Immigration Insider

News from the Alliance of Business Immigration Lawyers
Vol. 5, No. 9A · September 1, 2009

Headlines:

- **1. DHS Proposes To Rescind Social Security No-Match Rule; SEVIS Data To Be Integrated Into E-Verify** - DHS has proposed to rescind amendments relating to procedures that employers may take to acquire a safe harbor from receipt of no-match letters.

- **2. OMB Extends I-9 Approval to August 31, 2012** - Employers may use the I-9 with a revision date of either August 7, 2009, or February 2, 2009.

- **3. Seventh Circuit Affirms Time Limits on Labor Certifications** - The U.S. Court of Appeals for the Seventh Circuit affirmed a Department of Labor amended regulation setting time limits on grants of labor certification.

- **4. Employment-Based Fourth Preference Categories Unavailable for September** - The employment fourth preference is expected to return to "Current" status in October, the first month of the new fiscal year.

- **5. USCIS Clarifies Regulatory Requirements for Filing H-2B Petitions by Certain Associations and Their Members** - USCIS said it has noticed a particular type of filing error, involving "master" petitions, in many H-2B petitions filed by certain associations on behalf of their members.

- **6. DHS Announces New Directives on Border Searches of Electronic Media** - DHS announced new directives to enhance and clarify oversight of computer and other electronic media searches at U.S. ports of entry.

- **7. International Educators Ask President To Restore Academic Travel To Cuba** - The letter cites the benefits of academic exchanges and notes that opportunities for Americans to study abroad in Cuba have declined precipitously.

- **8. Congress Examines Foreign Investment, Verification, Real ID Issues At Recent Hearings** - The EB-5 Immigrant Investor Regional Center Program is set to expire at the end of September; Sen. Leahy said that making the program permanent "is a critical first step to its continuing success."

- **9. ABIL GLOBAL: Belgian Corporate Immigration Update** - Among other things, a social security agreement between Belgium and India took effect on September 1, 2009.

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Details...

1. DHS Proposes To Rescind Social Security No-Match Rule; SEVIS Data To Be Integrated Into E-Verify

On August 19, 2009, the Department of Homeland Security (DHS) proposed to rescind the amendments promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor from receipt of no-match letters. The U.S. District Court for the Northern District of California had enjoined implementation of the 2007 final rule on October 10, 2007. After further review, DHS said it plans to focus its enforcement efforts relating to the employment of unauthorized workers on increased compliance through improved verification, including participation in E-Verify, the ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

DHS noted that in fiscal year 2010, U.S. Citizenship and Immigration Services plans to improve the E-Verify system's ability to automatically verify international students and exchange visitors through the incorporation of ICE's Student and Exchange Visitors Information System (SEVIS) data into E-Verify. By incorporating SEVIS nonimmigrant student visa data into the automatic initial E-Verify check, the number of students and exchange visitors who receive initial mismatches should be reduced, DHS said. In 2010, ICE will launch a new version of SEVIS (SEVIS II), which will include employment eligibility information that E-Verify will be able to access electronically. Currently, the SEVIS database is checked manually by immigration status verifiers after an initial mismatch occurs.

DHS's proposed rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-19826.pdf.

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2. OMB Extends I-9 Approval to August 31, 2012

U.S. Citizenship and Immigration Services (USCIS) announced on August 27, 2009, that the Office of Management and Budget has extended its approval of Form I-9 (Employment Eligibility Verification Form) to August 31, 2012. Consequently, USCIS has amended the form to reflect a new revision date of August 7, 2009.

Employers may use the I-9 with a revision date of either August 7, 2009, or February 2, 2009. The revision dates are located on the bottom right-hand portion of the form.

The announcement is available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/update_I-9_extension0827.pdf.

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3. Seventh Circuit Affirms Time Limits on Labor Certifications

The U.S. Court of Appeals for the Seventh Circuit affirmed a Department of Labor amended regulation setting time limits on grants of labor certification. Specifically, the amended regulation states that an approved permanent labor certification granted on or after July 16, 2007, expires if not filed in support of an I-140 petition within 180 calendar days of the date the Department granted the certification, and that an approved permanent labor certification granted before July 16, 2007, expires if not filed in support of an I-140 petition within 180 calendar days of July 16, 2007.

Between March 2001 and May 2007, 14 unaffiliated Illinois businesses filed applications for labor certification on behalf of 15 potential employees. Thirteen were approved before the amended regulation took effect on July 16, 2007; the other two were approved after that date. After the Department of Homeland Security rejected eight of the workers' visa petitions because of expired labor certifications, the 14 businesses and 15 workers sued the Departments of Labor and Homeland Security. Among other things, the plaintiffs sought a judgment that the Department of Labor's promulgation of the amended regulation was beyond its authority or, alternatively, that retroactive application of the amended regulation was unlawful. The eight workers also sought a writ of mandamus against the Department of Homeland Security to compel the agency to process their visa petitions.

