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US IMMIGRATION & NATIONALITY LAW

DECEMBER 2008 IMMIGRATION UPDATE

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1. E-Verify Deadline Approaches for Federal Contractors

Federal contractors and subcontractors will be required to begin using U.S. Citizenship and Immigration Services' (USCIS) E-Verify system starting January

15, 2009, to verify their employees' eligibility to work legally in the United States. In a final rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council amended the Federal Acquisition Regulation (FAR) to reflect this change.

The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. The amended Executive Order reinforces the policy, first announced in 1996, that the federal government does business only with companies that have a workforce that is authorized to work in the U.S. This new rule requires federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the U.S.

Federal contracts awarded and solicitations issued after January 15, 2009, will include a clause committing government contractors to use E-Verify. The same clause will also be required in subcontracts over $3,000 for services or construction. Contracts exempt from this rule include those that are for less than $100,000 and those that are for commercially available off-the-shelf items. Companies awarded a contract with the federal government will be required to enroll in E-Verify within 30 days of the contract award date. They also will need to begin using the E-Verify system to confirm that all of their new hires and their employees directly working on federal contracts are authorized to work in the U.S.

The final rule reflects some changes from the proposed rule. The changes are intended to lighten the burden on small businesses that decide to accept federal contracts, and to provide contractors with flexible means of complying with the basic requirement that all persons working on federal contracts be electronically verified.

More than 92,000 employers currently use E-Verify, an Internet-based system operated by the DHS in partnership with the Social Security Administration that allows participating employers to verify the employment eligibility of their employees electronically. During fiscal year 2008, more than 6.6 million employment verification queries were run through the system, representing

one out of every eight people hired in the U.S. Approximately 96.1 percent of all cases queried through E-Verify are found to be employment-authorized, and individuals who are not immediately cleared are given the opportunity to correct their records, USCIS said.

The final rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-26904.pdf. A related USCIS announcement is available at http://www.uscis.gov/files/article/FAR_13Nov08.pdf. A USCIS "frequently asked questions" sheet is available at http://www.uscis.gov/files/article/FAR_FAQ_13nov08.pdf.

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2. Canada Fast-Tracks Skilled Workers

Jason Kenney, Canada's Minister of Citizenship, Immigration and Multiculturalism, announced on November 28, 2008, that retroactive to February 27, 2008, the "Action Plan for Faster Immigration" includes issuing instructions to visa officers reviewing new federal skilled worker applications to process those from candidates who:

- include an offer of arranged employment; or
- are from a foreign national living legally in Canada for one year as a temporary foreign worker or international student; or
- are from a skilled worker who has at least one year of experience under one or more of the 38 occupations listed at http://www.cic.gc.ca/eligible.

The list of 38 occupations was developed after consultations with the provinces and territories, business, labor, and other stakeholders. New federal skilled worker applications that do not meet the eligibility criteria outlined above will not be processed, and the application fee will be refunded. Citizenship and Immigration Canada (CIC) said in a statement that this effort, along with funds set aside in the 2008 budget to improve the immigration system, "will stop the backlog from growing and will start to draw it down."

"The eligibility criteria apply only to new federal skilled worker applicants and will not affect Canada's family reunification or refugee protection goals," Minister Kenney said. He noted that applicants who are not eligible for the federal skilled worker category may qualify under another category, such as the Provincial Nominee Program, or as temporary foreign workers, which could

then put them on a path to permanent residence through the new Canadian Experience Class.

"We expect new federal skilled worker applicants, including those with arranged employment, to receive a decision within six to 12 months compared with up to six years under the old system," said Minister Kenney. "All other economic class applications—including applicants chosen by Quebec, provincial nominees, the Canadian Experience Class, and live-in caregivers—will continue to be given priority."

All applications made before February 27, 2008, will be processed according to the rules that were in effect at that time.

