



APRIL 2011 IMMIGRATION UPDATE

Posted on March 31, 2011 by Cyrus Mehta

Headlines:

- **1. [USCIS Begins Accepting H-1B Petitions](#)** - As of April 1, 2011, USCIS has begun accepting H-1B petitions subject to the FY 2012 cap of 65,000.
- **2. [USCIS Proposes Rule on Registration Requirement for H-1B Petitioners](#)** - The rule, which would not take effect until next year, proposes to require employers seeking to petition for H-1B cap-subject workers to first file electronic registrations during a designated registration period.
- **3. [USCIS Launches E-Verify Self Check](#)** - This new voluntary service enables individuals to check their own employment eligibility status at no charge.
- **4. [ICE Announces Prison Term for Employing Undocumented Workers](#)** - A Missouri woman was sentenced to a year in prison for transporting, harboring, and hiring undocumented workers at the Chinese restaurant she managed.
- **5. [DOL Issues Proposed Rule on H-2B Temporary Nonagricultural Employment](#)** - Among other things, the DOL is revisiting the use of attestations.
- **6. [USCIS Announces Relief for Japanese, Pacific Nationals Stranded in U.S. Following Quake, Tsunami](#)** - Those who have exceeded or are about to exceed their authorized stay in the U.S. may be permitted up to an additional 30 days to depart.
- **7. [USCIS Provides Interim EADs To Some Salvadorans](#)** - USCIS mailed approximately 4,500 interim EADs to Salvadorans who have not yet received a final action on their re-registration applications.
- **8. [New Mumbai U.S. Consulate To Open Later in 2011; H and L Interviews Limited in Meantime](#)** - New H and L interviews may be

scheduled at other U.S. Consulates in India or at the U.S. Embassy in New Delhi.

- **9. [USCIS To Permanently Close Vietnam Office on March 31](#)** - As of March 25, applications and petitions previously accepted by the USCIS Ho Chi Minh City Field Office may be filed with the U.S. Department of State Consular Section there.
- **10. [DHS Issues Interim Final Rule on Guam-Northern Marianas VWP](#)** - The rule clarifies the countries and geographic areas eligible for participation in the Guam-CNMI Visa Waiver Program.
- **11. [USCIS Publishes Prevailing Wage Rates for H-2B Construction Workers on Guam](#)** - USCIS seeks comments on the system that the Governor of Guam is using to determine prevailing wage rates for construction occupations on Guam.
- **12. [ABIL Global: United Kingdom Update](#)** - The UK government is proposing various measures to reduce immigration and save public funds.

Details...

1. USCIS Begins Accepting H-1B Petitions

As of April 1, 2011, U.S. Citizenship and Immigration Services (USCIS) has begun accepting H-1B petitions subject to the fiscal year (FY) 2012 cap of 65,000. Cases will be considered accepted on the date USCIS receives a properly filed petition for which the correct fee has been submitted; not the date that the petition is postmarked.

USCIS will monitor the number of H-1B petitions received and will announce when the H-1B cap has been met. If USCIS receives more petitions than it can accept, it may on the date the cap is met (the "final receipt date") randomly select the number of petitions that will be considered for final inclusion within the cap. USCIS will reject petitions that are subject to the cap and are not selected, as well as petitions received after it has the necessary number of petitions needed to meet the cap.

The first 20,000 H-1B petitions filed on behalf of individuals with U.S. master's degrees or higher are exempt from the cap. Certain other petitions also are exempt from the congressionally mandated cap. Exempt petitions include those for which the beneficiaries will work at:

- institutions of higher education or related or affiliated nonprofit entities;

- nonprofit research organizations; or
- governmental research organizations.

Petitions filed on behalf of beneficiaries who will work only in Guam or the Commonwealth of the Northern Mariana Islands are exempt from the cap until December 31, 2014. Employers may continue to file petitions for these cap-exempt H-1B categories for beneficiaries who will start work during FYs 2011 or 2012.

Petitions filed on behalf of current H-1B workers who have been counted previously against the cap do not count toward the H-1B cap. USCIS will continue to process petitions filed to:

- extend the amount of time a current H-1B worker may remain in the United States;
- 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.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31f803aea7ace210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

[Back to Top](#)

2. USCIS Proposes Rule on Registration Requirement for H-1B Petitioners

The Department of Homeland Security has proposed to amend its regulations on petitions filed on behalf of H-1B workers subject to annual numerical limitations or exempt from numerical limitations by virtue of having earned a U.S. master's or higher degree. The rule proposes to require employers seeking to petition for H-1B cap-subject workers to first file electronic registrations with U.S. Citizenship and Immigration Services (USCIS) during a designated registration period.

