



Immigration Insider

News from the Alliance of Business Immigration Lawyers Vol. 5, No. 7A · July 1, 2009

Headlines:

- **1. Current I-9 Form Validity Extended Beyond June 30** - The I-9 form currently in use will continue to be valid beyond June 30, 2009.
- **2. H-1B Processing Time Will Increase July 1** - The ability to file an H-1B extension or change of employer petition for an H-1B employee on a same-day, or even same-week, basis will end on July 1.
- **3. CBP Reminds Visa Waiver Travelers of New Emergency/Temporary Passport Requirements Effective July 1** - Effective July 1, 2009, all VWP emergency or temporary passports must be electronic.
- **4. USCIS Discusses Requirements for H-1Bs in Health Care Specialty Occupations** - USCIS issued a memorandum clarifying the standards for adjudicating H-1B petitions filed on behalf of beneficiaries seeking employment in a health care specialty occupation.
- **5. USCIS Resumes Premium Processing for Certain I-140s** - Effective June 29, 2009, USCIS has resumed Premium Processing Service for certain I-140 Immigrant Petitions for Alien Worker.
- **6. USCIS Explains "Full-Time," Discusses Job Creation Timing in EB-5 Immigrant Investor Program** - Among other things, USCIS clarified that for purposes of the Immigrant Petition by Alien Entrepreneur adjudication and job creation requirements, USCIS will consider the two-year period to begin six months after approval of the I-526 petition.
- **7. USCIS Issues Guidance on Education, Training, Experience Requirements for Foreign Physicians** - In particular, the memo provides guidance on determining whether a foreign medical degree (MD) is the equivalent of a U.S. MD, and thus constitutes an advanced degree for EB-2 purposes.
- **8. President, Members of Congress Discuss Immigration Reform** - Department of Homeland Security Secretary Janet Napolitano will lead a group that will work with key members of the House and the Senate on immigration issues.
- **9. USCIS Discusses U.S. Interest-Related Discretionary Grants of H-2A, H-2B Status** - Limited exceptions to the country requirements can be made when they are determined to be in the U.S. interest.

- **10. USCIS, FBI Eliminate Name Check Backlog, Set New Standard** - The goal is to complete 98 percent of name check requests submitted by USCIS within 30 days, and the remaining two percent within 90 days.
- **11. USCIS Opens International Adjudication Branch in California** - The International Adjudications Support Branch (IASB) will not accept in-person appointments.
- **12. USCIS Issues Court Notice to Pending I-360 Religious Workers** - The court has ordered USCIS to accept properly filed I-485s and I-765s from beneficiaries of religious worker I-360s, and is allowing individuals whose concurrent filings were rejected previously to reapply for adjustment of status.

➤ **Also in this issue:**

[Publications and Items of Interest](#)

[Recent News from ABIL Members](#)

[Government Agency Links](#)

Details...

1. Current I-9 Form Validity Extended Beyond June 30

U.S. Citizenship and Immigration Services (USCIS) has announced that the I-9 Employment Eligibility Verification Form (rev. 2/2/09) currently in use will continue to be valid beyond June 30, 2009.

USCIS has requested that the Office of Management and Budget approve the continued use of the current I-9. While this request is pending, the form will not expire.

USCIS will update the I-9 when the extension is approved. Employers will be able to use either the I-9 with the new revision date or the I-9 with the 2/2/09 revision date at the bottom of the form.

The announcement is available at

http://www.uscis.gov/files/article/update_employ_eligible_i9.pdf.

[Back to Top](#)

2. H-1B Processing Time Will Increase July 1

The ability to file an H-1B extension or change of employer petition for an H-1B employee on a same-day, or even same-week, basis will end on July 1.

