



Immigration Insider

News from the Alliance of Business Immigration Lawyers Vol. 6, No. 1B · January 15, 2010

Headlines:

- **1. USCIS Issues Controversial Memo on Determining Employer-Employee Relationships for Adjudication of H-1B Petitions** - The memo states that a lack of guidance clearly defining what constitutes a valid employer-employee relationship has raised problems.
- **2. SSA Fails To Verify 19 Percent of New Hires** - The SSA also improperly E-Verified volunteers who should not have been screened under federal guidelines, and inappropriately screened some candidates in advance of hire.
- **3. DHS Grants TPS to Haitians Following Catastrophic Earthquake** - The Obama administration announced that it is granting temporary protected status to Haitians who were in the U.S. as of January 12, 2010.
- **4. USCIS Announces Restructuring of Fraud Detection, Customer Service, Domestic Operations** - USCIS has created or restructured several directorates.
- **5. USCIS Grants One-Time Accommodation for H-2A Shepherders** - USCIS will allow H-2A shepherders more time to fully transition to the three-year limitation of stay requirements under the agency's final rule.

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Details...

1. USCIS Issues Controversial Memo on Determining Employer-Employee Relationships for Adjudication of H-1B Petitions

Donald Neufeld, Associate Director for U.S. Citizenship and Immigration Services (USCIS) Operations, released a memorandum on January 8, 2010, that provides guidance concerning the requirement that an H-1B petitioner establish that an employer-employee relationship exists and will continue to

exist with the beneficiary throughout the duration of the requested H-1B validity period.

The memo states that a lack of guidance clearly defining what constitutes a valid employer-employee relationship has "raised problems," particularly with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. Mr. Neufeld notes that the placement of a beneficiary/employee at a worksite that is not operated by the petitioner/employer (third-party placement), common in some industries, "generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

Among other things, petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business and is expected to become a part of that business's regular operations, the memo notes. "The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists," the memo warns.

Further, the memo notes, USCIS must ensure that the employer is in compliance with Department of Labor regulations requiring that a petitioner file a labor condition application (LCA) specific to each location where the beneficiary will be working.

The memo includes a discussion of the "right to control" when, where, and how the beneficiary performs the job, which the memo distinguishes from "actual control." The memo states that the employer-employee relationship hinges on the right to control the beneficiary, and outlines 11 factors USCIS will consider to make such determinations. The memo also provides examples of valid and invalid employer-employee relationships; exceptions; documentation to establish the employer-employee relationship; and requests for evidence.

The memo, which has stirred controversy (see, e.g., <http://cyrusmehta.blogspot.com/2010/01/new-uscis-memo-on-employer-employee.html> and <http://www.nationofimmigrants.com/>), is available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>. A related Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3d015869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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2. SSA Fails To Verify 19 Percent of New Hires

In a recent 18-month period, the Social Security Administration (SSA) failed to verify the Social Security Numbers of 19 percent, or 1,767 of 9,311 new SSA employees, as required. In other cases examined by the SSA's Office of the Inspector General, the SSA improperly E-Verified volunteers who should not have been screened under federal guidelines, and inappropriately screened some candidates in advance of hire.

SSA agreed with the Inspector General's recommendations, including verifying the 1,767 workers and issuing guidance to remind staff to: (1) verify all new hires, (2) conduct verification queries within three business days after a new employee has reported for duty and both sections of the I-9 employment eligibility verification form have been completed, and (3) prohibit the verification of existing SSA employees, job candidates, and volunteers.

The Inspector General's report is available at <http://www.ssa.gov/oig/ADOBEPDF/A-03-09-29154.pdf>.

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3. DHS Grants TPS to Haitians Following Catastrophic Earthquake

Following the catastrophic earthquake in Haiti last week, the Obama administration announced that it is granting temporary protected status (TPS) to Haitians who were in the U.S. as of January 12, 2010. The designation will allow eligible Haitian nationals in the U.S. to continue living and working in the country for the next 18 months. Secretary of Homeland Security Janet Napolitano noted that "[t]hose who attempt to travel to the United States after January 12, 2010, will not be eligible for TPS and will be repatriated."