USCIS estimated that the proposed rule could save U.S. businesses more than \$23 million over the next 10 years by minimizing administrative burdens and

related expenses. The agency said the registration system would save employers the effort and expense of filing H-1B petitions, as well as labor condition applications, for workers who would be unable to obtain visas under the statutory cap. USCIS estimated that the registration process would take 30 minutes to complete.

Under the proposed rule, if USCIS anticipates that the H-1B cap will not be reached by the first day upon which H-1B petitions may be filed for a particular fiscal year, USCIS would notify all registered employers that they are eligible to file H-1B petitions on behalf of the beneficiaries named in the selected registrations. USCIS would continue to accept and select registrations until the H-1B cap is reached. On the other hand, if USCIS anticipates that the H-1B cap will be reached by the first day upon which H-1B petitions may be filed for a particular fiscal year, USCIS would close the registration before such date and randomly select a sufficient number of timely filed registrations to meet the applicable cap.

USCIS proposes to allow only those petitioners whose registrations are randomly selected to file H-1B petitions for the cap-subject prospective worker named in the registration. USCIS would create a waitlist containing some or all of the remaining registrations, based on USCIS statistical estimates of how many more registrations may be needed to fill the caps should the initial pool of selected registrations fall short. USCIS would notify the employers of those registrations placed on the waitlist when and if they are eligible to file an H-1B petition. Employers whose registrations were neither randomly selected to file petitions nor placed on the waitlist would receive notification that they were not selected to file petitions in that fiscal year.

USCIS said it anticipates that this new process "will reduce administrative burdens and associated costs on employers who currently must spend significant time and resources compiling the petition and supporting documentation for each potential beneficiary without certainty that the statutory cap has not been reached." The proposed mandatory registration process also "will alleviate administrative burdens on USCIS service centers that process H-1B petitions," the agency said.

Written comments must be submitted by May 2, 2011. This means that the final rule will not take effect until the 2012 H-1B filing season.

The proposed rule is available at

<http://edocket.access.gpo.gov/2011/pdf/2011-4731.pdf>. The USCIS announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ee87bbd04337e210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A related fact sheet is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b02864337c77e210VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD>.

[Back to Top](#)

3. USCIS Launches E-Verify Self Check

U.S. Citizenship and Immigration Services (USCIS) launched "E-Verify Self Check" on March 21, 2011. The voluntary service enables individuals to check their own employment eligibility status at no charge. USCIS is releasing E-Verify Self Check in phases, with the first phase accessible only to users who maintain an address and are physically located in Arizona, Idaho, Colorado, Mississippi, Virginia, or the District of Columbia.

For more on E-Verify Self Check, including a link to the system, see <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2ec07cd67450d210VgnVCM100000082ca60aRCRD&vgnnextchannel=2ec07cd67450d210VgnVCM100000082ca60aRCRD>. A related blog and video are available at <http://blog.uscis.gov/2011/03/introducing-e-verify-self-check-online.html>. A transcript of the press conference on this topic is available at http://www.uscis.gov/USCIS/News/Transcript_SelfCheckSecrtry.pdf. A fact sheet is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9feb59984b9de210VgnVCM100000082ca60aRCRD&vgnnextchannel=9feb59984b9de210VgnVCM100000082ca60aRCRD>.

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[Back to Top](#)

4. ICE Announces Prison Term for Employing Undocumented Workers

A Missouri woman was sentenced on March 22, 2011, to a year in prison for transporting, harboring, and hiring undocumented workers at the Chinese restaurant she managed. The sentence resulted from a worksite enforcement investigation conducted by U.S. Immigration and Customs Enforcement (ICE).

ICE reported that Hua Huang was sentenced in the Eastern District of Missouri "on two counts each of harboring, transporting, and employing illegal aliens, and one count each of structuring a financial transaction and conspiring to commit visa fraud." She pleaded guilty to the charges in December. Upon release from prison, Huang will also serve two years of supervised release with a six-month term of home confinement.

