public should consult the CBP Web site to monitor border wait times for various ports of entry, including Blaine and Sumas, Washington; Sweetgrass, Montana; and Pembina, North Dakota. Information is updated hourly and is useful in planning trips and identifying periods of light use and short waits.
- **Tip #4 ‰bIT** During periods of heavy travel, border crossers may wish to consider alternative, less heavily traveled entry routes.
- **Tip #5 ‰bIT** Travelers should plan to build extra time into their trips in the event they cross during periods of exceptionally heavy traffic (e.g., Canada Day and the Fourth of July holidays and adjacent weekends).
- **Tip #6 ‰bIT** Know the difference between goods for personal use and goods for commercial use.
- **Tip #7 ‰bIT** Do not attempt to bring fruits, meats, dairy, poultry products, or firewood into the U.S. from Canada without first checking whether they are permitted.
- **Tip #8 ‰bIT** CBP officers have the authority to conduct enforcement examinations without a warrant, ranging from a simple luggage examination up to and possibly including a personal search. Even during the summer vacation season, international border crossers should continue to expect a thorough inspection process when they enter the U.S. from Canada.

CBP said its officials continually monitor traffic and border crossing times at area ports of entry. CBP plans to fully staff all inspection lanes during peak periods and to implement various traffic management operations to maintain the flow of traffic during periods of exceptionally heavy usage.

The tips are available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/06272008.xml.

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3. USCIS To Issue Two-Year EADs for Certain LPR Applicants

U.S. Citizenship and Immigration Services (USCIS) announced on June 12, 2008, that certain lawful permanent resident applicants may file a Form I-765 (Application for Employment Authorization) to request a two-year employment authorization document (EAD). The two-year EAD is available to pending adjustment applicants (those who have filed a Form I-485, Application to Register Permanent Residence or Adjust Status) who have filed for an EAD under 8 CFR § 274.a.12(c)(9) and who are currently unable to adjust status because an immigrant visa number is not available. USCIS will continue to grant EADs that are valid for one year for adjustment applicants who have an available immigrant visa number and are filing for employment authorization under that section. The agency will decide whether to renew an EAD for either a one- or two-year validity period based on the most recent Department of State Visa Bulletin. We can anticipate that under this month's Visa Bulletin, the only employment-based applicants to benefit from the two-year period will be in the EB-3 classification, or EB-2 applicants who are natives of China or India.

USCIS said it expects to implement this initiative for cases pending on June 30, 2008. Applicants filing an I-765 under § 274.a.12(c)(9) should begin to receive their two-year EAD several weeks after the June 30, 2008, implementation date.

The announcement is available at http://www.uscis.gov/files/article/employ_auth_docs_061208.pdf. A related fact sheet is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=62ae15d3ffd7a110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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4. USCIS Issues Supplemental Guidance on Processing Petitions Affected by AC21 and ACWIA

U.S. Citizenship and Immigration Services (USCIS) released supplemental guidance on May 30, 2008, relating to processing forms I-140 (employment-based immigrant petitions), I-129 (H-1B petitions), and I-485 (adjustment of

status applications) affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). The guidance discusses a variety of issues, such as the application of several Department of Labor rules related to labor certification; documentation; H-1B petitions; and portability issues under AC21. USCIS plans to incorporate all previous still-applicable guidance into forthcoming rulemaking relating to various AC21 and ACWIA statutory provisions.

Among other things, the guidance notes that to determine an H-1B beneficiary's eligibility for an extension of H-1B status under § 104(c) of AC21, USCIS adjudicators are instructed to review the Department of State's Visa Bulletin that was in effect at the time of filing of the I-129 petition. If, on the date of filing of the H-1B petition, the Visa Bulletin shows that the beneficiary was subject to a per-country or worldwide visa limitation in accordance with the beneficiary's immigrant visa priority date, the H-1B extension request under AC21 § 104(c) may be granted. To establish the priority date, USCIS may accept a copy of the H-1B beneficiary's I-140 petition approval notice. The guidance further states that an expired labor certification (where an I-140 petition is not filed within 180 days) cannot be relied upon to seek a 1-year extension under §104(c).

The guidance also notes that USCIS adjudicators are instructed that if credible documentary evidence is provided in support of an H-1B petition that the beneficiary faced retaliatory action from his or her employer based on reporting a violation of INA § 212(n)(2)(C)(iv), USCIS adjudicators may consider any related loss of H-1B status by the beneficiary as an "extraordinary circumstance." This process may allow the beneficiary additional time to acquire new H-1B employment and remain eligible to apply for a change of status or extension of stay notwithstanding the termination of employment or other retaliatory action by the employer.

