



## FEBRUARY 2011 IMMIGRATION UPDATE

*Posted on February 1, 2011 by Cyrus Mehta*

### Headlines:

- **1. [H-1B Cap Reached for FY 2011](#)** - January 26, 2011, is the "final receipt date" for new H-1B specialty occupation petitions requesting an employment start date in FY 2011.
- **2. [ICE Announces New I-9 Compliance Inspection Center, Partnership With Tyson Foods; Audits Increase](#)** - Fifteen additional auditors will focus their efforts on major investigations of the largest companies.
- **3. [E-Verify Update: USCIS Updates Web Interface, Launches Newsletter; House Hearings Soon](#)** - USCIS has made changes to its E-Verify Web interface, and has launched a newsletter on E-Verify developments.
- **4. [Visa Numbers Move Slowly](#)** - Priority dates in several employment-based categories moved ahead, although not by much overall.
- **5. [USCIS Releases H-1B, H-2B Cap Counts](#)** - ABIL recommends filing petitions now.
- **6. [DHS Adds New Countries to H-2A, H-2B Programs; Drops Indonesia](#)** - Of the 53 countries on the list, 15 were designated for the first time this year.
- **7. [USCIS Releases Pending Employment-Based Adjustment of Status Inventory](#)** - The report shows how many pending adjustment of status (green card) applications in each preference classification have priority dates in a given month and year.
- **8. [USCIS Issues Policy Memo Disallowing Concurrent Filings for Special Immigrant Religious Workers](#)** - Any I-485 where the underlying basis for adjustment is an I-360 petition for a special immigrant religious worker must be filed based on an approved I-360 petition.

- **9. [State Dept. Announces New Passport Forms Starting March 1](#)** - Applicants should continue to use the current forms to submit a passport application before that date.
- **10. [House Holds Hearing on Worksite Enforcement Issues](#)** P Testifying on the panel were Kumar Kibble, ICE Deputy Director, and others.
- **11. [IRS Publishes W-4 Instructions for Nonresident Aliens](#)** P The IRS has modified the instructions on the W-4 for nonresidents to reflect restrictions on their filing status, the limited number of exemptions allowed, and the standard deduction.
- **12. [ABIL Global: Hong Kong Makes Changes to Capital Investment Entrant Scheme \(CIES\)](#)** P In the short term, the beneficiary of these changes is the U.S. EB-5 program.

## Details...

### 1. H-1B Cap Reached for FY 2011

U.S. Citizenship and Immigration Services (USCIS) announced on January 26, 2011, that it has received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2011.

USCIS noted that January 26, 2011, is the "final receipt date" for new H-1B specialty occupation petitions requesting an employment start date in FY 2011. The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 65,000. Properly filed cases will be considered received on the date that USCIS physically receives the petition, not the date that the petition was postmarked. USCIS said it will reject cap-subject petitions for new H-1B specialty occupation workers seeking an employment start date in FY 2011 that arrive after the final receipt date.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on January 26, 2011. USCIS will reject all remaining cap-subject petitions not randomly selected and will return the accompanying fee.

USCIS noted that it will continue to accept and process petitions that are

otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted toward the FY 2011 H-1B cap. Accordingly, USCIS will continue to accept and process petitions filed to:

- extend the amount of time a current H-1B worker may remain in the U.S.;
- change the terms of employment for current H-1B workers;
- allow current H-1B workers to change employers; and
- allow current H-1B workers to work concurrently in a second H-1B position.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields such as scientists, engineers, or computer programmers.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=7fd9b9138c9cd210VgnVCM100000082ca60aRCRD&vgnnextchannel=b56db6f2cae63110VgnVCM1000004718190aRCRD>.

