



# SEPTEMBER 2008 IMMIGRATION UPDATE

*Posted on September 2, 2008 by Cyrus Mehta*

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- 2. [\*\*USCIS Issues Work Authorization Application Version Reminder\*\*](#) - USCIS issued a reminder to use the correct version of the I-765 dated May 27, 2008.
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- 4. [\*\*Fragomen Files Lawsuit Against DOL Over Special Audit; DOL Releases Guidance\*\*](#) - The firm has moved for a preliminary injunction that would prevent the DOL from enforcing its new interpretation of the law.
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- 6. [\*\*Global Entry Program Expands\*\*](#) - The U.S. Department of Homeland Security recently announced the expansion of the "Global Entry" pilot program to four additional airports.
- 7. [\*\*USCIS Extends TPS to Sudan\*\*](#) - The extension will last 18 months, through May 2, 2010; eligible Sudanese must apply by October 14.
- 8. [\*\*USCIS Proposes Changes to H-2B Temporary Nonagricultural Worker Program, Withdraws Earlier Proposed Rule\*\*](#) - The changes, if implemented, would make the H-2B visa a viable option for many more jobs with U.S. employers, including professional occupations with project-

based timelines.

- **9. Mississippi Raid Largest in U.S. History; ICE Arrests Hundreds in Other Raids** - U.S. Immigration and Customs Enforcement (ICE) agents took nearly 600 plant workers into custody.
- **10. New Naturalization Test Implemented; USCIS Updates Processing Times** - USCIS will begin administering the redesigned naturalization test on October 1, 2008.
- **11. Third Preference Category Unavailable for September** - Many other employment-based dates are current for September 2008 but the third preference and "other workers" categories are unavailable.
- **12. Canada Introduces Fast Track to Permanent Residence** - The Canadian Experience Class, a new proposed avenue for immigration for certain temporary foreign workers and foreign student graduates with Canadian work experience, would allow an applicant's Canadian experience to be considered a key factor when immigrating to Canada.

### Details...

#### **1. New Passport Card Is Acceptable For Employment Eligibility Verification**

U.S. Citizenship and Immigration Services (USCIS) announced that the new U.S. passport card may be used in the employment eligibility verification (Form I-9) process.

Last month, the Departments of State and Homeland Security announced that the new passport card was in full production. The new card "provides a less expensive and more portable alternative to the traditional passport book, and will expedite document processing at United States land and sea ports-of-entry for U.S. citizens traveling to Canada, Mexico, the Caribbean, and Bermuda," the agencies said.

The new passport card is limited in its uses for international travel (e.g., it may not be used for international air travel), but it is a valid passport that attests to the U.S. citizenship and identity of the bearer. Accordingly, USCIS said, the card may be used for the I-9 process and can also be accepted by employers participating in the E-Verify program.

The passport card is considered a "List A" document that may be presented by newly hired employees during the employment eligibility verification process to show work authorized status. "List A" documents are those used by employees to prove both identity and work authorization when completing the I-9.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8daff5a7ebd9b110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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## **2. USCIS Issues Work Authorization Application Version Reminder**

U.S. Citizenship and Immigration Services (USCIS) issued a reminder to use the correct version of the Application for Employment Authorization (Form I-765) dated 05/27/08. The edition date appears in the lower right hand corner of the form as "Form I-765 (Rev. 05/27/08) N."

Submission of an earlier version of the I-765 may result in rejection of the application, USCIS said.

The I-765 instructions and application are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e8de36ad2e9cb110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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## **3. E-Verify Provokes Controversy**

The Department of Homeland Security's plan to expand the E-Verify online work authorization verification program to all federal contractors has led to controversy.

Randy Johnson, the U.S. Chamber of Commerce's Vice President for Labor, Immigration, and Employee Benefits, told Federal News Radio that "if they go forward with the final rule and don't respond to our concerns, I think very well we'll go into court. I think there's a good chance we'll go into court anyway because...the Congressional statute actually says that the program is voluntary and, in our view, making it a condition of a federal contract, in fact, renders it

mandatory in violation of the underlying Congressional statute." He said the expansion was "too quick" and untested, noting that "frankly, there's some legal problems with regard to whether or not the agencies even have the legal authority to do it."

