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US IMMIGRATION & NATIONALITY LAW

AUGUST 2009 IMMIGRATION UPDATE

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Headlines:

1. **USCIS Issues Guidance to Employers Whose H-1B Petitions for Health Care Specialty Occupations Are Denied** - Employers whose petitions were denied on certain bases should send an e-mail to the USCIS Service Center that issued the denial to request review.
2. **DHS Secretary Announces Support for Federal Contractor E-Verify Rule, Intention to Rescind No-Match Rule** - Janet Napolitano announced the Obama administration's support for the delayed E-Verify regulation, and the DHS's intention to rescind the Social Security No-Match Rule.
3. **Krispy Gets Kremed: $40,000 Fine Incurred for Immigration Violations** - 652 businesses around the country will be audited to determine their compliance.
4. **Court Remands Case Denying Visa to Muslim Scholar** - The court remanded the case to the district court for further proceedings.
5. **Ninth Circuit Finds Sponsor Did Not Qualify Because Not Domiciled in U.S.** - The sponsor/husband had resided in Japan for three years, owned no property in the U.S., and had a personal bank account in Japan.
6. **China, India EB-2 Priority Dates Progress in August; DOS Determines FY 2009 Limits** - The State Department's Visa Bulletin for August 2009 shows an October 1, 2003, cut-off date for both the China-mainland born and India EB-2 categories.
7. **DOS Releases DV-2010 Lottery Results** - The highest number for any single country went to Nigeria, at 6,006; dates for the upcoming DV-2011 program registration period will be announced in August.
8. **Ninth Circuit Rules That Revocation of I-140 Trumps Portability** - USCIS may revoke its previous approval of a visa petition at any time for

"good and sufficient cause."

9. **Use of Covert Tactics Ethical in Unauthorized Practice of Law Investigations, Virginia UPL Committee Finds** - It is ethical for staff counsel of the Virginia State Bar to direct a bar investigator or other outside investigator or volunteer, to engage in covert techniques in any UPL investigation in which no other reasonable alternative is available.
10. **USCIS Provides Guidance on I-751s Filed Before Termination of Marriage** - The memo provides guidance on how to adjudicate an I-751 petition if the conditional permanent resident and petitioning spouse are legally separated or have initiated divorce or annulment proceedings.
11. **Publications and Items of Interest**

1. **USCIS Issues Guidance to Employers Whose H-1B Petitions for Health Care Specialty Occupations Are Denied**

U.S. Citizenship and Immigration Services (USCIS) issued guidance on July 17, 2009, to certain employers who received a denial of Form I-129, Petition for Nonimmigrant Worker, requesting H-1B classification for a beneficiary to practice in a health care specialty occupation before May 20, 2009.

If the I-129 was denied solely on the basis that the beneficiary did not possess a master's or higher degree in the field, the petition may be reopened on service motion and will be adjudicated in accordance with the May 20, 2009, memorandum on "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation" (see http://www.uscis.gov/files/nativedocuments/health_care_occupations_20may09.pdf). That memo provides clarification on the standards for H-1B health care specialty occupations. USCIS will only review denials of petitions for which it has received a written request for review from the petitioning employer or its representative.

Employers whose I-129 petitions were denied on the above basis should send an e-mail to the USCIS Service Center that issued the denial to request review. An affirmative request for review from the petitioner or its representative is required to expedite this process, USCIS said. The agency said that it is providing a "special accommodation to the public" by initiating Service Motions to Reopen (upon receiving an e-mail request) in lieu of requiring petitioners to file an appeal. USCIS is not requiring petitioners to submit an appeal fee or any

other fee in this instance.

Requests should include "PT/OT Service Motion Request" in the subject line of the e-mail, and will be accepted through August 14, 2009. Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the California Service Center should be e-mailed to: csc-ncsc-followup@dhs.gov.

Requests for review of H-1B health care specialty occupation petitions that were adjudicated at the Vermont Service Center should be e-mailed to: vsc.ncscfollowup@dhs.gov.

Affected petitioners requesting USCIS review of their H-1B petitions are not required to submit a copy of the May 20, 2009, memorandum, but should explain how the beneficiary meets the standards set forth in that memorandum. Also, as with the reopening on a Service Motion, USCIS must be satisfied before approval that the beneficiary is currently eligible to practice in his or her respective health care occupation in the state of intended employment. USCIS advises petitioners to document this evidence. In any case where USCIS cannot make a final decision on the record before it, USCIS may request additional information. If the petition was denied upon additional grounds, or if the petitioner fails to submit requested evidence of the beneficiary's continuing eligibility, the original denial of the case will be affirmed.

The USCIS memo is available at http://www.uscis.gov/files/article/h-1b_health_care_professionals_17jul09.pdf.