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## **2. ICE Announces New I-9 Compliance Inspection Center, Partnership With Tyson Foods; Audits Increase**

On January 20, 2011, U.S. Immigration and Customs Enforcement (ICE) announced the creation of an employment compliance inspection center in Crystal City, Virginia. At the center, 15 auditors will support ICE's worksite enforcement strategy by helping agency field offices around the country expedite employment authorization verification (Form I-9) audits of businesses selected for inspection by ICE. Currently, ICE employs 137 full-time auditors. The 15 additional auditors will focus their efforts on major investigations of the largest companies, ICE Director John Morton said.

From fiscal year 2009 to the present, ICE initiated I-9 inspections of 3,769

businesses across the U.S. Last year, ICE audited 2,200 companies, the largest number of audits the agency has conducted in a year.

ICE also announced the same day that Tyson Foods, Inc., is the newest member of the agency's nationwide program designed to encourage businesses to collaborate with ICE and use hiring best practices to ensure that they are maintaining a lawful workforce. Tyson Foods Senior Vice President and Chief Human Resources Officer Ken Kimbro and ICE Director John Morton signed the "ICE Mutual Agreement between Government and Employers" (IMAGE) agreement during a ceremony at ICE headquarters.

Tyson Foods, Inc., which employs almost 100,000 people at locations throughout the U.S., is the first major food company to become a full member of ICE's IMAGE program. The voluntary program allows businesses to partner with ICE as part of their efforts to maintain an authorized workforce and protect themselves from the use of fraudulent identity documents by current or prospective employees. ICE said this program complements ICE's worksite enforcement strategy, which focuses on holding accountable employers that knowingly hire unauthorized workers to minimize operating costs and boost profits.

To become certified, Tyson was subject to an I-9 audit and other checks by ICE. The company met other IMAGE requirements with programs it already has in place. For example:

- Tyson conducts regular self-assessments or internal audits of its hiring activities. The company also uses an independent outside company to conduct its own audits of the company's hiring practices.
- Tyson voluntarily participates in the online government employment verification program known as E-Verify. The company also voluntarily uses the "Social Security Number Verification Service."
- Tyson trains all of its employment managers on the hiring process, proper completion of the I-9, and document examination and fraud detection.

ICE initiated the IMAGE program in 2006. All IMAGE members must participate in the Department of Homeland Security (DHS) E-Verify employment eligibility verification program, which provides an automated link to the Social Security Administration database and DHS immigration records.

Upon enrollment in and commitment to the IMAGE Best Employment Practices, program participants are deemed "IMAGE certified," a designation DHS and ICE say will become an industry standard. IMAGE also provides employers free training on the I-9 process, fraudulent document detection, and building a solid immigration compliance model.

The press release announcing the new inspection center and the partnership with Tyson Foods is available at

<http://www.ice.gov/news/releases/1101/110120washingtondc.htm>.

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### **3. E-Verify Update: USCIS Updates Web Interface, Launches Newsletter; House Hearings Soon**

U.S. Citizenship and Immigration Services (USCIS) has made the following changes to its E-Verify Web interface:

- added U.S. Passport Photo Matching, a new feature that uses data and photos from the U.S. passport system to assist in the verification process
- changed the title "Designated Agent" to "E-Verify Employer Agent"
- updated the following USCIS publications:
  - E-Verify User Manual for Employers
  - E-Verify User Manual for Federal Contractors
  - E-Verify User Manual for E-Verify Employer Agent
  - E-Verify Quick Reference Guide for Employers
  - E-verify Quick Reference Guide for E-Verify Employer Agent

USCIS has also launched *E-Verify Connection*, a newsletter on E-Verify developments. The first issue is available at <http://www.uscis.gov/USCIS/Verification/E-Verify/Publications/E-Verify-Connection.pdf>. You may join the newsletter distribution list by e-mailing "subscribe" to [E-VerifyOutreach@dhs.gov](mailto:E-VerifyOutreach@dhs.gov).