Mr. Johnson said the Government Accountability Office needs to study E-Verify further. He noted that some companies "are concerned about this regulation because of immigration concerns, but then there's another raft of companies, such as major contractors who are household names, that are concerned about it because it's just going to slow down the procurement process and already make it more complicated." He noted that colleges and universities that have federal contracts also have raised concerns.

Jennifer Kerber, Senior Director of ITAA's Federal and Homeland Security Programs, told Federal News Radio that ITAA would welcome E-Verify but is concerned about "the scalability of the system, the accuracy of the underlying data and the increased burden on federal contractors and government agencies." She noted that "today, according to the E-Verify system officials, there's an eight percent no-match rate. So, you take eight percent for 61,000 people using it , and you put eight percent on 7.4 million people using it - what kind of increased delays in government contract performance are we going to have?"

The Department of Homeland Security plans to offer a half-day information session on the E-Verify program. The session will include a live demonstration of the E-Verify system followed by a question-and-answer session. Dates and times have not yet been announced. For more information on the seminar, see <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=539248ea3a72b110VgnVCM1000004718190aRCRD&vgnextchannel=a16988e60a405110VgnVCM100004718190aRCRD>. General information about E-Verify is available at <http://www.uscis.gov/e-verify>.

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#### **4. Fragomen Files Lawsuit Against DOL Over Special Audit; DOL Releases Guidance**

On August 8, 2008, Fragomen, Del Rey, Bernsen & Loewy, LLP (Fragomen) filed a lawsuit in federal district court in Washington, D.C., seeking an injunction against the U.S. Department of Labor's (DOL's) special audit of labor

certification applications filed by the firm.

Fragomen said it believes that "it was necessary to file a lawsuit because DOL's actions have been unlawful and unconstitutional. The Department has sought to deny our clients' right to counsel under the Constitution, and is retroactively applying a new interpretation of its own regulations."

The firm has moved for a preliminary injunction that would prevent the DOL from enforcing its new interpretation of the law and has asked the court to order the agency to abide by its own regulations and the Constitution. The relief requested includes an order cancelling the special audit component of pending PERM cases so that those cases could return to the regular review queue.

The Department of Labor posted on its Web site related guidance released in June regarding labor certifications. A new "restatement" issued on August 29, 2008, supersedes the earlier guidance in response to the agency's receipt of "considerable feedback" from employers. The earlier guidance noted, among other things, that:

Where the Department finds evidence of potentially improper attorney, agent, or foreign worker involvement in considering U.S. worker applicants, the Department may audit applications to determine whether the employer' recruitment and hiring processes were conducted in good faith and to ensure adherence to all statutory and regulatory requirements.

The earlier guidance outlined the following prohibitions:

- Attorneys and agents may receive resumes and applications from U.S. workers who respond to the employer's recruitment efforts. They may not conduct any preliminary screening of applications before the employer does so, however, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. The attorney or agent may not withhold from the employer any resumes or applications that it receives from U.S. workers.
- Attorneys and agents may not participate in the interviewing of U.S. worker applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which

labor certifications are not filed. Such involvement, because of its uniqueness, has resulted in an impermissible "chilling effect" on the interests of U.S. worker-applicants in the position.

- After the evaluation of applications by the employer has been completed, the employer may consult with its attorney or agent about the implications of its qualification determinations on the labor certification application. Those consultations can encompass the question of whether applicants who were found by the employer to be unqualified were rejected for lawful, job-related reasons. Under no circumstances, however, should an attorney or agent seek to dissuade an employer from its initial determination that a particular applicant is minimally qualified, able, willing and available for the position in question.