In the past several years, employers have become used to immediate turnaround of H-1B petitions, made possible by the Department of Labor's (DOL) electronic system for filing and certification of the required Labor

Condition Application (LCA). Effective June 30, 2009, the new iCert system for LCAs will eliminate same-day LCA approvals in many cases. Instead, the DOL may take up to seven business days to certify the LCA. Early experience with the system indicates that DOL is using all seven business days or more.

In the era of iCert, advance planning is a must. Employers should monitor the expiration dates of H-1B employees and allow sufficient time (4-6 months) for the preparation and filing of H-1B extensions and amendments. This delay in filing H-1B petitions will also affect the usefulness of H-1B portability, because an individual in H-1B status will only be authorized to work for the new employer upon the filing of the new petition, and a certified LCA is required to make that filing. Under the new system, LCA delays will likely add at least a week to 10 days to that process. Unfortunately, employees who fall victim to the economy will also feel the impact of the delayed LCA certification timing because it will delay their ability to file a new H-1B petition once they have obtained new employment.

If you have further questions on how iCert affects your workforce, contact your Alliance of Business Immigration Lawyers attorney for more information.

[Back to Top](#)

3. CBP Reminds Visa Waiver Travelers of New Emergency/Temporary Passport Requirements Effective July 1

U.S. Customs and Border Protection (CBP) recently reminded Visa Waiver Program (VWP) travelers that effective July 1, 2009, all VWP emergency or temporary passports must be electronic. Under the VWP, an e-Passport contains an integrated chip that stores biographic data, a digitized photograph, and other information about the true bearer as indicated by a symbol on the passport cover. In lieu of a e-Passport, foreign nationals may apply for visitor's visas from the State Department instead of traveling through the VWP.

CBP may exercise discretion for those who do not have e-Passports if they are traveling for medical or other emergency reasons.

The announcement is available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/epssprt_vwp.xml.

[Back to Top](#)

4. USCIS Discusses Requirements for H-1Bs in Health Care Specialty Occupations

U.S. Citizenship and Immigration Services (USCIS) has issued a memorandum clarifying the standards for adjudicating H-1B petitions filed on behalf of beneficiaries seeking employment in a health care specialty occupation.

Among other things, the memo notes that if the petitioner provides documentary evidence that the beneficiary has a valid license to practice a health care occupation (and meets the definition of specialty occupation) in the state in which the beneficiary will be employed, the adjudicator "should not look beyond the license." However, the petitioner will still need to provide evidence that the beneficiary is admissible. This guidance applies regardless of whether the beneficiary has a bachelor's degree, master's degree, or doctoral degree in the health care occupation.

If the beneficiary has an unrestricted license and the petition is otherwise approvable, the memo states that an adjudicator should approve the petition for the full H-1B period requested (up to three years) but may not approve the petition beyond the validity of the labor condition application. The memo notes that most states require a license to be renewed periodically. If the beneficiary has an unrestricted license, the memo states that the renewal date should not be considered when determining the validity period of the approval.

The memo is available at

http://www.uscis.gov/files/natedocuments/health_care_occupations_20may09.pdf.

[Back to Top](#)

5. USCIS Resumes Premium Processing for Certain I-140s

U.S. Citizenship and Immigration Services (USCIS) has announced that effective June 29, 2009, it has resumed Premium Processing Service for certain I-140 Immigrant Petitions for Alien Workers. USCIS will accept premium processing requests for I-140s involving the EB-1 (extraordinary ability and outstanding professors/researchers), EB-2 (members of professions with advanced degrees or exceptional ability not seeking a national interest waiver), and EB-3 (professionals, skilled workers, and other workers) categories.

Premium processing is still not available for I-140s involving EB-1 multinational executives and managers and EB-2 members of professions

with advanced degrees or exceptional ability seeking a national interest waiver.

Under premium processing, USCIS guarantees petitioners that for a \$1,000 processing fee in addition to the normal filing fee, it will issue an approval notice, a notice of intent to deny, a request for evidence, or an investigation for fraud or misrepresentation within 15 calendar days of receipt. If the petition is not processed within 15 calendar days, USCIS will refund the \$1,000 fee and continue to process the request. In addition to faster processing, petitioners who participate in the program may use a dedicated phone number and e-mail address to check on the status of their petitions or ask related questions.

