



IMMIGRATION UPDATE - AUGUST 24, 2020

Posted on August 24, 2020 by Cyrus Mehta

Headlines:

[EAD Printing Delays Lead to USCIS I-9 Policy Flexibility](#) – Employees may present their Form I-797 Notice of Action showing approval of their I-765 application as a List C document for Form I-9 compliance until December 1, 2020.

[USCIS Reminds F-1 Nonimmigrants in Post-Completion OPT and DSOs of Severe Consequences for Not Entering Employer Info in SEVIS](#) – USCIS said that SEVIS "will count each day without employer information toward the total number of unemployment days allowed."

[DHS Blasts GAO Report on Invalidity of Appointments of Wolf and Cuccinelli, Demands Rescission; GAO Refuses](#) – Following last week's bombshell GAO report finding the appointments invalid, DHS asked GAO to rescind its finding. GAO refused.

[Two Lawsuits Challenge Fee Rule](#) – The suit seeks an emergency injunction to prevent the fee rule from going into effect on October 2, 2020. The rule raises fees on many applications for immigration benefits.

[State Dept.'s Visa Bulletin Includes Info on Employment Limit for FY 2020 and DV-2021 Results and Timetable](#) – The Visa Bulletin for the month of September 2020 includes information on several topics.

[Virginia Man Arrested on \\$21 Million H-1B Visa Fraud Conspiracy Charges](#) – An indictment alleges that a Virginia man's four companies generated gross profits from 2011 to 2016 of approximately \$21 million pursuant to a visa fraud scheme.

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EAD Printing Delays Lead to USCIS I-9 Policy Flexibility

U.S. Citizenship and Immigration Services (USCIS) has acknowledged production delays in printing Employment Authorization Documents (EADs) due to the COVID-19 pandemic. As a result, USCIS said, foreign nationals may use Form I-797, Notice of Action, with a notice date "on or after December 1, 2019, through and including August 20, 2020," informing the applicant of approval of Form I-765, Application for Employment Authorization, as a Form I-9 (Employment Eligibility Verification) List C #7 document that establishes work authorization, even though the notice states it is not evidence of that.

"Employees may present their Form I-797 Notice of Action showing approval of their I-765 application as a List C document for Form I-9 compliance until December 1, 2020," USCIS said.

For I-9 completion, employees who present a Form I-797 Notice of Action described above for new employment must also present their employer with an acceptable List B document that establishes identity. By December 1, 2020, USCIS said, employers must reverify employees who presented the I-797 Notice of Action as a List C document. "These employees will need to present their employers with new evidence of employment authorization from either List A or List C," USCIS said.

This flexible policy is part of a proposed settlement to resolve a proposed class action lawsuit challenging delays in the printing of EADs. The lawsuit claims the agency has a printing backlog of approximately 75,000 EADs.

Details:

- USCIS notice, <https://www.uscis.gov/i-9-central/form-i-9-verification-during-ead-production-delays-due-to-covid-19>

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USCIS Reminds F-1 Nonimmigrants in Post-Completion OPT and DSOs of Severe Consequences for Not Entering Employer Info in SEVIS

U.S. Citizenship and Immigration Services (USCIS) issued a reminder on August 18, 2020, to

F-1 nonimmigrant students and their designated school officials (DSOs) that they must update the employer information in the Student and Exchange Visitor Information System (SEVIS), including unemployment data, because "exceeding unemployment limits can result in a loss of status." USCIS said that SEVIS "will count each day without employer information toward the total number of unemployment days allowed."

F-1 nonimmigrants must notify their DSOs within 10 days of any changes in their personal or employment information. In turn, DSOs must update SEVIS with the F-1 nonimmigrant's information within 21 days. USCIS said that in addition to a possible loss of status, failure to timely update employer information in SEVIS and thus exceeding unemployment limits could result in USCIS's initiating revocation proceedings for the F-1 nonimmigrant's employment authorization document or negatively affect the F-1 nonimmigrant's future benefit requests filed with USCIS.

Details:

- USCIS notice, <https://www.uscis.gov/news/alerts/uscis-reminds-f-1-aliens-in-post-completion-opt-and-their-dsos-to-enter-employer-information-in>

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DHS Blasts GAO Report on Invalidity of Appointments of Wolf and Cuccinelli, Demands Rescission; GAO Refuses

Following last week's bombshell report from the U.S. Government Accountability Office (GAO) finding invalid the appointments of Chad Wolf as Acting Secretary for the Department of Homeland Security (DHS) and Kenneth Cuccinelli as Senior Official Performing the Duties of Deputy Secretary, DHS asked GAO to rescind its finding. GAO refused.

DHS's letter to GAO's General Counsel, Thomas Armstrong, sent August 17, 2020, and signed by Chad Mizelle, Senior Official Performing the Duties of the General Counsel, states that GAO's conclusions are "baseless and baffling" and that the report is "premised on multiple errors," questions GAO's authority to even issue the report, calls the timing of the report "suspect" because it was released 80 days before the presidential election, questions the staffing of the report, and asserts that GAO "must accept permissible interpretation" that "he

moment that Secretary Nielsen invoked her authority, she overrode all past designations." The letter includes a photo of Secretary Nielsen swearing in Acting Secretary Kevin McAleenan, which GAO had found set in motion a chain of invalid succession.