The August 29 restatement notes that:

- Given that the permanent labor certification program imposes recruitment standards on the employer that may deviate from the employer's normal standards of evaluation, the Department understands and appreciates the legitimate role attorneys and agents play in the permanent labor certification process. Additionally, the Department respects the right of employers to consult with their attorney(s) or agent(s) during that process to ensure that they are complying with all applicable legal requirements.
- By prohibiting attorneys, agents, and foreign workers from interviewing and considering U.S. workers during the permanent labor certification process,...the Department does not thereby prohibit attorneys and agents from performing the analyses necessary to counsel their clients on legal questions that may arise with respect to this process. The employer, and not the attorney or agent, must be the first to review an application for employment, and must determine whether a U.S. applicant's qualifications meet the minimum requirements for the position, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. By requiring that initial reviews of and final determinations on all applications are made by the employer, the Department seeks to ensure that the consideration process is as close to the employer's non-immigration-related hiring process as possible and that U.S. workers receive full and fair consideration by the employer for the job. Attorneys (and, to the extent it is consistent with state rules governing the practice

of law, agents) may, however, provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations, and policies.

The August 29 restatement notes that where the Department finds evidence of "potentially improper" attorney, agent, or foreign worker involvement in considering U.S. worker applicants, the Department will audit those applications and subsequently may require supervised recruitment.

The Government filed a reply brief in *Fragomen v. Chao* declaring that, with the issuance of its August 29, 2008 restatement Guidance Bulletin, "there are no restraints on the advice that attorneys may provide their clients concerning the labor certification process." The Government is attempting to moot out the motion for a preliminary injunction filed by Fragomen.

The DOL's August 29 restatement is available at

[http://www.foreignlaborcert.dol.gov/pdf/PERM\\_Guidance\\_Final\\_082908.pdf](http://www.foreignlaborcert.dol.gov/pdf/PERM_Guidance_Final_082908.pdf).

The agency's earlier guidance is available at

<http://www.foreignlaborcert.dol.gov/pdf/PERMRule20CFR65610b2.pdf>.

Fragomen's announcement is available at

<http://pubweb.fdlbl.com/news1.nsf/9abe5d703b986cff86256e310080943af08d74778d94da65852574a200680691?OpenDocument>.

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## **5. Electronic VWP Application System Now Available**

The Electronic System for Travel Authorization (ESTA) is now accessible online for citizens and eligible nationals of Visa Waiver Program (VWP) countries to apply for advance authorization to travel to the United States under the VWP. Effective January 12, 2009, all VWP travelers will be required to obtain an electronic travel authorization before boarding a carrier to travel by air or sea to the U.S. under the VWP.

To use the system, log onto the ESTA Web site at <https://esta.cbp.dhs.gov> and complete an online application in English. Travelers are encouraged to apply early. The Web-based system will prompt you to answer basic biographical and eligibility questions typically requested on a paper I-94W form. Basic information on ESTA is available in Dutch, English, French, German, Italian, Japanese, Portuguese, Spanish, and Swedish.

Applications may be submitted at any time before traveling. The Department of

Homeland Security recommends, however, that applications be submitted at least 72 hours before traveling. In most cases, the DHS promises, you will receive one of the following responses "within seconds":

1. Authorization Approved: Travel is authorized.
2. Travel Not Authorized: The traveler must obtain a nonimmigrant visa at a U.S. Embassy or Consulate before traveling to the U.S.
3. Authorization Pending: The traveler will need to check the ESTA Web site for updates within 72 hours to receive a final response.

An approved travel authorization via ESTA is:

- Required for all VWP travelers before boarding a carrier to travel by air or sea to the U.S. under the VWP beginning January 12, 2009;
- Valid, unless revoked, for up to two years or until the traveler's passport expires, whichever comes first;
- Valid for multiple entries into the U.S. As future trips are planned, or if an applicant's destination addresses or itineraries change after authorization has been obtained, the applicant may update that information through the ESTA Web site; and
- Not a guarantee of admissibility to the U.S. at a port of entry. ESTA approval only authorizes a traveler to board a carrier for travel to the U.S. under the VWP.

Additional information is available in "For International Visitors" at <http://www.CBP.gov/travel>. The ESTA Web site is at [http://www.cbp.gov/xp/cgov/travel/id\\_visa/esta/esta\\_intro/](http://www.cbp.gov/xp/cgov/travel/id_visa/esta/esta_intro/).