The guidance is available at http://www.uscis.gov/files/nativedocuments/AC21_30May08.pdf.

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5. USCIS Offers Premium Processing Service for Certain Immigrant Worker Petitions

U.S. Citizenship and Immigration Services (USCIS) will make available Premium Processing Service for designated Form I-140 petitions (Immigrant Petition for Alien Worker) filed for H-1B nonimmigrant workers who are reaching the end of their sixth year in H-1B nonimmigrant status. Starting on June 16, 2008, USCIS is accepting Form I-907, Request for Premium Processing Service, for I-140s filed for beneficiaries who, as of the date of filing the I-907:

- are currently in H-1B nonimmigrant status;
- will reach the end of their sixth year of H-1B nonimmigrant stay in 60 days;
- are only eligible for a further H-1B extension under § 104(c) (three-year extension provision) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) upon approval of their I-140; and
- are ineligible to extend their H-1B status under AC21 § 106(a).(i.e., failed to file a labor certification application before the end of the final year of H-1B status)

Premium Processing Service guarantees petitioners that within 15 calendar days of receipt of a petition, USCIS will issue an approval or denial notice, a notice of intent to deny, a request for evidence, or a notice of investigation for fraud or misrepresentation. Because of the limitations imposed by USCIS, relatively few people will be able to take advantage of this new announcement.

The announcement is available at
http://www.uscis.gov/portal/site/uscis/menuitem.
5af9bb95919f35e66f614176543f6d1a/?
vgnextoid=7e3355fe4a37a110VgnVCM10000
04718190aRCRD&vgnextchannel=68439c775
5cb9010VgnVCM10000045f3d6a1RCRD.

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6. U.S., U.K. Border Agencies Agree to Expedite Travel Between Nations

U.S. Customs and Border Protection has signed a joint agreement with the

government of the United Kingdom to develop a bilateral pilot program to facilitate travel between the two nations. The International Expedited Traveler Initiative will integrate CBP's Global Entry program with the British registered traveler program.

CBP announced the Global Entry pilot program April 11 to build upon other CBP trusted traveler programs, such as NEXUS and SENTRI, designed to facilitate and expedite the entry process for pre-registered low-risk international travelers into the U.S. NEXUS is a joint program with the Canada Border Services Agency that allows expedited processing into the U.S. and Canada at the land border and at Canadian pre-clearance airports. SENTRI provides for dedicated processing at the U.S.-Mexico land border.

The Global Entry pilot kicked off for U.S. citizens and U.S. permanent residents on June 6 at three airports: John F. Kennedy International Airport in New York; George Bush Intercontinental Airport in Houston, Texas; and Washington Dulles International Airport. CBP began accepting online applications on May 12. CBP expects that citizens of the United Kingdom will be invited to apply as soon as late this year. CBP signed a similar agreement with the government of the Netherlands on May 19.

The announcement is available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/06242008_4.xml.

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7. Homeland Security Tech Undersecretary, Others Warn of Skills Crisis

Jay Cohen, the Department of Homeland Security Department's undersecretary for science and technology, warned during his keynote address at a recent University of Maryland global security summit that the U.S. workforce is "in crisis" because of insufficient numbers of students going into math and science fields. Mr. Cohen said students view those topics as too difficult.

Mr. Cohen also noted that "e don't have the leadership in industry to make the sustained investment in basic and applied research because of monthly and

quarterly returns."

Among other things, Mr. Cohen noted, the U.S. government may soon sign an agreement with the European Union, which has promised an investment of 1.3 billion euros in security-related projects, including the development of new technologies.

Rep. Judy Biggert (R-Ill.) and 10 other lawmakers sent a recent letter on the same issue to House Speaker Nancy Pelosi (D-Cal.), Minority Leader John Boehner (R-Ohio), and others, asking that they reinstate a portion of U.S. competitiveness funds cut in the fiscal year 2008 omnibus appropriations bill.

Additional information about the global security summit is available at http://www.rhsmith.umd.edu/ciber/globalsecurity 2008/agenda.html.

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8. DOL Audits Labor Cert Applications Filed By Fragomen

The Department of Labor has decided to conduct an audit of all permanent labor certification applications filed by Fragomen, Del Rey, Bernsen & Loewy, LLP (Fragomen). The Department alleged that it "has information indicating that in at least some cases the firm improperly instructed clients who filed permanent labor certification applications to contact their attorney before hiring apparently qualified U.S. workers." The audits will determine which, if any, applications should be denied or placed into department-supervised recruitment "because of improper attorney involvement in the consideration of U.S. worker applicants," the Department said.