CIC said that these changes "bring Canada in line with two of its main competitors for highly skilled labor: Australia and New Zealand. Both of these countries have eliminated their backlogs and have systems that deliver final decisions for economic applicants within a year."

Canada plans to admit between 240,000 and 265,000 new permanent residents in 2009, Minister Kenney said, noting that the planned numbers are on par with last year and are among the highest for Canada during the past 15 years. The 2009 plan includes up to 156,600 immigrants in the economic category; 71,000 in the family category; and 37,400 in the humanitarian category.

Minister Kenney noted that "he recent steps this Government has taken to improve our immigration system will help ensure that Canada remains competitive internationally and responsive to labour market needs domestically." Critics, however, expressed concerns that the new emphasis on skilled workers would create two classes of immigrants and that less-skilled workers would be at a disadvantage, and that doubling the number of temporary workers would depress wages. "It's bad for the Canadian economy and it's bad for , because they cannot bring in their families and often are open to exploitation and abuse," said New Democrat Olivia Chow.

CIC has expanded its web site. The site now includes a section for employers (http://www.cic.gc.ca/employers) and a new interactive tool (http://www.cic.gc.ca/cometocanada) that matches information provided by potential applicants with immigration programs.

The ministerial instructions are available at http://www.cic.gc.ca/english/department/media/backgrounders/2008/2008-11-

28a.asp. A notice announcing the instructions is available at http://www.cic.gc.ca/english/department/media/backgrounders/2008/2008-11-28.asp. For more information on the new initiatives, see http://www.cic.gc.ca/english/department/media/releases/2008/2008-11-28.asp.

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3. USCIS Revises Religious Worker Regulations

U.S. Citizenship and Immigration Services (USCIS) announced that it has revised significantly the special immigrant and nonimmigrant (R-1) religious worker visa classification regulations. USCIS said the final rule "will ensure the integrity of the religious worker program by establishing a requirement that employers submit a formal petition for temporary religious workers, and by providing for increased inspections, evaluations, verifications, and compliance reviews of religious organizations." The rule "also fulfills the recent Congressional mandate to issue final regulations to eliminate or reduce fraud in the religious worker program."

Previously, foreign religious workers were able to request an R-1 religious worker visa at a consular post without any previous stateside review of the religious organization or job offer. The final rule will require individuals seeking to enter the U.S. through the nonimmigrant religious worker program to provide a consular officer an approved Form I-129, Petition for Alien Worker. Stateside review of the petition will allow USCIS to verify that the petitioner and the job offer are legitimate before the State Department issues a visa and admits the religious worker to the U.S.

Among other things, the rule also reduces the initial period of admission for a nonimmigrant from three years to a period of up to 30 months. The USCIS said this will allow it an earlier opportunity to review whether the terms of the visa have been met before extending the nonimmigrant religious worker's stay in the U.S. Religious workers will be allowed one extension of up to an additional 30 months.

The final rule was published in the Federal Register on November 26, 2008, and was effective the same day. The full text of the final rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-28225.pdf. A questions-and-answers sheet is available at http://www.uscis.gov/files/article/religious_work_faq_21nov08.pdf. A related

fact sheet is available at http://www.uscis.gov/files/article/religious_worker_factsheet_21nov08.pdf. A policy memorandum on handling non-minister special immigrant religious worker petitions affected by the October 1, 2008, sunset date is available at http://www.uscis.gov/files/nativedocuments/SpecialImmigrantRWPetitionsOct1sunset91908.pdf.

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4. DHS Adds Countries to Visa Waiver Program; CBP Requires Travel Authorization

Effective November 17, 2008, the Department of Homeland Security has added the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic to the list of countries authorized to participate in the Visa Waiver Program (VWP).

Citizens and eligible nationals of VWP countries may apply for admission at a U.S. port of entry as nonimmigrants for up to 90 days for business or pleasure without obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The designated countries in the VWP include Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom (defined for VWP purposes as England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man).