GAO's response to DHS's letter, sent August 21, 2020, and signed by Mr. Armstrong, states that a rescission of its August 14 decision is denied because "DHS has not shown that our decision contains either material errors of fact or law, nor has DHS provided information not previously considered that warrants reversal or modification of the decision." Among other things, GAO's letter notes that "GAO will modify or reverse a prior decision only if it contains a material error of fact or law." GAO further said that an agency's interpretation "is not entitled to deference unless the controlling language is ambiguous, nor is deference available" to an agency's rationalization advanced after the fact to defend past agency action.

Details:

- Letter from DHS to GAO, August 17, 2020, https://www.dhs.gov/sites/default/files/publications/20_0817_ogc_gao-as1-succession-response.pdf
- Letter from GAO to DHS, August 21, 2020, <https://www.gao.gov/assets/710/708944.pdf>

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Two Lawsuits Challenge Fee Rule

Two lawsuits were filed recently challenging U.S. Citizenship and Immigration Services (USCIS) fee hikes and related actions:

AILA/Sidley lawsuit. The American Immigration Lawyers Association (AILA) and Sidley Austin LLP filed a lawsuit on August 20, 2020, challenging the legality of the Department of Homeland Security's (DHS) final rule increasing the costs of applying for many immigration benefits. The suit seeks an emergency injunction to prevent the fee rule from taking effect on October 2, 2020.

The complaint states that the final rule is unlawful because it was proposed under Kevin McAleenan and issued under Chad Wolf, "both of whom assumed the title of Acting Secretary of without constitutional or statutory authority." The complaint states that the final rule "is therefore void and without effect."

The complaint notes that for low-income applicants, the final rule increases the cost of applying to naturalize, in some cases from \$0 to \$1,170, and charges a non-waivable fee for asylum applicants for the first time in U.S. history "even though the fee will deter vulnerable people from seeking statutory protection." The complaint states that the final rule also requires asylum seekers to pay \$580 to obtain their first employment authorization, and calls for an unexplained budget increase of 21 percent.

Immigrant advocacy groups lawsuit. Northwest Immigrant Rights Project, Ayuda, Inc., and Casa de Maryland, Inc., filed a lawsuit on August 21, 2020, challenging a series of actions by DHS that "make it significantly more difficult and expensive for immigrants to apply for vital immigration benefits: naturalization, employment authorization, asylum, and others." The complaint notes that in addition to raising fees, in some cases by exorbitant amounts, DHS eliminated fee waivers for all but a few narrow categories of immigrants. "DHS expects that its new rule will force immigrants to pay a combined total of about \$1 billion in extra fees to USCIS per year, to fund operations that DHS does not explain and to raise money against an outdated estimated budget," the complaint states.

Details:

- Press release, AILA, <https://www.aila.org/advo-media/press-releases/2020/aila-and-sidley-aust-in-llp-challenge-trump>
- AILA/Sidley lawsuit, <https://www.aila.org/infonet/aila-partners-sue-uscis-fee-rule>
- Immigrant advocacy groups lawsuit, <https://www.citizen.org/wp-content/uploads/42.1-Fee-Rule-proposed-complaint.pdf>

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State Dept.'s Visa Bulletin Includes Info on Employment Limit for FY 2020 and DV-2021 Results and Timetable

The Department of State's (DOS) Visa Bulletin for the month of September 2020 includes modest forward movement in the family-based immigration categories. There was no movement in the employment-based preference categories, with the exception of a slight move forward for India and China in

the EB-1 category. September's bulletin includes the following information:

- The employment preference numerical limit for fiscal year (FY) 2020 is 156,253. For FY 2020, the per-country limit is 26,758. The dependent area annual limit is 7,645.
- The Kentucky Consular Center in Williamsburg, Kentucky, has registered and notified the winners of the DV-2021 diversity visa lottery. Approximately 132,404 applicants have been registered and notified and may now make an application for an immigrant visa from among the 55,000 permanent resident visas available under this program for the fiscal year. Selected applicants who do not receive visas by September 30, 2021, will derive no further benefit from their DV-2021 registration. The bulletin also includes a country-by-country breakdown of those registered for the DV-2021 program.
- Dates for the DV-2022 program registration period will be widely publicized in the coming months.

Details:

- September Visa Bulletin,
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html>

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Virginia Man Arrested on \$21 Million H-1B Visa Fraud Conspiracy Charges

Ashish Sawhney, of Sterling, Virginia, was arrested on August 20, 2020, on charges of conspiracy to commit visa fraud and for inducing undocumented people to come to the United States using fraudulently obtained H-1B visas.

According to court documents, Mr. Sawhney allegedly used four corporations to orchestrate the improper submission of fraudulent applications for H-1B specialty occupation temporary work visas. The six-count indictment alleges that he used the four corporations to purport to provide information technology staffing and software development services for commercial clients in the United States. He submitted or caused to be submitted H-1B visa application materials stating that the foreign workers named in the applications would fulfill a specific job when, in fact, no such job existed. Through Mr. Sawhney's ownership and direction of the scheme, the indictment alleges, his

companies generated gross profits from 2011 to 2016 of approximately \$21 million.

Details:

- Press release, U.S. Attorney's Office for the Eastern District of Virginia, <https://www.justice.gov/usao-edva/pr/man-arrested-charges-21-million-h-1b-visa-fraud-conspiracy>

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Firm in the News

Cyrus Mehta was quoted by *Law360* in "DHS Appointments Risk 1 ½ Years of Immigration Policy." He spoke about the unlawful appointment of Chad Wolf at the Department of Homeland Security and the impact this could have on regulations signed by him. The article is available by registering at <https://www.law360.com/articles/1301788/dhs-appointments-risk-1-years-of-immigration-policy>.

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