Fragomen responded in a statement released on its Web site that "DOL, by its audit, seeks to limit the right to counsel. In order to make its point, DOL presses to make a radical departure from past practice and create a new regulatory interpretation which would limit the role of employers' attorneys and bar them from giving guidance on specific fact situations." Fragomen noted "widespread outrage" in the business community and in the immigration bar at the Department's "unprecedented sweeping audit and its misinterpretation of the

law." Also voicing support, Fragomen noted, are the American Immigration Lawyers Association, "which ha challenged and criticized DOL's new interpretation and also the manner in which it has publicly announced the audits," and the U.S. Chamber of Commerce. Fragomen said it is working to reach an agreement "that will enable us to move forward quickly to a resolution and have DOL release cases from audit in the near future, so cases will be back on track in the routine process."

The Department of Labor's announcement is available at http://www.dol.gov/opa/media/press/eta/eta20080752.htm. Fragomen's statement is available at http://pubweb.fdbl.com/news1.nsf/9abe5d70 3b986cff86256e310080943a/13b637d2e0930e1d8 52574750003a7d6?OpenDocument. Fragomen's update is available at http://www.ilw.com/immigdaily/news/2008, 0630-fragomen.pdf. See also http://mondaq.com/article.asp?articleid=62392.

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9. Court Rules Del Monte Cannot Avoid Liability for Wage Violations of Contractor

A federal court ruled that Fresh Del Monte Produce Southeast, Inc., is liable for worker wage violations by a labor contractor. The lawsuit was filed by the Southern Poverty Law Center (SPLC) in April 2006 on behalf of up to 500 field and factory H-2A agricultural workers working in Georgia on planting, harvesting, and packaging onions.

Mary Bauer, director of the SPLC's Immigrant Justice Project, said the decision was particularly significant "because it provides a roadblock to a disturbing trend by large corporate growers that import workers. Increasingly, those corporations attempt to evade responsibility for their workers by having middlemen - generally penniless crew leaders - submit the applications for H-2A workers, instead of the wealthy corporations doing so themselves."

Additional information about the case, Luna v. Del Monte Fresh Produce, is available at http://www.splcenter.org/news/item.jsp?aid=304.

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10. State Dep't Issues Final Rule To Offer Electronic Nonimmigrant Visa Applications

The Department of State has issued a final rule, effective April 29, 2008, to offer a completely electronic application procedure for nonimmigrant visas as an alternative to submission of the Form DS-156.

The Department has developed and introduced an electronic application process for nonimmigrant visas to eventually replace the current application process, which depends on a paper form (the DS-156, and other forms when required, such as the DS-157 and DS-158). The first step in paper reduction efforts was to offer an electronic visa application form (EVAF) as a voluntary alternative way of obtaining and preparing the DS-156. While a nonimmigrant visa applicant could obtain and prepare the DS-156 electronically, he or she was required to sign the DS-156 manually.

On October 1, 2006, the EVAF was made mandatory worldwide wherever possible. Now, although the Department will continue to accept the EVAF where necessary, it plans to eventually eliminate the DS-156 entirely and replace it with the DS-160, an electronic form designed to be completed and signed electronically. The procedure is the same for the nonimmigrant visa applicant except that he or she will not be required to print and sign a form to take to the visa interview. All information entered into the DS-160 will be available to the consular officer at the time of the interview. The applicant is required to "sign" the DS-160 electronically.

The full text of the final rule is available at http://edocket.access.gpo.gov/2008/E8-9336.htm.

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11. USCIS Closing Tijuana, Hong Kong Field Offices

U.S. Citizenship and Immigration Services (USCIS) announced on June 18, 2008, that it is closing its Tijuana and Hong Kong field offices.

Details on where applications sent to the Tijuana office will be forwarded and processed are at
http://www.uscis.gov/portal/site/uscis/menuitem.
5af9bb95919f35e66f614176543f6d1a/?vgnextoid=
29b534a30f49a110VgnVCM1000004718190aRCRD&vgne
xtchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Details on where applications sent to the Hong Kong office will be forwarded and processed are at

http://www.uscis.gov/portal/site/uscis/menuitem.
5af9bb95919f35e66f614176543f6d1a/?vgnextoid=
a70af774c6c9a110VgnVCM1000004718190aRCRD&vgnex
tchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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12. Federal Court Enjoins Oklahoma From Enforcing State Immigration Law

On June 4, 2008, a federal court in Oklahoma City enjoined Oklahoma from enforcing portions of the state's immigration law, H.B. 1804, that were scheduled to take effect July 1. Among them were a requirement that employers use E-Verify to check work authorizations of employees, which is currently voluntary for private employers under federal law. Judge Robin J. Cauthron found that it was "substantially likely" that Oklahoma's law is preempted by federal immigration law. The lawsuit was filed by the U.S. Chamber of Commerce and other groups.