Additional information is available in "For International Visitors" at <http://www.CBP.gov/travel>. The ESTA Web site is at [http://www.cbp.gov/xp/cgov/travel/id\\_visa/esta/esta\\_intro/](http://www.cbp.gov/xp/cgov/travel/id_visa/esta/esta_intro/).

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## **6. Global Entry Program Expands**

The U.S. Department of Homeland Security recently announced the expansion of the "Global Entry" pilot program to four additional airports: Los Angeles International, Hartsfield-Jackson Atlanta International, Chicago O'Hare International, and Miami International.

Upon arrival at the airport, Global Entry-approved participants bypass the regular passport control line and proceed directly to the Global Entry kiosk. At

the kiosk, Global Entry travelers activate the system by inserting their passports or U.S. permanent resident cards into a document reader. The kiosk directs travelers to provide digital fingerprints and compares them with the fingerprints on file.

The new Global Entry sites are expected to be operational in the fall of 2008, and will be equipped with kiosks for expedited processing. As part of the program's expansion, U.S. Customs and Border Protection (CBP) will install Global Entry kiosks at additional international terminals at John F. Kennedy International Airport (JFK). The Global Entry pilot program began June 10 at JFK, George Bush Intercontinental Airport, and Washington Dulles International Airport. Approximately 1,100 members have already enrolled and about 370 Global Entry members have used kiosks at the existing pilot locations.

Global Entry travelers are photographed and prompted to answer declaration questions on the kiosk's touch-screen. A transaction receipt is issued upon completion, which must be presented to CBP officers before leaving the inspection area.

The dates of the expansion of the Global Entry pilot program to the individual airports will be announced at <http://www.cbp.gov>. For more information on the program, see [http://www.cbp.gov/xp/cgov/travel/trusted\\_traveler/global\\_entry/](http://www.cbp.gov/xp/cgov/travel/trusted_traveler/global_entry/). The expansion was announced in a Federal Register notice available at <http://edocket.access.gpo.gov/2008/pdf/E8-18724.pdf>.

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## **7. USCIS Extends TPS to Sudan**

U.S. Citizenship and Immigration Services (USCIS) announced that it is extending temporary protected status (TPS) to nationals of Sudan or people having no nationality who last habitually resided in Sudan. The extension covers an estimated 500 Sudanese who have already applied for and received benefits under TPS since the October 7, 2004, re-designation. The extension will last 18 months, through May 2, 2010. Applicants must file during the 60-day re-registration period (August 14, 2008, through October 14, 2008).

Sudanese currently registered under TPS who desire an extension must re-register by filing both an Application for Temporary Protected Status (Form I-821) and an Application for Employment Authorization (Form I-765), with the appropriate fees or fee waiver requests. The I-821 has been revised and applicants must use the version dated 10/17/2007 or later. The I-765 also has

been revised and applicants must use the version dated 5/27/2008 or later. Failure to use these versions of the forms may result in rejection of the application. Certain nationals of Sudan who have not previously applied for TPS may be able to apply under the late initial registration process.

A notice announcing the TPS extension is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=c024c623f8dbb110VgnVCM100000471819>

[0aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD).

A fact sheet is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=5f27c623f8dbb110VgnVCM1000004718190>

[aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD).

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## **8. USCIS Proposes Changes to H-2B Temporary Nonagricultural Worker Program, Withdraws Earlier Proposed Rule**

U.S. Citizenship and Immigration Services (USCIS) published a proposed rule on August 20, 2008, that would streamline procedures for hiring workers under the H-2B program, supplementing the changes the agency proposed last spring. The H-2B nonimmigrant temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs for which U.S. workers are not available.

The most important changes include:

- The employer's "temporary need" for a worker could be as long as three years. Until now, it has been believed widely that the need could not exceed nine months per stay, followed by a hiatus of at least three months. This has limited the number of assignments for which the H-2B is attractive, but many employers have projects that could end within three years, followed by a three-month absence from the US. Specifically, USCIS proposes changing the definition of "temporary employment" to include jobs for which the work will end in the near, definable future and to eliminate the requirement that employers show "extraordinary circumstances" to be eligible to hire H-2B workers for up to three years.
- The wait outside the U.S. for those who want to switch from H-2B to H-1B or L-1 visas would be reduced to three months (instead of the current six

months).