In a related field guidance memo issued on January 15, Secretary Napolitano said that U.S. Citizenship and Immigration Services "will implement procedures to adjudicate favorably, where possible, applications for change or extension of nonimmigrant status following the expiration of an applicant's period of admission; grant an additional period of parole or advance parole in appropriate cases; and authorize 'F' nonimmigrant students' requests for off-campus employment work authorization." She said USCIS will also "expedite the processing of advance parole applications and relative petitions for minor children from affected areas," and will "grant employment authorization where appropriate."

The field guidance memo, which outlines actions a USCIS officer may take when an applicant is a Haitian national or a habitual resident of Haiti, is available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/haiti-field-guidance.pdf>. The announcement, along with information about USCIS's Haiti relief effort, is available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=9cf75869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=9cf75869c9326210VgnVCM100000082ca60aRCRD>. Details on TPS application and eligibility requirements for Haitians are available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e54e60f64f336210VgnVCM100000082ca60aRCRD&vgnnextchannel=e54e60f64f336210VgnVCM100000082ca60aRCRD>. Department of State information about queries related to U.S. citizens in Haiti and related issues is available at http://travel.state.gov/travel/cis_pa_tw/pa/pa_haiti_info_number.html.

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4. USCIS Announces Restructuring of Fraud Detection, Customer Service, Domestic Operations

U.S. Citizenship and Immigration Services announced on January 11, 2010, that it has realigned its organizational structure "to achieve greater efficiency and to more ably accomplish our mission." The realignment reflects the prioritization of certain critical agency responsibilities, USCIS said. The three most significant changes are:

- The creation of a Fraud Detection and National Security Directorate.
- The creation of a new Customer Service Directorate.
- The division of the existing Domestic Operations Directorate into two separate directorates: Service Center Operations and Field Operations.

The announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=687e62cb6ee16210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A USCIS organizational chart is available at <http://www.uscis.gov/USCIS/News/Images/USCISOrgChart.JPG>.

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5. USCIS Grants One-Time Accommodation for H-2A Shepherders

U.S. Citizenship and Immigration Services (USCIS) announced that it will allow H-2A shepherders more time to fully transition to the three-year limitation of stay requirements under the agency's final rule that became effective on January 17, 2009. USCIS said it is making the one-time accommodation in deference to the industry's previous exemption from the three-year limitation. This exemption does not impact other H-2A categories. The time spent as an H-2A worker performing labor or services as a shepherd before the effective date of the final rule will not be counted toward the three-year maximum period of stay, USCIS said. Instead, the agency is "starting the clock" on January 17, 2009, for shepherders who were lawfully present in the U.S. in H-2A classification on that date.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1c9a1543455e5210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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New Publications and Items of Interest

Responding to a new era of global mobility. NAFSA: Association of International Educators has published *A Visa and Immigration Policy for the Brain-Circulation Era: Adjusting to What Happened in the World While We Were Making Other Plans*. The report says that it's time for the United States to adopt an approach that embraces the opportunities of a new era in global mobility and supports its economic competitiveness and foreign policy goals. NAFSA urges a comprehensive set of policy actions that will enhance the U.S.'s ability to benefit from the contributions of foreign students and foreign talent, and makes recommendations in the areas of visa reform, including revising the policy on interviews for visa applicants, expediting reviews for low-risk travelers, and reforming the security clearance process for visiting scientists; comprehensive immigration reform, including reforming employment-based immigration, attracting international students, and improving management of the Department of Homeland Security; and identity documents and document security, including revisiting REAL ID. The report is available at

<http://www.nafsa.org/PressRoom/PressRelease.aspx?id=17421>.

