



Immigration Insider

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Details...

1. USCIS Reopens FY 2009 H-2B Petition Filing Period

On August 6, 2009, U.S. Citizenship and Immigration Services (USCIS) reopened the fiscal year (FY) 2009 H-2B petition filing period and announced that it will immediately accept new H-2B petitions. The H-2B program allows U.S. employers to bring foreign nationals to the U.S. to fill temporary nonagricultural jobs for which there is a shortage of available U.S. workers. Typically, H-2B workers fill labor needs in occupational areas such as education, construction, health care, landscaping, manufacturing, food service/processing, and resort/hospitality services.

Although on January 7, 2009, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the congressionally mandated annual cap of 66,000, the Department of State received far fewer than expected requests for H-2B visas and, as a result, has issued only 40,640 H-2B visas for FY 2009 to date. This means that approximately 25,000 visas could go unused because they have not been granted. Because of the low visa issuance rate, USCIS is reopening the filing period to allow employers to file additional petitions for qualified H-2B temporary foreign nonagricultural workers.

The normal (non-premium processing) adjudication timeframe for H-2B petitions is 60 days. USCIS said it will make visa numbers available to petitions in the order in which the petitions are filed. However, because H-2B petitions (Forms I-129) for FY 2009 visas must be received, evaluated, and adjudicated by the FY 2009 deadline of September 30, 2009, USCIS said it cannot guarantee approval of any H-2B petition by that date. The agency therefore encourages employers to file as soon as possible and to request premium processing by filing a Form I-907 and submitting the \$1,000 premium processing fee, which will allow for expedited adjudication.

The USCIS notice, which includes instructions on how to qualify for a FY 2009 H-2B cap number, is available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/h-2b_petitions_fy09.pdf. A related Q&A is available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/QA_USCIS_Reopens_H-2B_Filing.pdf. Information on how to use premium processing service is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ebaf0c594dafd010VgnVCM1000000ecd190aRCRD&vgnnextchannel=54519c7755cb9010VgnVCM10000045f3d6a1RCRD>. A USCIS

guide to hiring a foreign national for short-term employment in the U.S. is available at <http://www.uscis.gov/files/article/E1eng.pdf>.

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2. State Dept. Introduces Online Nonimmigrant Visa Application Form

The Department of State (DOS) recently posted a cable sent to the field in May 2009 introducing the new DS-160 Web-based nonimmigrant visa application form, which is part of the Visa Office's effort to automate the visa process to the extent possible. DOS noted that at least 12 posts currently require applicants to use the DS-160. The new form incorporates all of the current NIV forms (DS-156, 157, 158, 156K, 3032, and parts of the E visa application) into one interactive format, and allows applicants to upload a photo. It is hosted on the Consular Electronic Application Center, which eventually will host online immigrant visa and passport applications, online fee payments, "possible queuing systems," and an online appointment system.

When an applicant fills out and submits the form online, the cable noted, he or she receives a confirmation page with a barcode that allows consular officers to locate the applicant's case in the Consular Consolidated Database system and load it into the nonimmigrant visa system.

As noted above, 12 posts (including some Mexican and Canadian posts, Dublin, Hamilton, Hong Kong, and Tripoli) are requiring use of the DS-160 by their applicants. These posts' applicant volume makes up about a tenth of the worldwide NIV applicant workload, DOS noted. This summer, the agency is expanding DS-160 use to two additional posts in Mexico, as well as Australia. Current server capacity, however, does not allow DOS to expand DS-160 use more rapidly.

The form is available in English and Spanish, but translations into Arabic, Japanese, Chinese, Russian, Serbian, and French are being developed. DOS hopes to have it available to all posts (and in the above languages) by the end of 2009.

The DOS cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4547.html.

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3. State Dept. Announces Revised Exchange Visitor Skills List

The Department of State (DOS) recently released a cable sent to the field in June 2009 announcing the revised 2009 J-1 Exchange Visitor Skills List. Exchange visitors who entered the U.S. on a J-1 visa before June 28, 2009, will continue to be governed by the 1997 Exchange Visitor Skills List, as amended, only if their country remains on the revised 2009 list. Exchange visitors whose countries were removed from the revised 2009 skills list are retroactively not subject to the two-year home residence requirement based on the Exchange Visitor Skills List, even if they entered the U.S. before the effective date.

The DOS cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4548.html. The revised list was published in the Federal Register at <http://edocket.access.gpo.gov/2009/pdf/E9-9657.pdf>.