U.S. Customs and Border Protection (CBP) also announced on November 13, 2008, that beginning January 12, 2009, all VWP nonimmigrants traveling to the U.S. must obtain an approved travel authorization from the Department's Electronic System for Travel Authorization (ESTA). To comply with ESTA, VWP travelers must provide electronically to CBP the information currently collected on the I-94W Nonimmigrant Alien Arrival/Departure (Form I-94W) through the CBP ESTA Web site and receive authorization to travel before embarking on travel to the U.S. The ESTA Web site is at https://esta.cbp.dhs.gov/esta/esta.html?_flowExecutionKey=_cD88DB6CB-CF0E-B36E-3AE3-4C453B4C386E_k613ED908-DCC2-7541-9CDA-5DB7BB3E0773.

The final rule adding the VWP countries is available at http://edocket.access.gpo.gov/2008/pdf/E8-27062.pdf. The CBP notice about obtaining travel authorization is available at http://edocket.access.gpo.gov/2008/pdf/E8-26997.pdf.

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5. TPS Re-Registration Period Extended for Nicaraguans, Hondurans

U.S. Citizenship and Immigration Services (USCIS) has announced an extension to the re-registration period for nationals of **Nicaragua** and **Honduras** who have been granted temporary protected status (TPS) and are now eligible to re-register and maintain their status an additional 18 months. Initially, the 60-day re-registration period for nationals of Honduras and Nicaragua began October 1, 2008, and ended on December 1, 2008. The re-registration period is being extended through December 30, 2008, because of tropical storm activity in the region.

Additionally, USCIS has automatically extended the validity of employment authorization documents (EADs) for eligible Honduran and Nicaraguan TPS beneficiaries for 6 months, through July 5, 2009. USCIS said this is intended to allow sufficient time for eligible TPS beneficiaries to re-register and receive an EAD without any lapse in employment authorization.

The Department of Homeland Security (DHS) announced in October 2008 that the TPS designations of **Honduras** and **Nicaragua** were extended through July 5, 2010. The extension will make those who have already been granted TPS eligible to re-register and maintain their status for an additional 18 months.

Nicaraguan and Honduran TPS beneficiaries are strongly encouraged to apply as soon as possible within the registration period that now ends December 30, 2008.

There are approximately 3,500 nationals of Nicaragua and 70,000 nationals of Honduras (and people having no nationality who last habitually resided in Honduras and Nicaragua) eligible for TPS re-registration. TPS does not apply to Nicaraguan or Honduran nationals who entered the U.S. after Dec. 30, 1998.

TPS beneficiaries must submit an *Application for Temporary Protected Status,* Form I-821, without the application fee and the *Application for Employment Authorization,* Form I-765, to re-register for TPS. A separate biometric service

fee, or a fee waiver request, must be submitted by re-registrants 14-years of age and older. If the applicant is only seeking to re-register for TPS and is not seeking an extension of employment authorization, he or she must submit the I-765 for data-gathering purposes only and is not required to submit the I-765 filing fee. All applicants seeking an extension of employment authorization through July 5, 2010, must submit the required application filing fee with the I-765 or a fee waiver request with proper documentation.

The announcement is available at http://www.uscis.gov/files/article/tps_nicaragua_honduras_extend_21nov08).pdf. USCIS published a related notice in the Federal Register on November 24, 2008, available at http://edocket.access.gpo.gov/2008/pdf/E8-27702.pdf (Honduras) and http://edocket.access.gpo.gov/2008/pdf/E8-27703.pdf (Nicaragua).

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6. Guestworkers To Recover Wages

In a class action lawsuit, U.S. District Court Judge Clarence Cooper found that unreimbursed expenses incurred by guestworkers for a large forestry contractor, Eller and Sons Trees, Inc., of Franklin, Georgia, may be recovered and that actual damages sought by the workers may exceed $500,000. The employer had sought to cap the damages.