For more information on these developments, see <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?>

[vgnextoid=04db32802cbc8210VgnVCM100000082ca60aRCRD&vgnnextchannel=04db32802cbc8210VgnVCM100000082ca60aRCRD.](#)

In related news, Florida recently began requiring certain state agencies and contractors to use E-Verify, while Rhode Island has rescinded its E-Verify requirement for state contractors.

Also, Rep. Elton Gallegly (R-Cal.) will chair the U.S. House of Representatives' Subcommittee on Immigration Policy and Enforcement. Observers had expected Rep. Steve King (R-Iowa) to be appointed instead, but he is now vice chairman. Rep. Gallegly is considered by many observers to be hawkish on immigration but less controversial than Rep. King. Among other things, Rep. Gallegly was instrumental in creating the pilot program that led to E-Verify. He is expected to hold hearings on E-Verify soon.

The American Immigration Lawyers Association has published a fact sheet on Rep. Gallegly, available at <http://www.aila.org/content/default.aspx?docid=34122>.

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#### **4. Visa Numbers Move Slowly**

The Department of State has released the Visa Bulletin for February 2011. Priority dates in several employment-based (EB) categories moved ahead, although not by much overall. For example, the third preference "Other Workers" worldwide category advanced from April 22, 2003, to May 1, 2003. The Mexico third preference category advanced from April 15, 2003, to July 8, 2003. Many categories remain Current.

It had been initially reported that the India EB-2 category was Current, but the Visa Office corrected that erroneous information. The India second preference priority date remains at May 8, 2006.

The February 2011 Visa Bulletin is available at

[http://travel.state.gov/visa/bulletin/bulletin\\_5228.html](http://travel.state.gov/visa/bulletin/bulletin_5228.html).

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## **5. USCIS Releases H-2B Cap Count**

For the H-2B temporary nonagricultural category, the cap is 66,000 per fiscal year, with 33,000 allocated in the first half of the year and 33,000 in the second half. As of January 21, 2011, USCIS had approved 36,275 beneficiaries (with 1,414 pending) for the first half of FY 2011, and had approved 7,315 so far for the second half (with 3,446 pending). USCIS noted that the estimated number of beneficiaries needed to be included on petitions filed with USCIS to reach the H-2B cap will always be higher than the actual cap, to allow for withdrawals, denials, and revocations.

The H-2B cap count and related information is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=356b6c521eb97210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD>.

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## **6. DHS Adds New Countries to H-2A, H-2B Programs; Drops Indonesia**

The Department of Homeland Security (DHS), in consultation with the Department of State (DOS), has identified 53 countries whose nationals will be eligible to participate in the H-2A (temporary agricultural) and H-2B (temporary nonagricultural) programs for the coming year. Of those countries, 15 were designated for the first time this year.

With limited exceptions, USCIS approves petitions only for nationals of countries designated to participate in the H-2A and H-2B programs. A new list of eligible countries was published in a Federal Register notice on January 18, 2011 (<http://edocket.access.gpo.gov/2011/pdf/2011-646.pdf>); the designations are valid for one year from the date of publication.

Effective January 18, 2011, nationals from the following countries are eligible to participate in the H-2A and H-2B programs: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu.

Of these countries, the following were designated for the first time this year: Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

DHS and DOS have determined that Indonesia does not warrant a renewed designation as a participating country in the H-2A and H-2B programs for 2011.

The new list does not affect the status of individuals who currently hold valid H-2A or H-2B status. A national from a country that is not on the list may be the beneficiary of an approved H-2A and H-2B petition if the Secretary of Homeland Security determines, in her sole and unreviewable discretion, that it is in the U.S. interest.