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Recent News from ABIL Members

The January-February 2010 issue of *Business Law Today*, published by the American Bar Association, features articles written by several members of the Alliance of Business Immigration Lawyers. The issue is posted at <http://www.abanet.org/buslaw/blt/>. The articles include:

- Top Five Business Immigration Law Issues, by H. Ronald Klasko (bio: <http://www.abil.com/lawyers/lawyers-klasko.cfm>), available at <http://www.abanet.org/buslaw/blt/2010-01-02/klasko.shtml>
- Creating a Global Workforce, co-authored by Bryan Funai (bio: <http://www.abil.com/lawyers/lawyers-funai.cfm>), available at <http://www.abanet.org/buslaw/blt/2010-01-02/funai-contreras.shtml>
- Bothersome Immigration Buzz Spells Trouble for M&A Deals, by Angelo Paparelli (bio: <http://www.abil.com/lawyers/lawyers-paparelli.cfm>), available at <http://www.abanet.org/buslaw/blt/2010-01-02/paparelli.shtml>

Stephen Yale-Loehr (bio: <http://www.abil.com/lawyers/lawyers-loehr.cfm>) was quoted in a January 10, 2010, article in the *Washington Post* on immigrant investors. Noting that the number of EB-5 visas being granted falls well short of the maximum 10,000 allowed each year, Mr. Yale-Loehr commented, "There's a lot more that we could be doing to promote the EB-5 program so that it can achieve its true potential in this economic recession."

Cyrus Mehta's new blog, "New USCIS Memo on Employer-Employee Relationship for H-1B Petitions: Will It Keep Certain Workers Out?," argues that a new January 8, 2010, memo from U.S. Citizenship and Immigration Services (USCIS), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>, "guts the ability of IT consulting firms to file H-1B visas," and represents "a thinly veiled attempt to kill a successful Indian business model that American businesses have so readily embraced." He says it is no surprise that "the outrageous singling out of Indians since the New Year waiting in the line at Newark and other airports by CBP [U.S. Customs and Border Protection] officials is the result of the Neufeld Memo that may have filtered through CBP officialdom but not the public until January 13, 2010." The blog is available at <http://cyrusmehta.blogspot.com/2010/01/new-uscis-memo-on-employer-employee.html>. Mr. Mehta also released a blog, "Expedited Removal of H-1B Workers at Newark," which discusses H-1B workers from India employed by IT consulting firms being subject to expedited removal orders at Newark airport in New Jersey. That blog is available at

<http://cyrusmehta.blogspot.com/2010/01/expedited-removal-of-h-1b-workers-at.html>.

Mr. Paparelli's new blog, "Please Tweet Me an H-1B," comments on the same January 8, 2010, memo from USCIS. The blog notes that in the past, the immigration service would publish regulations with an opportunity to comment, and an explanation of the agency's thinking in the supplementary information. Mr. Paparelli calls the new memo on the Web, along with an accompanying FAQ, a "mush" and a "porridge of new and indigestible pronouncements." Mr. Paparelli says "the OMB of old would never have allowed such mush to splatter the pages of the *Federal Register*." The blog is available at <http://www.nationofimmigrants.com/>.

Charles Kuck's (bio: <http://www.abil.com/lawyers/lawyers-kuck.cfm>) latest blog, "It Is Time for TPS Designation for Haitians," notes that in addition to the recent 7.0 earthquake, Haitians endured political upheaval, riots over skyrocketing food prices, and four major storms in 2008 from which they have yet to recover. "Allow the nationals of that country currently in the United States to help that country recovery by allowing them to come forward and secure a work permission in the United States," Mr. Kuck argues. (Secretary of Homeland Security Janet Napolitano subsequently announced that TPS has been granted to Haitians present in the U.S. as of January 12, 2010.) Mr. Kuck also recently published a blog on comprehensive immigration reform, "Immigration and the Economy - We Need CIR Now!," which discusses reports showing that removal of the 12 million undocumented people in the U.S. would be an economic disaster, causing a loss to the U.S. economy of over \$2 trillion over the next 10 years. The blog postings are available at <http://www.immigration.net/Blog/>.

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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/processTimesDisplay.do>

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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