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2. DHS Secretary Announces Support for Federal Contractor E-Verify Rule, Intention to Rescind No-Match Rule

On July 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced the Obama administration's support for a delayed regulation that will award federal contracts only to employers who use E-Verify to check employees' work authorization. Secretary Napolitano also announced the Department's intention to rescind a Social Security No-Match rule in favor

of the E-Verify system.

Following the previous announcement of the delay in the effective date of the new E-Verify rule until September 8, 2009, U.S. Citizenship and Immigration Services (USCIS) instructed federal contractors not to use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the Federal Acquisition Regulation's E-Verify clause. The new final E-Verify rule will require 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. A DHS press release said the Obama administration intends to "push ahead" with full implementation of the rule, which will apply to federal solicitations and contract awards government-wide starting on September 8, 2009.

The DHS also will propose a new regulation rescinding the 2007 No-Match rule, which was blocked by court order shortly after issuance and has never taken effect. That rule established procedures that employers could follow if they receive Social Security no-match letters or notices from DHS that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even a year later that an employeeXs name and Social Security Number provided for a W-2 earnings report do not match SSA records, often due to typographical errors or unreported name changes. The DHS said that E-Verify "addresses data inaccuracies that can result in No-Match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and combating illegal employment."

The press release is available at http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm.

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3. Krispy Gets Kremed: $40,000 Fine Incurred for Immigration Violations; Enforcement Actions Increase Nationwide

It seems there is a hole in Krispy Kreme's immigration compliance doughnut.

On July 7, 2009, U.S. Immigration and Customs Enforcement (ICE) and the Butler County, Ohio, Sheriff's Office announced a $40,000 fine settlement reached with the Krispy Kreme Doughnut Corporation for violations of immigration laws. ICE conducted an I-9 inspection of Krispy Kreme after receiving information from the Butler County Sheriff's Office that the company had employed dozens of undocumented workers at one of Krispy's doughnut factories in Cincinnati.

In other news, ICE recently found that nearly a third of 6,000 American Apparel workers may lack work authorization. Dov Charney, CEO of American Apparel, said, "Many of these employees, some of whom have worked at American Apparel for as long as a decade, have been responsible, hard-working employees who have made significant contributions to the Company's growth and success. As a company that prides itself on being one of the last major apparel manufacturers still making clothing in the United States, at a 'sweatshop free' factory where we pay our garment workers some of the highest wages in the industry, it is the company's hope--and my personal hope as an immigrant myself--that these employees are able to confirm their work authorization so that they may continue to work at American Apparel. The company remains very proud of its track record as an advocate for the comprehensive reform of the country's immigration laws." ICE has also announced that as part of a new auditing initiative, 652 businesses around the country will be audited to determine their levels of I-9 compliance.

More information on the American Apparel case is available at http://investors.americanapparel.net/releasedetail.cfm?ReleaseID=393357. The ICE notice is available at http://www.ice.gov/pi/nr/0907/090707cincinnati.htm.

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4. Court Remands Case Denying Visa to Muslim Scholar

Tariq Ramadan is a Swiss-born Islamic scholar whose work focuses on the integration of Muslim beliefs with Western European culture and society. Before August 2004, he traveled regularly to the U.S., giving lectures at institutions such as Harvard and Princeton and to the Department of State, and attending meetings and conferences. As a Swiss citizen, Ramadan was eligible

to participate in the Visa Waiver Program (VWP). Thus, Ramadan did not need to apply for a visa to enter the U.S. for these short engagements.

In January 2004, Ramadan accepted a tenured teaching position at the University of Notre Dame. Notre Dame submitted an H-1B visa petition on Ramadan's behalf, which was approved in May 2004. Ramadan made arrangements for the move, scheduled for early August 2004. However, on July 28, 2004, the U.S. Embassy in Bern revoked his visa approval without an explanation. In response to press inquiries, a Department of Homeland Security (DHS) spokesperson stated that the basis for the revocation was a provision of the Immigration and Nationality Act (INA) that then permitted exclusion of prominent individuals who endorse or espouse terrorist activity. The Government later denied that this "endorse or espouse" provision provided the grounds for the revocation.

The consulate advised Ramadan that he could re-apply for a visa. Notre Dame accordingly filed a second H-1B visa petition on October 4, 2004. By December 13, 2004, the DHS had not yet acted on the second petition, and on that date Ramadan resigned from the position at Notre Dame. On December 21, 2004, having been informed about the resignation, the DHS revoked the renewed H-1B petition. After this revocation, Ramadan could no longer take advantage of the VWP that had authorized his previous temporary entries.