The USCIS notice is available at

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

[vgnnextoid=88404e9c7c08d210VgnVCM100000082ca60aRCRD&vgnnextchannel=684](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=88404e9c7c08d210VgnVCM100000082ca60aRCRD&vgnnextchannel=684)

[39c7755cb9010VgnVCM100000045f3d6a1RCRD.](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=88404e9c7c08d210VgnVCM100000045f3d6a1RCRD)

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## **7. USCIS Releases Pending Employment-Based Adjustment of Status Inventory**

U.S. Citizenship and Immigration Services (USCIS) has released a report of the



agency's total pending inventory of applications for employment-based green cards (Form I-485, Application to Register Permanent Residence or Adjust Status). USCIS also has posted five other reports by country of chargeability (China, India, Mexico, Philippines, and All Other Chargeability).

The "Pending Employment-Based Form I-485 Report" shows how many pending adjustment of status (green card) applications in each preference classification have priority dates in a given month and year.

Because of historically higher demand for visas from China, India, Mexico, and the Philippines, each of those countries has its own separate report.

The January 2011 report is available at

<http://www.uscis.gov/USCIS/statistics/Employment%20Based%20I-485%20Pending%20Inventory%20as%20of%20January%202005,%202011.pdf>.

For more information, see the USCIS Q&A at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnnextoid=5e170e6bcb7e3210VgnVCM100000082ca60aRCRD>.

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## **8. USCIS Issues Policy Memo Disallowing Concurrent Filings for Special Immigrant Religious Workers**

In January 2011, U.S. Citizenship and Immigration Services released a policy memorandum dated November 9, 2010, which states that any Form I-485 (Application to Register Permanent Residence or Adjust Status) where the underlying basis for adjustment is an I-360 petition for a special immigrant religious worker must be filed based on an approved I-360 petition. USCIS service centers and offices (including the lockboxes) must reject any Forms I-485, I-765 (Application for Employment Authorization), or I-131 (Application for Travel Document) filed concurrently with or based on a pending I-360 petition

seeking the special immigrant religious worker classification.

The new guidance was issued pursuant to a decision by the U.S. Court of Appeals for the Ninth Circuit (*Ruiz-Diaz v. United States*, No. 09-35734 (9th Cir. Aug. 20, 2010)). The memo notes that any I-485 based on an I-360 religious worker petition filed before November 9, 2010, will be accepted and adjudicated pursuant to the guidelines established in an earlier memorandum issued on August 5, 2009 (Memorandum HQDOMO AD09-45, "Clarifying Guidance on the Implementation of the District Court's Order in *Ruiz-Diaz v. United States*, No C07-1881RSL (W.D. Wash. June 11, 2009)").

The new memo is available at

[http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Ruiz-Diaz\\_Policy\\_Memo.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Ruiz-Diaz_Policy_Memo.pdf).

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## **9. State Dept. Announces New Passport Forms Starting March 1**

The Department of State has announced that new passport forms will be available on March 1, 2011. The Department advises that applicants should continue to use the current forms to submit a passport application before that date. Travel.State.Gov and all passport facilities will make the new forms available on March 1, 2011.

The passport forms that are being updated as of March 1 are:

- Form DS-11: *Application for a U.S. Passport*
- Form DS-82: *U.S. Passport Renewal Application for Eligible Individuals*
- Form DS-4085: *Application for Additional Visa Pages or Miscellaneous Passport Services*
- Form DS-5504: *Application for a U.S. Passport (Name Change, Data Correction, Limited Passport Replacement)*
- Form DS-3053: *Statement of Consent or Special Circumstances: Issuance of a Passport to a Minor under Age 16*

For more information, see

[http://www.travel.state.gov/passport/passport\\_1738.html](http://www.travel.state.gov/passport/passport_1738.html).

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## **10. House Holds Hearing on Worksite Enforcement Issues**

On January 26, 2011, the House of Representatives' Subcommittee on Immigration Policy and Enforcement held a hearing on worksite enforcement issues. Testifying on the panel were Kumar Kibble, Deputy Director of U.S. Immigration and Customs Enforcement (ICE); Mark Krikorian, Executive Director, Center for Immigration Studies; Michael Kutler, INS Senior Special Agent, and Daniel Griswold, Director, Center for Trade Policy Studies, Cato Institute.

