



NOVEMBER 2008 IMMIGRATION UPDATE

Posted on November 3, 2008 by Cyrus Mehta

Headlines:

1. [USCIS Estimates 21 Percent of H-1B Cases Involve Fraud or Technical Violations](#) - USCIS concluded that there is a 21 percent baseline fraud and technical violation rate for H-1B petitions and plans procedural changes as a result.
2. [U.S. Increases Period of Stay for Trade-NAFTA Professionals From Canada and Mexico](#) - The final rule changes the initial period of admission for TN workers from one to three years.
3. [Seven Countries To Be Added to Visa Waiver Program](#) - The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea will be added soon.
4. [USCIS Withdraws Lockbox for Naturalization Applications](#) - USCIS has decided to delay implementation of the lockbox while technical issues are resolved.
5. [State Dept. Issues Final Rule on Foreign Health Care Worker Certifications](#) - The rule, adopted without change, requires certain health care workers seeking admission to the U.S., excluding physicians, to present certificates establishing competency in a specific health care field.
6. [Department of Homeland Security Streamlines Process for Short-Term Visitors Infected With HIV](#) - DHS will allow those who are HIV-positive to enter as visitors for a temporary period not to exceed 30 days, without being required to seek such admission under the current case-by-case process.
7. [State Dept. Eliminates Board of Appellate Review](#) - Determinations related to loss of citizenship and passport denials now are being made by the Bureau of Consular Affairs instead.
8. [DHS Exempts Certain Systems From Privacy Act Requirements.](#)

[Including Legal Records, SEVIS](#) - DHS is claiming exemption from certain requirements of the Privacy Act for various systems.

9. [Slow Forward Movement Predicted for Employment Categories](#) - Slow forward movement is expected in the cut-off dates for most employment visa categories during the next few months, and retrogressions cannot be ruled out.

Details...

1. USCIS Estimates 21 Percent of H-1B Cases Involve Fraud or Technical Violations

U.S. Citizenship and Immigration Services' (USCIS) Office of Fraud Detection and National Security, a division of the National Security and Records Verification Directorate, collaborated with other USCIS components on a new report, "H-1B Benefit Fraud & Compliance Assessment," released in September 2008. The report estimates that about one in every five H-1B cases involves either fraud or a technical violation.

There were a total of 51 cases within the sample of 246 H-1B petitions that USCIS said represented either fraud, a technical violation, or multiple technical violations. USCIS said the cases reviewed constituted "a statistically valid random sampling of pending and completed cases over a recent six-month period." The agency noted that "not all violations will rise to the level that would warrant a criminal investigation or prosecution," and that the "vulnerabilities and abuses" identified "need not lead to a criminal investigation and/or prosecution in order to be reported for purposes since systemic vulnerabilities ultimately may contribute to higher rates of successful fraudulent filings." USCIS used the "overall violation rate" of 20.7 percent to extrapolate an estimate of approximately 20,000 petitions nationwide that "may have some type of fraud or technical violation(s)."

USCIS also identified "primary fraud or technical violation indicators," including:

1. Firms with 25 or fewer employees have higher rates of fraud or technical violation(s) than larger-sized companies.
2. Firms with an annual gross income of less than \$10 million have higher rates of fraud or technical violations than firms with an annual gross income greater than \$10 million.
3. Firms in existence less than 10 years have higher incidences of fraud or

technical violations than firms with an annual gross income greater than \$10 million.

4. The results indicate that H-1B petitions filed for accounting, human resources, business analysts, sales, and advertising occupations are more likely to contain fraud or technical violations than other occupational categories.
5. Beneficiaries with only bachelor's degrees had higher fraud or technical violation rates than did those with graduate degrees.

USCIS concluded that the results of this study "have established a 21% baseline fraud and technical violation(s) rate for H-1B petitions. Given the significant vulnerability, USCIS is making procedural changes, which will be described in a forthcoming document."

The Alliance of Business Immigration Lawyers, of which this firm is part of, has expressed concerns about the small sample size (0.2 percent of the 96,827 H-1B petitions filed between October 1, 2005, and March 31, 2006) and the fact that over 80 percent of the violations found by the USCIS involved Department of Labor regulations outside of USCIS's mission of adjudicating requests for immigration benefits.