On September 16, 2005, Ramadan applied for a B visa to enter the U.S. for a short period of time to attend conferences. According to Ramadan, he was interviewed by consular and DHS officials at the U.S. Embassy in Bern, Switzerland, in 2005. He was questioned about his political views and associations. Ramadan informed officials that between 1998 and 2002, he had donated approximately $1,336 to the Association de Secours Palestinien (ASP), which was designated by the U.S. Treasury Department as a terrorist organization due to its funding of Hamas. Ramadan received a telephone call on September 19, 2006, and a letter shortly thereafter, informing him that the consulate had denied his petition because he had provided material support to a terrorist organization. Consular officials based this decision on a security advisory opinion, Ramadan's interviews, and "additional information provided by Washington."

On January 25, 2006, plaintiffs filed suit in the District Court challenging Ramadan's ongoing exclusion from the U.S. The three plaintiff organizations (the American Academy of Religion, the American Association of University Professors, and the PEN American Center) appealed the denial of a visa to Ramadan on the grounds that it violated their First Amendment right to have Ramadan share his views with the organizations and with the public. The U.S. government contended that the visa was properly rejected on the ground that Mr. Ramadan's contributions to the ASP, which provided some financial support to Hamas, rendered him inadmissible. The government prevailed, and the plaintiffs filed an appeal with the U.S. Court of Appeals for the Second Circuit.

On July 17, 2009, the court of appeals remanded the case to the district court for further proceedings. Among other things, the Second Circuit concluded that the record did not establish that the consular officer who denied the visa confronted Ramadan with the allegation that he had knowingly rendered material support to a terrorist organization, thereby precluding an adequate opportunity for Ramadan to attempt to satisfy the statutory provision that exempts a visa applicant from exclusion under the "material support" subsection if he "can demonstrate by clear and convincing evidence that did not know, and should not reasonably have known, that the organization was a terrorist organization."

The opinion is available at http://www.aclu.org/pdfs/safefree/americanacademyofreligion_secondcircuitruling.pdf.

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5. Ninth Circuit Finds Sponsor Did Not Qualify Because Not Domiciled in U.S.

In an opinion on July 9, 2009, the U.S. Court of Appeals for the Ninth Circuit found that substantial evidence supported the Board of Immigration Appeals' determination that a South Korean's U.S. sponsor (and husband) did not qualify as a sponsor because he was not domiciled in the U.S. At the time of the adjustment of status hearing in 2001, the sponsor/husband had resided in

Japan for three years, owned no property in the U.S., and had a personal bank account in Japan. He visited his wife in Hawaii three times in three years: once for a week, the second time for three to four days, and the last time to testify before the immigration judge. He stated that his long-term plan was to return to Hawaii and open a business, but he could not identify the specific date of his return.

The opinion is available at http://www.metnews.com/sos.cgi?0709%2F07-74420.

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6. China, India EB-2 Priority Dates Progress in August; DOS Determines FY 2009 Limits

The State Department's Visa Bulletin for August 2009 shows an October 1, 2003, cut-off date for both the China-mainland born and India EB-2 categories, which is close to a four-year jump from last month's cut-off date. The third preference and "other workers" employment-based categories are Unavailable; all other categories are Current. EB-3 visa numbers worldwide and for India, China, and Mexico are expected to remain unavailable for the remainder of this fiscal year at least. The EB-3 category for India could remain unavailable indefinitely.

This follows on the heels of news last month that the India and China EB-2 categories could become unavailable in August or September and remain unavailable indefinitely. The Department had explained that there is a backlog of at least 25,000 India EB-2 cases awaiting visa numbers. Charles Oppenheim of the Department of State's Visa Office reportedly stated that without legislative relief, the waiting time for Indian EB-2 applicants might be measured in years, even decades.

The Department also noted in the August Visa Bulletin that heavy applicant demand for numbers in the employment-based fourth preference is likely to require the establishment of a cut-off date, or the preference becoming "Unavailable," for September. The category can be expected to return to a "Current" status for October, the first month of the new fiscal year.

Meanwhile, the Department of State has determined the family and employment preference numerical limits for FY 2009. The worldwide employment-based preference limit is 140,000.

The per-country limit is fixed at 7 percent of the family and employment annual limits. For FY 2009, the per-country limit is 25,620. The dependent area annual limit is 2 percent, or 7,320.

The August Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html.

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7. DOS Releases DV-2010 Lottery Results

The Kentucky Consular Center has registered and notified the winners of the DV-2010 diversity visa lottery. Applicants registered for the DV-2010 program were selected at random from over 13.6 million qualified entries received during the 60-day application period that ran from October 2, 2008, until December 1, 2008. The visas have been apportioned among six geographic regions with a maximum of seven percent available to persons born in any single country. During the visa interview, principal applicants must provide proof of a high school education or its equivalent, or show two years of work experience in an occupation that requires at least two years of training or experience within the past five years.