Premium processing continues to be available for previously designated classifications within the I-140 and within the I-129 Petition for Nonimmigrant Worker.

The notice is available at http://www.uscis.gov/files/article/premproc_22jun09.pdf.

[Back to Top](#)

6. USCIS Explains "Full-Time," Discusses Job Creation Timing in EB-5 Immigrant Investor Program

U.S. Citizenship and Immigration Services (USCIS) recently issued a guidance memorandum providing USCIS adjudication officers with instructions related to the timing of job creation and the meaning of "full-time" positions in the EB-5 Immigrant Investor Program.

The memo clarifies that for purposes of the Immigrant Petition by Alien Entrepreneur (Form I-526) adjudication and job creation requirements, USCIS will consider the two-year period to begin six months after approval of the I-526 EB-5 petition.

USCIS officers will ensure that the business plan filed with the I-526 reasonably demonstrates that the requisite number of jobs will be created by the end of the two-year period. For Regional Center petitions and for purposes of indirect job creation, USCIS adjudicators may consider economic models that rely on certain variables to show job creation and the amount of investment to determine whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.

USCIS also has concluded that certain direct and indirect jobs that previously would have been considered to be temporary or intermittent

(such as construction jobs) may be considered as permanent jobs for purposes of the EB-5 program if the positions can be expected to last at least two years.

A notice announcing the memo is available at http://www.uscis.gov/files/article/EB-5_Guidance.pdf. The memo is available at http://www.uscis.gov/files/nativedocuments/eb5_17jun09.pdf.

Alliance of Business Immigration Lawyers attorney Steve Yale-Loehr has written an article analyzing USCIS's EB-5 memo. The article is available at <http://www.millermayer.com/Immigration/EB5Investors/USCISClarifiesKeyAspectsOfEB5Program/tabid/394/Default.aspx>.

[Back to Top](#)

7. USCIS Issues Guidance on Education, Training, Experience Requirements for Foreign Physicians

U.S. Citizenship and Immigration Services (USCIS) has issued a memorandum providing guidance on adjudication of the I-140 Petition for Alien Worker filed for certain physicians. In particular, the memo provides guidance to Immigration Services Officers (ISOs), formerly known as Information Immigration Officers (IIOs) or Adjudications Officers (AOs), on determining whether a foreign medical degree (MD) is the equivalent of a U.S. MD, and thus constitutes an advanced degree for EB-2 purposes.

The memorandum also addresses how to determine whether a foreign physician has met the education, training, and experience requirements of labor certification and licensure in the area of intended employment. The memo clarifies that all EB-2 and EB-3 physicians must overcome the "unqualified physician" provisions of INA § 212(a)(5)(B) at the time of the permanent job offer.

The memo notes that the U.S. is one of the few countries where medical school applicants must obtain a bachelor's degree as a prerequisite to admission to medical school. As a result, a U.S. MD is considered to be an advanced degree. In many other countries, USCIS noted, a person may be admitted to medical school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than the program for a less specialized foreign bachelor's degree (generally 3-4 years in duration.)

The memo is available at http://www.uscis.gov/files/nativedocuments/AFM_alien_physicians_i140_afm_update_ad09_10.doc.pdf.

[Back to Top](#)

8. President, Members of Congress Discuss Immigration Reform

President Barack Obama met on June 25, 2009, with several members of his cabinet, advisors, and Congress to discuss immigration reform. President Obama noted that Department of Homeland Security Secretary Janet Napolitano will lead a group that will work with key members of the House and the Senate on immigration issues. President Obama said that "we've got a responsible set of leaders sitting around the table who want to actively get something done and not put it off until a year, two years, three years, five years from now, but to start working on this thing right now."