The USCIS report is available at

<http://www.ieeeusa.org/policy/reports/DHSH1BFraudRpt.pdf>.

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2. U.S. Increases Period of Stay for Trade-NAFTA Professionals From Canada and Mexico

U.S. Citizenship and Immigration Services (USCIS) has increased the maximum period of time a Trade-NAFTA (TN) professional worker from Canada or Mexico may remain in the U.S. before seeking readmission or obtaining an extension of stay. The final rule changes the initial period of admission for TN workers from one to three years, making it equal to the initial period of admission for H-1B professional workers.

Eligible TN nonimmigrants now may receive extensions of stay in increments of up to three years instead of the previous maximum period of stay of one year. Spouses and unmarried minor children of TN nonimmigrants in their corresponding nonimmigrant classifications will also benefit from the new regulation.

The TN nonimmigrant visa classification is available to eligible Mexicans and Canadians with at least a bachelor's degree or appropriate professional credentials who work in certain qualified fields pursuant to the North American Free Trade Agreement (NAFTA). Qualified professions identified within NAFTA include, but are not limited to, accountants, engineers, attorneys, pharmacists, scientists, and teachers.

The final rule, effective October 16, 2008, is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24600.pdf>. The announcement, issued on October 14, 2008, is available at http://www.uscis.gov/files/article/tn_nonimmigrant_changes_update.pdf.

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3. Seven Countries To Be Added to Visa Waiver Program

The Bush administration announced on October 17, 2008, that it plans to add seven countries to the Visa Waiver Program (VWP): the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea. President George W. Bush said that eligible citizens of those countries will be able to travel to the U.S. for up to 90 days without a visa "in about a month." So-called "roadmap" countries, which are on track to qualify for VWP admission, include Bulgaria, Cyprus, Greece, Malta, Poland, and Romania.

The VWP currently allows the citizens of 27 countries to travel to the U.S. for tourism or business without obtaining a visa. Nationals participating in the VWP must travel only for business, pleasure, or transit; stay in the U.S. for 90 days or fewer; and, if arriving by sea or air, hold a valid ticket for return or onward travel and enter the U.S. aboard an air or sea carrier that has been designated as a participant in the VWP.

President Bush's statement is available at <http://www.whitehouse.gov/news/releases/2008/10/20081017-5.html>. A fact sheet is available at <http://www.whitehouse.gov/news/releases/2008/10/20081017-15.html>.

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4. USCIS Withdraws Lockbox for Naturalization Applications

U.S. Citizenship and Immigration Services (USCIS) has withdrawn its instruction issued on September 12, 2008, that in certain instances the Application for Naturalization (Form N-400) would be filed at a USCIS lockbox facility rather than at the USCIS Service Center. The notice was to take effect on October 14,

2008. USCIS has decided to delay implementation while technical issues are resolved and has withdrawn as of October 10, 2008, the notice published in September. Applicants should continue to file their N-400s according to the instructions on the form.

The new notice is available at

<http://edocket.access.gpo.gov/2008/pdf/E8-24095.pdf>.

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5. State Dept. Issues Final Rule on Foreign Health Care Worker Certifications

The Department of State (DOS) issued a final rule effective October 20, 2008, that adopts as final without change the Department's interim rule published at 67 Fed. Reg. 77158 (Dec. 17, 2002). The rule requires certain health care workers seeking admission to the U.S., excluding physicians, to present certificates establishing competency in a specific health care field. This certification is issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or other credentialing organizations that have been approved by the Department of Homeland Security (DHS) in consultation with the Department of Health and Human Services. DOS said this rule facilitates greater uniformity between the regulations of DHS and the Department of State.

The final rule is available at

<http://edocket.access.gpo.gov/2008/pdf/E8-24474.pdf>. The interim rule is available at <http://edocket.access.gpo.gov/2002/pdf/02-31603.pdf>.