The court noted that:

> hile the public clearly has an interest in issues of illegal immigration, and no court should treat the prospect of overturning state law without grave consideration, the Constitution requires that the will of the States must occasionally give way to the need for uniformity among the States, and that uniformity can only be accomplished through congressional action.

> Thus, for now, the provisions of H.B. 1804 challenged by Plaintiffs must be enjoined until a final determination can be made about the extent to which States can permissibly regulate without interfering with areas reserved exclusively for congressional action. The Court is not deciding that Plaintiffs will ultimately prevail, rather, when the materials before the Court are viewed as the facts and law exist today, it appears that Plaintiffs are likely to prevail and consequently are entitled to a preliminary injunction.

The decision is available at http://www.uschamber.com/assets/nclc/henrypreliminjunction.pdf. For additional details and a history of the case, see http://www.nfib.com/object/IO_37522.html and http://hr.cch.com/news/employment/062008a.asp.

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13. State Dept. Releases Information on Employment Second and Third Preference Availability for July

The Department of State's Visa Office has released the following information on employment second and third preference visa number availability for July 2008:

Employment second preference. The Department noted that questions have been raised regarding the way visa numbers have been provided to China and India in the employment second preference categories beginning in April. Under the Immigration and Nationality Act, if total demand for visas in an employment preference category is insufficient to use all available visa numbers in that category in a calendar quarter, the unused numbers may be made available without regard to the annual per-country limit, the Department noted. For example, if the second preference annual limit were 40,000, number use by "All Other Countries" were estimated to be only 25,000, and the China/India combined number use based on their per-country limits were 6,000, there would be 9,000 numbers unused. Those 9,000 numbers could then be made available to China and India applicants without regard to their per-country limits.

The Department determined that the demand from "All Other Countries" for second preference numbers, plus the quantity of numbers available under the China and India second preference per-country limit, would be insufficient to use all available numbers under the annual limit for this category. Therefore, the unused numbers have been made available to China and India second preference applicants. Because such unused numbers must be made available strictly in priority date order, the China and India applicants have been subject to the same cut-off date as worldwide applicants. As there are more employment second preference applicants from India and the Indian applicants may have earlier priority dates, the Department said it is likely that Indian applicants will receive a larger portion of the available numbers than Chinese applicants.

The employment second preference category is "Current" for all countries except China and India. If at any point it appears to the Department that demand from "All Other Countries" would use all available numbers, an adjustment would be made to the China/India cut-off date. Therefore, providing the unused numbers to China and India "in no way disadvantages applicants from any other country, and helps to insure that the worldwide annual limit can be reached," the Department noted.

Employment third preference. Demand for numbers, primarily by USCIS for adjustment of status cases, has brought the entire employment third preference category to the annual numerical limit by the end of June. As a result, this category will become "unavailable" beginning in July and will remain so for the remainder of fiscal year 2008, the Department said. Such action will be temporary, and employment third preference availability will return to the cut-off dates established for June in October, the first month of the new fiscal year.

The latest Visa Bulletin containing this and other information on priority dates is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4252.html. Back to Top **14. Diversity Visa Lottery Results Announced**

The Department of State's Visa Office has reported that the Kentucky Consular Center in Williamsburg, Kentucky, has registered and notified the winners of

the DV-2009 diversity lottery. The DV lottery makes available 50,000 permanent resident visas annually to persons from countries with low rates of immigration to the United States. Over 9.1 million people applied for the DV lottery this year. Of that number, approximately 99,600 applicants have been registered and notified and may now make an application for an immigrant visa. Because it is likely that some of the first 50,000 persons registered will not pursue their cases to visa issuance, the Department said this larger figure should ensure that all DV-2009 numbers will be used during fiscal year 2009 (October 1, 2008, to September 30, 2009). Those selected will need to act on their immigrant visa applications quickly. Applicants should follow the instructions in their notification letter and must fully complete the information requested.

The latest Visa Bulletin for July 2008 contains a country-by-country breakdown of those registered for DV-2009, at http://travel.state.gov/visa/frvi/bulletin/bulletin_4252.html.

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