Meanwhile, Charles Schumer (D-N.Y.), chair of the Senate's immigration subcommittee, said on June 24 that he will hold hearings on employment-related immigration in July. Stay tuned.

President Obama's statement is available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-after-meeting-with-members-of-Congress-to-discuss-immigration/.

[Back to Top](#)

9. USCIS Discusses U.S. Interest-Related Discretionary Grants of H-2A, H-2B Status

U.S. Citizenship and Immigration Services (USCIS) issued a memorandum elaborating on the adjudicator's responsibility to consider thoroughly the evidence submitted in support of a request that a national from a country not eligible to participate in the H-2A or H-2B programs be accorded H-2A or H-2B status. The memo notes some of the factors to be taken into consideration when making the discretionary decision whether to grant H-2A or H-2B status to such persons.

The memo notes that nationals from the following countries are eligible to participate in the H-2A and H-2B visa programs (same countries for both programs): Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; and the United Kingdom.

The list of eligible countries will be updated regularly, the agency said. Organizations or individuals, including members of Congress, interested in having a country added to the H-2A list should send a letter to the DHS

Office of Policy (addressed to the Assistant Secretary for Policy) requesting such addition.

Limited exceptions to the country requirements can be made when they are determined to be in the U.S. interest. Based on regulatory requirements, USCIS said it takes into consideration the following factors when determining whether the U.S. interest requirement has been met:

1. Evidence that the beneficiary has been admitted to the U.S. previously in H-2A or H-2B status and complied with the terms of his or her status;
2. Evidence that a worker with the required skills is not available from a country on the list of eligible countries;
3. Low potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B program through the potential admission of these worker(s) that a petitioner plans to hire; and
4. Other factors that would serve the U.S. interest, if any.

Each request for a U.S. interest exception is considered on a case-by-case basis. Although USCIS will consider any evidence submitted to address each factor, the agency said it has determined that it is not necessary for a petitioner to satisfy every factor. Instead, a determination will be made based on the totality of circumstances.

The memo is available at

http://www.uscis.gov/files/nativedocuments/h2a_h2b_eligible_countries.pdf.

[Back to Top](#)

10. USCIS, FBI Eliminate Name Check Backlog, Set New Standard

U.S. Citizenship and Immigration Services (USCIS) has announced that, in partnership with the Federal Bureau of Investigation (FBI), it has met all milestones set forth in a joint business plan announced April 2, 2008, resulting in elimination of the FBI National Name Check Program (NNCP) backlog.

The goal was to complete 98 percent of name check requests submitted by USCIS within 30 days, and the remaining two percent within 90 days. This performance level will become the new standard, USCIS said. As is the case with all security checks undertaken by USCIS, any information provided by the FBI through these checks may require further evaluation and may lead to follow-up queries to other agencies. This could result in additional delays in processing, which USCIS said are not governed by the processing goals in

the joint business plan. In the majority of instances, however, USCIS said the completion of a backlogged FBI name check has resulted in a "no record response." Next steps in the adjudication of any cases that were delayed because of a pending FBI name check request may now include updating fingerprint results, scheduling interviews, requesting additional evidence and other reviews to determine whether the applicant is eligible for the requested immigration benefit.

The announcement is available at http://www.uscis.gov/files/article/NNCP_backlog_elim_22jun09.pdf.

[Back to Top](#)

11. USCIS Opens International Adjudication Branch in California

The International Operations Division of U.S. Citizenship and Immigration Services (USCIS) recently opened a new support branch in Anaheim, California, to assist in processing select paper-based applications and petitions received from its international offices. The International Adjudications Support Branch (IASB) will not accept in-person appointments.

Initially, the IASB will focus its efforts on adjudicating non-health related applications to waive grounds of inadmissibility (Forms I-601) from USCIS's office in Ciudad Juarez, Mexico. Such applicants must continue to file their waiver applications with USCIS at the U.S. consulate having jurisdiction over their place of residence.