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4. Visa Waiver Program Emergency/Temporary Passports Must Be Electronic, CBP Says

All Visa Waiver Program (VWP) emergency or temporary passports now must be electronic passports (e-Passports) to be eligible for travel to the U.S. without a visa. This includes VWP applicants who present emergency or temporary passports to transit the U.S. An e-Passport contains an integrated chip that stores biographic data, a digitized photograph, and other information about the bearer, and is distinguished by a gold-colored symbol on the passport's front cover. VWP applicants arriving in the U.S. with a non-compliant passport may be required to undergo further processing and/or denied admission. U.S. Customs and Border Protection (CBP) may exercise discretion at the ports of entry in cases of medical or other emergency travel.

The CBP notice released July 14, 2009, contains additional country-by-country details and is available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/epsprt_vwp.xml.

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5. USCIS Extends TPS Designation, Work Authorization for Somalians

U.S. Citizenship and Immigration Services (USCIS) has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of September 17, 2009, through March 17, 2011. USCIS also automatically extended the validity of employment authorization documents (EADs) issued under the TPS designation of Somalia for six months, through March 17, 2010, to give re-registrants sufficient time to receive their new EADs after their current EADs expire.

The USCIS notice sets forth procedures necessary for nationals of Somalia, or those having no nationality who last habitually resided in Somalia) to re-register with USCIS for TPS. Re-registration is limited to persons who previously registered for TPS under the designation of Somalia and whose applications have been granted by, or remain pending with, USCIS. The 60-day re-registration period began on July 27, 2009, and will remain in effect until September 25, 2009.

The notice is available at <http://edocket.access.gpo.gov/2009/pdf/E9-17862.pdf>. A related Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=7862cb29f99b2210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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6. State Dept. Updates Visa Medical Examination Forms

Updated visa medical forms are now being used. The forms are:

- DS-2053 - Medical Examination for Immigrant or Refugee Applicant (1991 TB TIs)
- DS-2054 - Medical Examination for Immigrant or Refugee Applicant (2007 TB TIs)
- DS-3024 - Chest X-Ray and Classification Worksheet (1991 Centers for Disease Control (CDC) Technical Instructions (TIs) on tuberculosis (TB))
- DS-3030 - Chest X-Ray and Classification Worksheet (2007 TB TIs)
- DS-3026 - Medical History of Physical Examination Worksheet (all posts), and
- DS-3025 - Vaccination Documentation Worksheet (all posts).

The Department of State recently released a cable sent to the field in June 2009 listing the forms and noting that all posts should begin using the DS-2053, DS-3024, DS-3026, and DS-3025 forms immediately, and discontinue use of any older version of these forms. Medical exams that have been completed using the older version of the forms, however, do not have to be repeated.

The cable is available at

http://travel.state.gov/visa/laws/telegrams/telegrams_4550.html. Related information from the CDC, including CDC global TB control activities for U.S. immigration and TIs for TB screening and treatment, is available at http://www.cdc.gov/ncidod/dq/panel_2007.htm. Other CDC information on proposed vaccination criteria for U.S. immigration, and guidelines for medical examination of immigrants, is available at <http://www.cdc.gov/ncidod/dq/refugee/index.htm>.

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7. USCIS Resumes Premium Processing for Nonimmigrant Religious Workers

After a suspension of several years, U.S. Citizenship and Immigration Services (USCIS) announced that it has resumed premium processing service for nonimmigrant religious worker petitions filed by certain R-1 petitioners. Only those petitioners who have successfully passed an on-site inspection are eligible to file under premium processing service. Under premium processing service, USCIS guarantees petitioners that, for a \$1,000 processing fee, within 15 calendar days of receipt it will issue either an approval notice or, where appropriate, a denial notice, a notice of intent to deny, or a request for evidence, or will open an investigation for fraud or misrepresentation.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=8b3dcb29f99b2210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A related Q&A is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3f4ecb29f99b2210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

Information on how to use premium processing service is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=ebaf0c594dafd010VgnVCM1000000ecd190aRCRD&vgnnextchannel=54519c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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8. Tata America's Foreign Workers in U.S. Win Right To Court Hearing

The U.S. Court of Appeals for the Ninth Circuit has denied Tata America International Corp.'s attempt to compel arbitration in Mumbai, India, and dismiss a class action by Tata's noncitizen U.S. employees, who had been required to sign over their federal and state tax refund checks to Tata. The suit, *Vedachalan v. Tata America International Corp.*, included a proposed class of thousands of current and former noncitizen U.S. employees of Tata working in the U.S.