The named plaintiffs are three migrant farmworkers. Eller and Sons Trees provides forest reforestation (tree planting) and forestry services such as brush clearing, boundary marking, and chemical spraying. Most of its employees are engaged in tree planting, predominantly in the southern U.S. during the months of December, January, and February. Eller and Sons Trees cannot find enough employees in the U.S. to perform the work, the decision noted. As a result, most of the workers come from outside the U.S., with the vast majority coming from Guatemala, and others coming from Mexico, Honduras, and Colombia. Eller and Sons Trees obtains temporary seasonal employees through the H-2B visa program.

The guestworkers were represented by the Southern Poverty Law Center (SPLC), and the Legal Aid Justice Center of Virginia is serving as co-counsel. The SPLC said it now must prove how much money is owed to the workers. "This is a great victory for these forestry workers," said Mary Bauer, director of the

SPLC's Immigrant Justice Project. "For too long this industry has seen guestworkers as a disposable workforce to be used, abused and thrown away. This decision is a signal that those days are coming to an end."

According to the SPLC, the court also found that the representations an employer makes to the government on H-2B visa applications, such as the total number of hours the employees will work per week, can be enforced by the workers even if they are unaware of what the employer reported to the government. This finding would hold an employer liable for a 40-hour work week promised on its application to federal government, even if the employer never made such an agreement with its workers, the SPLC noted. The judge in this case found that an employer cannot drive a worker's pay below the minimum wage rate by deducting expenses for things that primarily benefit the employer. The court also found that the prevailing wage rate for the area, rather than the lower minimum wage rate, is protected from such deductions under this principle. The SPLC said that this is the first time such a decision has been reached in a contested case.

The judge found that the costs of passports, visas, and other travel costs not only drove the workers' pay below the protected rate level but resulted in workers having "negative incomes" in their first week of work. The judge awarded $53,890 to the case's plaintiffs for expenses that were not reimbursed during their first work week, citing the Fair Labor Standards Act. The SPLC believes that damages for the rest of the class, which the organization expects number into the thousands of workers, may reach into the millions of dollars.

The case records for *Escolastico de Leon-Granados et al. v. Eller and Sons Trees, Inc*., are available at http://www.splcenter.org/legal/docket/files.jsp?cdrID=49&sortID=4. The SPLC has filed a number of other guestworker lawsuits.

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7. CDC Expands Scope of Medical Exam

The Centers for Disease Control and Prevention (CDC) published an interim final rule in October 2008 that changed the "definition of a communicable disease of public health significance, the scope of the medical examination for aliens, and the evaluation criteria for tuberculosis," the Department of State announced. The definition of communicable disease of public health

significance continues to include the previous list of eight specific diseases (including HIV infection) and adds two new disease categories: (1) quarantinable diseases designated by Presidential Executive Order, and (2) diseases that meet the criteria of a public health emergency of international concern, which require notification to the World Heath Organization under revised international health regulations. The scope of the medical examination for certain foreign persons wishing to come to the U.S. has been "amended to incorporate a more flexible, risk-based approach based on medical and epidemiologic factors," the Department noted.

The Department of State's notice, sent to all diplomatic and consular posts in November 2008, is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4388.html. Further information from the CDC is available at http://www.cdc.gov/ncidod/dq/ifr_main.htm.

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8. Student and Exchange Visitor Program Office Moves

The Student and Exchange Visitor Program (SEVP) office has moved. Until direct mail service is established, SEVP recommends that all correspondence be mailed to: Student and Exchange Visitor Program, Attn: (Branch Name), Potomac Center North, 500 12th Street, SW, Washington, DC 20024. The new main telephone number is (703) 603-3400. E-mail addresses have not changed, so inquiries may be sent to SEVP staff through their previous e-mail or through SEVIS.Source@dhs.gov.

For more information on SEVP, see http://www.ice.gov/sevis/index.htm?searchstring=sevp.

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