These two changes, if implemented, would make the H-2B visa a viable option for many more jobs with U.S. employers, including professional occupations with project-based timelines. Several other provisions are proposed for purposes of fraud prevention in the H-2B program.

The agency also withdrew an earlier proposed regulation published in 2005 that would have established a one-step petition process for U.S. employers seeking H-2B temporary workers, eliminating the need for employers to apply for a labor certification; required electronic filing of the Petition for a Nonimmigrant Worker, Form I-129, within 60 days in advance of the requested employment start date; eliminated the use of agents as H-2B petitioners; and established new management mechanisms. In light of the public's comments, USCIS said it is no longer moving forward with the proposed rule as designed and will publish a new proposed rule for public comment.

<http://edocket.access.gpo.gov/2008/pdf/E8-19322.pdf>.

USCIS will accept public comments until September 19, 2008, on the new proposed rule, which is published at

<http://edocket.access.gpo.gov/2008/pdf/E8-19306.pdf>. The notice is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=5d07a176642cb110VgnVCM1000004718190aRCRD&vgnnextchannel=3381c0ed71f85110VgnVCM1000004718190aRCRD>. A fact sheet is available at <http://www.uscis.gov/files/pressrelease/h-2-faq-15Aug08.pdf>.

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## **9. Mississippi Raid Largest in U.S. History; ICE Arrests Hundreds in Other Raids**

U.S. Immigration and Customs Enforcement (ICE) agents took nearly 600 plant workers into custody on August 25, 2008, in what is reportedly the largest immigration raid in U.S. history. The raid at the Howard Industries transformer plant was the result of an investigation prompted by a tip from a union member. The workers were from Brazil, El Salvador, Germany, Guatemala, Honduras, Mexico, Panama, and Peru, ICE said. The agency also arrested 400 workers on May 12 at the Agriprocessors meatpacking plant in Iowa, and seized a number of fraudulent green cards from the company's human resources department.

Meanwhile, ICE arrested 42 undocumented men at Washington Dulles International Airport as part of a critical infrastructure protection (CIP) operation. ICE agents, with support of airport security agencies, arrested the men just inside the airport grounds at a checkpoint established to verify the identity and immigration status of workers entering a service gate.

ICE agents interviewed more than 200 individuals to verify their identities, immigration status, and eligibility for lawful employment in the U.S. Among those arrested were nationals of Argentina, Bolivia, El Salvador, Guatemala, Mexico, and Peru. Most of the individuals encountered worked on construction projects at the airport. Those detained are being interviewed, fingerprinted, photographed, and entered into Department of Homeland Security databases at a local ICE office.

In another action, 57 undocumented workers at Mills Manufacturing Corporation (MMC) in Asheville, North Carolina, were arrested by ICE special agents. MMC is a Department of Defense contractor responsible for the manufacturing of parachutes for the U.S. military. Among those arrested were nationals of Mexico, Guatemala, Ecuador, and Honduras.

The arrests were based on an ICE investigation that revealed, ICE said, that the workers had used fraudulent social security numbers to obtain employment. The agency said the company has been fully cooperative and is not a target of the ICE investigation.

All of those arrested were transferred to the Henderson County Sheriff's Office for immigration processing, and all were placed into removal proceedings for being in violation of U.S. immigration law. Those arrested were interviewed by ICE agents to determine if they had medical, caregiver, or other humanitarian issues. ICE identified approximately 29 individuals who qualified for humanitarian release and will be required to appear before a federal immigration judge.

In fiscal year 2008, ICE agents have made more than 700 administrative arrests and 100 criminal arrests at critical infrastructure facilities. As of July 2008, ICE has made more than 3,800 administrative arrests overall for immigration violations during worksite enforcement operations.

The Mississippi announcement is available at <http://www.ice.gov/pi/nr/0808/080826laurel.htm>. The Dulles announcement is

available at