According to plaintiffs' representative Lief Cabraser Heimann & Bernstein, LLP, the complaint claims that Tata has paid its employees less than promised; has failed to pay its employees overtime pay and has misclassified them as exempt from overtime; and has failed to compensate employees for earned but unused vacation pay. The complaint alleges further that Tata required its noncitizen U.S. employees to sign power of attorney agreements delegating an outside agency to calculate and submit each employee's tax return to state and federal authorities. Tata then required its noncitizen employees who received tax refunds from state and federal tax authorities to endorse the tax refund checks and send them to Tata.

A press release announcing the ruling is available at http://www.lieffcabraser.com/press_releases/20090731-lawsuit-against-tata.htm, and the decision is available at <http://www.lieffcabraser.com/pdf/20090730-tata-order.pdf>. Additional information on the lawsuit and related links are available at <http://www.lieffcabraser.com/lawsuitagainsttata.htm>.

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Recent News from ABIL Members

Charles Kuck (bio: <http://www.abil.com/lawyers/lawyers-kuck.cfm>) has added a new posting, "H-1B Investigations - USCIS Run Amok!" to his blog. The posting discusses a new benefit fraud assessment program run by U.S. Citizenship and Immigration Services, in which a private contractor is sending investigators to conduct thousands of site visits to H-1B employers to verify H-1B positions. Mr. Kuck asks: "[W]hy is USCIS spending money on a program 'looking' for problems when they would be better off using their resources to solve the problems they already have as an agency and better

manage the extant operations that need to run more effectively?" The posting is available at <http://www.immigration.net/blog/>.
Laura Danielson (bio: <http://www.abil.com/lawyers/lawyers-danielson.cfm>) was quoted in the Bureau of National Affairs' Workplace Immigration Report's August 10, 2009, issue regarding how employers should respond to an increase in I-9 audits. For most employers, she said the E-Verify program has "such strenuous requirements" that it is hard to see "how the benefits outweigh the disadvantages." The article is available at <http://www.fredlaw.com/bios/attorneys/danielsonlaura/BNAWorkplaceArticle.pdf>.

John Nahajzer (bio: <http://www.abil.com/lawyers/lawyers-nahajzer.cfm>) will be a presenter for a Business & Legal Reports 90-minute teleconference on the E-Verify program on August 27, 2009. For more information, see <http://www.blr.com/product.cfm?product=30566200>.

Stephen Yale-Loehr (bio:) was quoted in Inc. magazine's Web site in an article about EB-5 visas and start-ups turning to foreign investors seeking U.S. citizenship. "Congress thinks it's a good program because it's what I call a win-win-win-win," he said, but noted that "[i]t's not for everyone." The article is available at <http://www.inc.com/news/articles/2009/08/capital.html>.

Mr. Yale-Loehr also recently authored "USCIS Clarifies Key Aspects of EB-5 Program," discussing two USCIS memoranda and related issues, and providing practice pointers. The article is available at [http://www.abil.com/articles/USCIS%20Clarifies%20Key%20Aspects%20of%20EB-5%20Program%20\(Yale-Loehr\).pdf](http://www.abil.com/articles/USCIS%20Clarifies%20Key%20Aspects%20of%20EB-5%20Program%20(Yale-Loehr).pdf).

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Government Agency Links

Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

USCIS Service Center processing times online:
<https://egov.uscis.gov/cris/jsps/ptimes.jsp>

Department of Labor processing times and information on backlogs:
<http://www.foreignlaborcert.doleta.gov/times.cfm>

Department of State Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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The Alliance of Business Immigration Lawyers (ABIL) is an entity that offers a single point of contact for customer needs, news alerts, staff training and other programs that benefit the client through the collaboration of the 140 member attorneys and their 460 staff. Corporate counsel, human resource professionals, in-house immigration managers and other corporate decision-makers turn to ABIL attorneys for outstanding legal skills and services. ABIL's work also includes advocating for enlightened immigration reform, providing speakers and media sources, presenting conferences, publishing books and articles on cutting-edge immigration topics, and sharing best practices, all with the ultimate goal of offering value-added services to business immigration clients.

The Alliance of Business Immigration Lawyers' Web site is:
<http://www.abil.com/>.

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