Ms. Huang was arrested on October 4, 2010, by ICE agents and officers with the Poplar Bluff Police Department. She was ordered held without bond at the time of her arrest, and she remains in federal custody.

The investigation, which was initiated by the Poplar Bluff Police Department, began in February 2009. ICE joined the investigation in October 2009. The investigation revealed that between January 2009 and August 2010, Huang was manager of the China Buffet/Mongolian Grill in Poplar Bluff. During that time she regularly employed a number of undocumented workers from Mexico and China. The employees typically worked 12-hour shifts, six days a week, and were paid in cash amounts far less than minimum wage. Waiters and waitresses were typically paid in tips only. State and federal taxes were not withheld. Cash sales for the restaurant routinely went unreported.

As a result of surveillance conducted by ICE agents and Poplar Bluff police officers, authorities determined that the workers were being housed or "boarded" in two residences owned by individuals and entities connected to the China Buffet/Mongolian Grill. Authorities observed that the workers were shuttled to and from work daily in a van operated by Ms. Huang or other employees of the business.

On August 4, 2010, federal search warrants were executed at several residences and the China Buffet/Mongolian Grill. During the execution of the

search warrants, agents seized a 2008 Highlander sport utility vehicle, a 2005 Chevrolet passenger van, and \$34,000 in cash. The van was being operated by Ms. Huang to transport the workers to the China Buffet. As part of the prosecution, the vehicles, cash, and four separate pieces of real estate were ordered forfeited, with a total value of more than \$350,000.

During the search at Ms. Huang's residence, authorities located a contract between Huang, her father, and her uncle. The contract provided that Ms. Huang's uncle would travel to China to marry a Chinese woman for the sole purpose of obtaining U.S. visas for the woman and her two children. According to the contract, Ms. Huang and her father agreed to pay her uncle \$140,000 in three installments, the last to be paid when the woman and her two children obtained U.S. visas and green cards. The contract provided that Ms. Huang's uncle would not divorce the Chinese woman until she and her children had secured legal status in the U.S. As part of the contract, in exchange for their visas, the Chinese woman and her two children were bound to work for Ms. Huang and her father in the United States for three years each. On July 3, 2007, Huang's uncle married the Chinese woman and on September 28, 2007, he applied for a U.S. visa on behalf of the woman and her two children. The petition was denied.

In her guilty plea, Ms. Huang also admitted to structuring financial transactions to prevent a financial institution, the Sterling Bank of Poplar Bluff, from reporting those transactions.

The ICE announcement is available at

<http://www.ice.gov/news/releases/1103/110322stlouis.htm>.

[Back to Top](#)

5. DOL Issues Proposed Rule on H-2B Temporary Nonagricultural Employment

The Department of Labor's (DOL) Employment and Training Administration and Wage and Hour Division have proposed a rule to revise and solicit comments on the process by which employers obtain temporary labor certifications from the DOL for use in petitioning the Department of Homeland Security (DHS) to employ nonimmigrant workers in H-2B status. The DOL also proposes "to create new regulations to provide for increased worker protections for both U.S. and foreign workers and enhanced enforcement under the H-2B program."

Among other things, the DOL is revisiting the use of attestations. The DOL said it is interested in receiving comments on the alternative of maintaining the current or some modification of the current attestation-based program design. Specifically, the DOL seeks comments on whether it should develop certain attestations that can be required of all employers (such as an attestation for certain kinds of recruitment), or for only certain program compliance requirements. The DOL proposes to bifurcate the current application process into a registration phase that addresses the employer's temporary need and an application phase that addresses the labor market test.

The rule also proposes substantive changes to several terms; for example, clarifying what non-agricultural employment is and adding a definition of "area of substantial employment" to the H-2B program. The rule also proposes to amend the definition of "full time" in the H-2B program to mean 35 or more hours per week, instead of the current 30. The DOL said it welcomes comments regarding whether extending the definition of a full-time workweek to at least 40 hours for the H-2B program is more protective of U.S. workers and whether it conforms better to employer standards and needs.

Comments may be submitted to the office named in the proposed rule by May 17, 2011. The proposed rule, which was published on March 18, 2011, is available at <http://edocket.access.gpo.gov/2011/pdf/2011-6152.pdf>.