The public may contact the IASB by mail at P.O. Box 65006, Anaheim, CA 92815-5006, or by e-mail to iopsia@fins3.dhs.gov. The announcement is available at http://www.uscis.gov/files/article/qa_international_adjudication_support_branch_19may09.pdf.

[Back to Top](#)

12. USCIS Issues Court Notice to Pending I-360 Religious Workers

On June 11, 2009, the U.S. District Court for the Western District of Washington issued an order in *Ruiz-Diaz v. U.S.*, finding that 8 CFR § 245.2(a)(2)(i)(B), which does not allow religious workers to concurrently file an Application to Register Permanent Residence or Adjust Status (Form I-485), was invalid and unenforceable. The court has ordered USCIS to accept properly filed I-485s and I-765s from beneficiaries of religious worker I-360 petitions. The court order also allows individuals whose concurrent

filings were rejected previously to reapply for adjustment of status. The order accords a spouse and children of I-360 beneficiaries the same benefits.

A June 25, 2009, USCIS memo implementing the decision and providing information about filing applications for foreign religious workers with pending I-360s is available at

http://www.uscis.gov/files/nativedocuments/Ruiz-Diaz_Implementation_25jun09.pdf.

[Back to Top](#)

Publications and Items of Interest

U.S. Citizenship and Immigration Services (USCIS) Acting Director Michael Aytes issued a response on June 12, 2009, to the USCIS ombudsman's EB-5 recommendations. Among other things, the ombudsman recommended that USCIS update its regulations. USCIS acknowledged that the regulations governing the EB-5 program need to be updated. USCIS said it will re-examine its current resources in relation to its ability to promulgate new regulations versus statutory mandates and other existing priority regulations that are currently in progress. The USCIS response is available at http://www.dhs.gov/xlibrary/assets/uscis_response_cisomb_rec_40.pdf.

[Back to Top](#)

Recent News from ABIL Members

Four members of the Alliance of Business Immigration Lawyers were listed by *Human Resource Executive Online* as among the nation's 10 most important employment attorneys in the field of immigration law. The ABIL attorneys listed include H. Ronald Klasko (bio: <http://www.abil.com/lawyers/lawyers-klasko.cfm>), Angelo A. Paparelli (bio: <http://www.abil.com/lawyers/lawyers-paparelli.cfm>), Julie Pearl (bio: <http://www.abil.com/lawyers/lawyers-pearl.cfm>), and Bernard P. Wolfsdorf (bio: <http://www.abil.com/lawyers/lawyers-wolfsdorf.cfm>).

The list is available at http://www.hreonline.com/pdfs/090516Chart2_Immigration.pdf.

Steve Trow (bio: <http://www.abil.com/lawyers/lawyers-trow.cfm>) spoke on "U.S. Immigration and Citizenship Planning for High Net-Worth Clients" at the Practising Law Institute's International Estate & Tax Planning Conference in New York City on June 2, 2009. Mr. Trow also spoke on "Green Cards in Light of the Exit Tax" and "Accidental American Citizens" at the June 22,

2009, meeting of the Mid-Atlantic Chapter of the Society of Trust and Estate Practitioners.

Mr. Trow was elected to the Board of Directors of the British American Business Association (BABA) in Washington, DC, on June 24, 2009. BABA is the premier forum for British and American business professionals in the mid-Atlantic region to exchange information, establish networks, and pursue mutual interests.

Cyrus Mehta (bio: <http://www.abil.com/lawyers/lawyers-mehta.cfm>) spoke at the AILA Web Seminar on June 23, 2009. His panel's topic was "Maintaining LPR Status to Become a U.S. Citizen." For more information, see <http://eo2.commpartners.com/users/aila/register.php?id=2681>.

[Back to Top](#)

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

[Back to Top](#)

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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[Back to Top](#)