Mr. Kibble noted that in fiscal year 2010, ICE initiated a record 2,746 worksite enforcement investigations, more than doubling the number of cases initiated in FY 2008. He said ICE is prioritizing the criminal prosecution of employers "who knowingly hire undocumented workers, abuse and exploit their workers, engage in the smuggling or trafficking of their alien workforce, or facilitate document or benefit fraud." He noted that over the past two years, the Department of Homeland Security "has engaged in record enforcement" and has removed more people in 2009 and 2010 "than in any point in the history of our country, including more than 195,000 criminal aliens last year."

The full hearing testimony is available at [http://judiciary.house.gov/hearings/hear\\_01262011.html](http://judiciary.house.gov/hearings/hear_01262011.html).

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## **11. IRS Publishes W-4 Instructions for Nonresident Aliens**

The Internal Revenue Service has revised "Supplemental Form W-4 Instructions for Nonresident Aliens." The IRS has modified the instructions on the W-4 for nonresidents to reflect restrictions on their filing status, the limited number of exemptions allowed, and the standard deduction. Nonresident aliens must follow special instructions when completing Form W-4, Employee's Withholding Allowance Certificate, available at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>, for compensation paid to such individuals as employees performing dependent personal services in the U.S.

Compensation for dependent personal services includes amounts paid as wages, salaries, fees, bonuses, commissions, compensatory scholarships, fellowship income, and similar designations for amounts paid to an employee.

The revised Notice 1392 is available at <http://www.irs.gov/pub/irs-pdf/n1392.pdf>.

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## **12. ABIL Global (www.abil.com): Hong Kong Makes Changes to Capital Investment Entrant Scheme (CIES)**

The Hong Kong Capital Investment Entrant Scheme has been extremely popular. Successful applicants can benefit from one of the premier financial centers of the world with a robust economy and a low, simple and predictable tax regime. Initially launched by the Hong Kong Special Administrative Region (SAR) government in October 2003 to attract investments from qualifying individuals who wished to obtain Hong Kong residency through making a capital investment without the need to establish or join in a business in Hong Kong, as of the end of 2010, 16,600 applications had been received and 8,924 applicants had invested a total of \$63.31 billion, representing an average of HKD \$7.09 million per entrant.

On October 14, 2010, responding to Hong Kong's Chief Executive Donald Tsang's concerns about surging property prices in Hong Kong expressed in his annual policy address, the government temporarily removed real estate from the permissible investment asset classes under the CIES because 40% of the investments in the first half of 2010 had been in real estate.

More specifically, the amendments included the following changes:

- The threshold of investment (and net assets/net equity requirement) for admission to Hong Kong under the CIES was raised from HK\$6.5 million (USD \$834,000) to HKD \$10 million (USD \$1.28M);
- Real estate was suspended temporarily as a class of Permissible Investment Assets (PIA) under the CIES; and

An insurer authorized to carry on Class C business as specified in Part 2 of the First Schedule to the Hong Kong Insurance Companies Ordinance became

eligible, in addition to banks, to act as a financial intermediary for the purpose of the CIES

The government believes that despite the amendments, the scheme remains competitive compared with the investment programs of other jurisdictions, and promised that the investment threshold (and net assets/net equity requirement) will be reviewed once every three years. With respect to the temporary suspension of real estate as a class of PIA, this decision will be assessed at the next regular review, or earlier as necessary.

In the short term, the beneficiary of these changes is the U.S. EB-5 program, which has become relatively "cheap" at USD \$500,000, since Canada's investment threshold is currently CDN \$800,000, while effective January 1, 2011, the Singapore Monetary Authority's Financial Investor Scheme (FIS) requires applicants to place S \$10 million in assets for a continuous period of five years, up from a minimum of S \$5 million previously, with a financial institution regulated by the Monetary Authority of Singapore, although a portion - up to \$2 million - can be used to buy private residential properties.

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