[Back to Top](#)

6. USCIS Announces Relief for Japanese, Pacific Nationals Stranded in U.S. Following Quake, Tsunami

U.S. Citizenship and Immigration Services announced on March 11, 2011, the following relief for Japanese and other nationals from the Pacific stranded in the U.S. due to the earthquake and tsunami disasters in Japan:

This advisory is for Japanese and other foreign nationals from the Pacific stranded in the United States due to the earthquakes and tsunami devastation. If you have exceeded or are about to exceed your authorized stay in the U.S. you may be permitted up to an additional 30 days to depart.

Visitors traveling under the Visa Waiver Program (VWP):

- If you are at an airport, contact the U.S. Customs and Border Protection office at the airport

- All others, please visit the [local U.S. Citizenship and Immigration Services office](#)

Visitors traveling under a nonimmigrant visa:

- Visit the [local U.S. Citizenship and Immigration Services office](#)
- Bring your passport, evidence that you are stranded (such as an itinerary for the cancelled flight), and your I-94 departure record

The announcement is available at

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

[vgnextoid=89a8ce68596ae210VgnVCM100000082ca60aRCRD&vgnnextchannel=e78](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89a8ce68596ae210VgnVCM100000082ca60aRCRD&vgnnextchannel=e78)

[01c2c9be44210VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=89a8ce68596ae210VgnVCM100000082ca60aRCRD). Additional immigration relief options are available on the Special Situations Web page at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?>

[vgnextoid=f34d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f34d3](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f34d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f34d3)

[e4d77d73210VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f34d3e4d77d73210VgnVCM100000082ca60aRCRD).

[Back to Top](#)

7. USCIS Provides Interim EADs To Some Salvadorans

U.S. Citizenship and Immigration Services (USCIS) announced on March 8, 2011, that it sent some existing Salvadoran temporary protected status (TPS) beneficiaries interim employment authorization documents (EADs) during the continued processing of their re-registration applications. USCIS mailed approximately 4,500 interim EADs to Salvadorans who have not yet received a final action on their re-registration applications.

Issuance of the interim EADs allows TPS beneficiaries to continue working while USCIS completes the processing of their re-registration applications. The original expiration date for Salvadoran EADs was September 9, 2010. USCIS had automatically extended this validity period to March 9, 2011.

USCIS has already processed over 208,000 Salvadoran re-registration applications for the current TPS extension period ending March 9, 2012.

Any re-registration applicant who receives an interim EAD must still respond to

any USCIS requests for additional evidence, including requests for documents, or biometric or fingerprint appointments.

The USCIS announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1401a07eb269e210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

[Back to Top](#)

8. New Mumbai U.S. Consulate To Open Later in 2011; H and L Interviews Limited in Meantime

A new U.S. Consulate is being constructed for Mumbai, scheduled to open later in 2011. No new H and L appointments are being made at the current Mumbai Consulate, which has limited interview capabilities due to aging infrastructure. New H and L interviews may be scheduled at other U.S. Consulates in India or at the U.S. Embassy in New Delhi.

For more information, see <http://www.vfs-usa.co.in/USIndia/news.html>.

[Back to Top](#)

9. USCIS To Permanently Close Vietnam Office on March 31

U.S. Citizenship and Immigration Services (USCIS) has announced that it will permanently close its field office in Ho Chi Minh City, Vietnam, on March 31, 2011. As of March 25, applications and petitions previously accepted by the USCIS Ho Chi Minh City Field Office may be filed with the U.S. Department of State Consular Section there. Where authorized, the Consular Section will assume responsibility for processing certain cases.

For details, including contact information for queries, see

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=48f1b3e38c19e210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

[Back to Top](#)

10. DHS Issues Interim Final Rule on Guam-Northern Marianas VWP

The Department of Homeland Security (DHS) issued an interim final rule on March 23, 2011, that clarifies the countries and geographic areas eligible for participation in the Guam-Commonwealth of the Northern Mariana Islands (CNMI) Visa Waiver Program.

The rule notes that effective May 23, 2011, individuals holding British National (Overseas) (BN(O)) passports as a result of their connection to the Hong Kong Special Administrative Region are eligible for participation in the Guam-CNMI Visa Waiver Program. The program allows certain nonimmigrant aliens to enter Guam and/or the CNMI as nonimmigrant visitors for business or pleasure without a visa for a period of authorized stay up to 45 days. This interim final rule provides that individuals holding BN(O) passports as a result of their connection to Hong Kong and traveling to Guam and/or the CNMI under the program on such BN(O) passport must present it and a Hong Kong identification card.