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6. Department of Homeland Security Streamlines Process for Short-Term Visitors Infected With HIV

The Department of Homeland Security (DHS) issued a final rule effective October 6, 2008, to provide, on a "limited and categorical" basis, a more streamlined process for nonimmigrants infected with human immunodeficiency virus (HIV) who wish to visit the U.S. on a short-term basis. Under the final rule, DHS will allow those who are HIV-positive to enter as visitors (for business or pleasure) for a temporary period not to exceed 30 days, without being required to seek such admission under the more complex (individualized, case-by-case) process provided under current DHS procedures. Additionally, DHS has decided to permit an additional "period or periods of

satisfactory departure in exigent circumstances" under a provision modeled after the Visa Waiver Program.

Nonimmigrants who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by the final rule may seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for those infected with HIV.

The final rule is available at

<http://edocket.access.gpo.gov/2008/pdf/E8-23287.pdf>.

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7. State Dept. Eliminates Board of Appellate Review

The Department of State (DOS) issued a final rule effective October 20, 2008, that eliminates the Department's Board of Appellate Review (L/BAR), which had been authorized to review certain Department determinations, in particular those related to loss of citizenship and passport denials. Because L/BAR's jurisdiction has been superseded or made obsolete, and in large part replaced by review of loss of citizenship and passport matters by the Bureau of Consular Affairs, this rule eliminates L/BAR and authorizes on a discretionary basis an "alternative, less cumbersome" review of loss of nationality determinations by the Bureau of Consular Affairs.

The final rule is available at

<http://edocket.access.gpo.gov/2008/pdf/E8-24472.pdf>.

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8. DHS Exempts Certain Systems From Privacy Act Requirements, Including Legal Records, SEVIS

The Department of Homeland Security (DHS) has published final rules exempting certain systems from some provisions of the Privacy Act because of "criminal, civil, and administrative enforcement requirements." The systems include the General Counsel Electronic Management System (GEMS). The DHS noted that Immigration and Customs Enforcement (ICE) attorneys work closely with investigators throughout the process of adjudicating immigration cases. ICE attorneys "must have access to investigative documents and related materials in order to form their decisions about how to handle particular cases." Additionally, DHS noted, ICE attorneys create attorney work product associated with immigration proceedings. The GEMS system will facilitate the

collection and maintenance of materials used by ICE attorneys in immigration adjudications. "It will supplement and ultimately replace the current attorney work product paper files that are primarily stored and managed in the hardcopy alien file commonly known as the 'A-file,'" DHS noted.

DHS also is claiming exemption from certain requirements of the Privacy Act for the Student and Exchange Visitor Information System (SEVIS). DHS noted that because the purpose of the SEVIS system is to collect and maintain pertinent information on nonimmigrant students and exchange visitors, and the schools and exchange visitor program sponsors that host them while in the U.S., "it is possible that the information in the record system may pertain to national security or law enforcement matters." Disclosure of related information would therefore present a "serious impediment" to law enforcement and national security efforts, DHS said. Disclosure of the information also would permit an individual who is the subject of a record "to impede the investigation and avoid detection or apprehension, which undermines the entire system." DHS said this exemption is "a standard law enforcement and national security exemption utilized by numerous law enforcement and intelligence agencies."

DHS said it is establishing a new agency-wide system of records under the Privacy Act for DHS General Legal Records. This will ensure that all components of DHS follow the same privacy rules for collecting and handling general legal records. DHS is proposing to exempt its general legal records from provisions of the Privacy Act.

The GEMS final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24996.pdf>. The SEVIS final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-25000.pdf>. The General Legal Records proposed rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24997.pdf>.

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9. Slow Forward Movement Predicted for Employment Categories

The Department of State's Visa Office reported in the November 2008 Visa Bulletin that the level of demand being received from U.S. Citizenship and Immigration Services (USCIS) offices indicates that USCIS has a significant number of cases with priority dates that are earlier than the established cut-offs. This is likely to result in slow forward movement of the cut-off dates for most employment visa categories during the next few months, the Department

said. Sudden changes in the USCIS demand patterns could result in fluctuations in the monthly cut-off dates, and retrogressions cannot be ruled out during fiscal year 2009. The November 2008 Visa Bulletin can be found at http://travel.state.gov/visa/frvi/bulletin/bulletin_4371.html

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