Only participants in the DV-2010 program who were selected for further processing have been notified; those who have not received notification were not selected. The dates for the registration period for the DV-2011 lottery program will be announced in August 2009.

The highest number for any single country went to Nigeria, at 6,006. The country-by-country breakdown of DV-2010 registrations appears at http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html.

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8. Ninth Circuit Rules That Revocation of I-140 Trumps Portability

A recent decision by the U.S. Court of Appeals for the Ninth Circuit affirmed that U.S. Citizenship and Immigration Services (USCIS) may revoke its previous approval of a visa petition at any time for "good and sufficient cause." In *Herrera v. USCIS*, the court found that the plaintiff's changing jobs ("portability") did not shield her from revocation of her previously approved I-140 Immigrant Petition for Alien Worker, which USCIS had concluded was justified because of the company's small size (seven employees) and the agency's conclusion that the plaintiff did not perform managerial or executive duties.

For more on this case and its implications, see "Ninth Circuit in *Herrera v. USCIS* Rules That Revocation of I-140 Petition Trumps Portability," available at http://cyrusmehta.com/perseus/Print_Prev.aspx?SubIdx=ocyrus200979113434.

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9. Use of Covert Tactics Ethical in Unauthorized Practice of Law Investigations, Virginia UPL Committee Finds

The Virginia State Bar's Unauthorized Practice of Law (UPL) Committee recently found that it is ethical for staff counsel of the Virginia State Bar to direct a bar investigator or other outside investigator or volunteer, to engage in covert techniques in the investigation of the unauthorized practice of law in any case in which no other reasonable alternative is available.

The Committee noted that law enforcement authorities, including government lawyers, are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct. The Committee's opinion is that lawyers involved in or supervising undercover activity in such cases are not acting unethically despite the general prohibition against conduct involving fraud, dishonesty, deceit, or misrepresentation reflecting adversely on the lawyerXs fitness to practice law.

The Committee has also stated that although undercover investigations involve some elements of misrepresentation and deceit, the conduct does not reflect adversely on the fitness or character of the lawyer directing or supervising a lawful criminal investigation. The Supreme Court of Virginia has specifically approved a legal ethics opinion that recognizes a "law enforcement" exception.

This exception includes civil investigations using "testors" conducted under the supervision of government lawyers charged with investigation and prosecuting cases of housing discrimination. The Committee said it sees no principled distinction between these types of investigations, in which undercover operations have been approved, and a UPL investigation in which lawyers and agents of a governmental agency are charged by law with the investigation of conduct that is criminal or illegal.

The Committee's opinion is available at http://www.vacle.org/opinions/1845.htm.

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10. USCIS Provides Guidance on I-751s Filed Before Termination of Marriage

Donald Neufeld, U.S. Citizenship and Immigration Services Acting Associate Director, sent a memo to the field on I-751s filed before the termination of a marriage. The memo provides guidance on how to adjudicate an I-751 petition if the conditional permanent resident and petitioning spouse are legally separated or have initiated divorce or annulment proceedings, but the marriage has not been terminated.

The memo is available at http://www.uscis.gov/files/nativedocuments/i-751_Filed_%20Prior_Termination_3apr09.pdf.

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11. Publications and Items of Interest

The Migration Policy Institute has released "Aligning Temporary Immigration Visas With U.S. Labor Market Needs: The Case for Provisional Visas," by Demetrios G. Papademetriou, Doris Meissner, Marc R. Rosenblum, and Madeleine Sumption; and "The Next Generation of E-Verify: Getting Employment Verification Right," by Doris Meissner and Marc R. Rosenblum. Links to the reports are available at http://www.migrationpolicy.org/pubs/.

The Council on Foreign Relations (CFR) released a report, TU.S. Immigration Policy,У available at http://www.cfr.org/publication/19556/. This bipartisan report, authored by an Independent Task Force, chaired by Jeb Bush and Thomas F. McLarty III, concludes, TThe continued failure to devise and implement a sound and sustainable immigration policy threatens to weaken AmericaXs economy, to jeopardize its diplomacy, and to imperil its national security."

The Small Business Administration has released a research summary, "High-Tech Immigrant Entrepreneurship in the United States," by the Corporate Research Board. The report quantifies the role of immigrants in high-tech entrepreneurship using the High-Impact, High-Tech Company Survey database. The authors also examine U.S. immigration policies and processes (especially the H-1B visa) relevant to high-tech immigrant entrepreneurship. The report is available at http://www.sba.gov/advo/research/rs349.pdf.

The House Subcommittee on Government Management, Organization, and Procurement held a hearing on July 23, 2009, "E-Verify: Challenges and Opportunities. Links to the testimony are available at http://governmentmanagement.oversight.house.gov/story.asp?ID=2552.

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