Comments may be sent by May 23 to the person named in the interim final rule, which is available at

<http://edocket.access.gpo.gov/2011/pdf/2011-6555.pdf>.

[Back to Top](#)

11. USCIS Publishes Prevailing Wage Rates for H-2B Construction Workers on Guam

U.S. Citizenship and Immigration Services (USCIS) seeks comments on the system that the Governor of Guam is using to determine prevailing wage rates for construction occupations on Guam. In addition, USCIS has posted the most recent prevailing wage rates that have been proposed by the Governor of Guam. Based on its own analysis and input from the public, USCIS will determine whether the prevailing wage rates suggested by the Governor of Guam are reasonable and whether USCIS should require a new system to be used by the Governor of Guam in determining the prevailing wage rates.

Comments are due by April 18, 2011, to the office named in the notice, which is available at <http://edocket.access.gpo.gov/2011/pdf/2011-6208.pdf>.

[Back to Top](#)

12. ABIL Global (www.abil.com): United Kingdom Update

Less, less, less migration: The UK government is proposing various measures to

reduce immigration and save public funds.

On February 16, 2011, the UK Border Agency (UKBA) released a Statement of Intent (SOI) detailing proposals to change the eligibility criteria for the Points-Based System (PBS) Tier 2 migrants and the operation of permanent limits on certain Tier 2 applications. Additionally, proposals to change the criteria for indefinite leave to remain (ILR) for Tiers 1 and 2 and work permit holders were made. These changes will come into force on April 6, 2011, including the final closure of the Tier 1 (General) category. Increases in application fees have also been proposed due to the need to cut public spending.

The Coalition Government's overarching aim for UK immigration is to reduce net migration by "selecting the best and brightest." To help achieve this, UKBA proposes to raise the qualifying thresholds for the Tier 2 category and cap the number of Tier 2 (General) migrants to an annual limit. Moreover, restrictions will extend to the requirements for settlement in the UK to implement the government's "less automatic settlement" agenda.

UKBA is expected to publish the new Rules and formal guidance on March 16, 2011.

Proposals for Tier 1 (Highly Skilled)

The final closure of Tier 1 (General) on April 6, 2011, will deal a huge blow to both employers and individuals alike. After the dubious operational assessment of the category in October 2010, which purported to find that 29% of Tier 1 migrants were in unskilled jobs (the report was based on solely Tier 1 dependents who had been in the UK for six months), UKBA believed it had justification to delete the entire highly skilled migrant category. At least there will be transitional provisions in place for those who will be submitting eleventh-hour Tier 1 (General) applications by post, so that their applications will be assessed in accordance with the Rules in place on the date of application (the date the application is posted).

Under the transitional arrangements, migrants who are not already in Tier 1 (General) or its predecessor category under the highly skilled migrant program will not be permitted to switch into this category beginning on April 6, 2011. The Tier 1 (General) route will remain open to allow those with existing leave to enter or remain under Tier 1 (General) or its predecessor to extend their leave. However, the points threshold for extensions will be raised to 100 points for

those who required 100 points when first granted leave.

It is feared by immigration practitioners that the Tier 1 (post study work) category may survive the changes only to be phased out after the new rules are implemented. Generous transitional provisions are anticipated, if this were to be the case.

On a positive note, there are proposals for those recognized as possessing "exceptional talent" from different sectors to be certified as "exceptionally talented." It will be decided that a migrant meets the "exceptionally talented" criteria by entities who have been delegated the power to certify migrants. The UKBA has yet to set definitive criteria on what will amount to "exceptional talent." Unsurprisingly, a Nobel prize winner will be viewed as such. The proposals need to be built upon and it is still unclear how the capped allocation of 1,000 migrants for each sector will be managed, let alone how UKBA will deal with an undoubted "oversubscription" to the category.

Proposals for reform of the Tier 1 Entrepreneur and Investor categories have not yet been published but future (skilled) changes are expected to be nominal.

Proposals for Tier 2

As the main category for sponsored skilled workers, Tier 2 requires a Certificate of Sponsorship (COS) from the migrant's licensed sponsor. These will be divided into "Restricted" and "Unrestricted" COS.

From April 6 on, the Restricted COS will be capped at an annual limit of 20,700 - 4,200 of which will be available for the first month and 1,500 available thereafter. It is proposed that if a monthly limit is undersubscribed, the balance will be a