The Seventh Circuit ruled in favor of the government, noting among other things that when the Department of Labor amended its regulation to establish a 180-day time limit for previously approved labor certifications, the plaintiffs' right to the certifications' indefinite validity ended, and the plaintiffs did not possess any vested right that the amended regulation could impair.

The case is available at http://adnet-nyc.com/Article/durable.pdf.

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4. Employment-Based Fourth Preference Categories Unavailable for September

The Department of State's Visa Bulletin for September notes that heavy applicant demand for green card numbers in the employment fourth, and employment fourth "Certain Religious Worker," categories has resulted in their becoming "Unavailable" for September. This unavailable status took effect immediately in August because the annual limit for those categories was reached. Therefore, the Department said, no further requests for numbers in those categories can be processed during fiscal year 2009.

The employment fourth preference is expected to return to "Current" status in October, the first month of the new fiscal year. The employment fourth "Certain Religious Workers" category is scheduled to expire on September 30, 2009, and future availability will depend on legislative action.

The latest Visa bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4558.html.

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5. USCIS Clarifies Regulatory Requirements for Filing H-2B Petitions by Certain Associations and Their Members

U.S. Citizenship and Immigration Services (USCIS) issued a clarification on August 28, 2009, to associations and their members of certain regulatory requirements for filing petitions for H-2B classification on behalf of foreign workers. USCIS said it has noticed a particular type of filing error in many H-2B petitions filed by certain associations on behalf of their members. Rather than filing an individual petition with USCIS, some employers who are members of an association have sought H-2B non-agricultural workers via a "master" petition filed by their association.

USCIS noted that a "master" petition is a petition that:

- Is filed by an association (listing the association as petitioner) on behalf of several of its member-employers; and
- Includes multiple temporary labor certifications that have been issued by the Department of Labor (DOL) for each individual member-employer, rather than a single temporary labor certification certified for the particular association itself as an employer or "joint employer."

USCIS said it recognizes that the facts of each case may be different, but that association member-employers generally should file a petition for H-2B classification directly and separately (listing themselves as the petitioner) with USCIS, rather than through a "master" petition filed by an association (listing the association as the petitioner) on behalf of several of its members. Petitions filed by associations that fail to meet the petitioner requirements for H-2B classification will be denied, USCIS warned.

The clarification, which includes discussion and analysis of the reasons why H-2B petitions filed by associations on behalf of their employer members generally would not qualify for H-2B classification, is available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/August%202009/h2b-filed-by-associations.pdf.

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6. DHS Announces New Directives on Border Searches of Electronic Media

On August 27, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced new directives to enhance and clarify oversight of computer and other electronic media searches at U.S. ports of entry. The new directives address the circumstances under which U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) can conduct border searches of electronic media consistent with the Department's authority to search other sensitive non-electronic materials, such as briefcases, backpacks and notebooks, at U.S. borders.

DHS said the new directives will also allow the agency "to develop automated, comprehensive data collection and analytic tools to facilitate accurate, thorough reporting on electronic media searched at the border, the outcomes of those searches and the nature of the data searched."

Between October 1, 2008, and August 11, 2009, CBP encountered more than 221 million travelers at U.S. ports of entry. Approximately 1,000 laptop searches were performed during that time. Of those, 46 were "in-depth."

Among other things, related CBP guidance issued on August 20, 2009, notes:

> Officers may encounter materials that appear to be legal in nature, or an individual may assert that certain information is protected by attorney-client or attorney work product privilege. Legal materials are not necessarily exempt from a border search, but they may be subject to the following special handling procedures: If an Officer suspects that

the content of such a material may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the Officer must seek advice from the CBP Associate/Assistant Chief Counsel before conducting a search of the material, and this consultation shall be noted in appropriate CBP systems of records. CBP counsel will coordinate with the U.S. Attorney's Office as appropriate.

Other possibly sensitive information, such as medical records and work-related information carried by journalists, shall be handled in accordance with any applicable federal law and CBP policy.

Officers encountering business or commercial information in electronic devices shall treat such information as business confidential information and shall protect that information from unauthorized disclosure. Depending on the nature of the information presented, the Trade Secrets Act, the Privacy Act, and other laws, as well as CBP policies, may govern or restrict the handling of the information. Any questions regarding the handling of business or commercial information may be directed to the CBP Associate/Assistant Chief Counsel.

Information that is determined to be protected by law as privileged or sensitive will only be shared with federal agencies that have mechanisms in place to protect appropriately such information.

The CBP guidance also notes that an officer at the border may "detain" electronic devices or copies of information contained in them for "a reasonable period of time to perform a thorough border search," which may take place either on-site or at another location. The guidance states that unless extenuating circumstances exist, the detention of such devices ordinarily should not exceed five days and should be completed "as expeditiously as possible." Supervisory approval is required for detaining electronic devices, or copies of information contained in them, for continuation of a border search after an individual's departure. Port Director, Patrol Agent in Charge, or other equivalent level manager approval is required to extend any such detention beyond five days.

The DHS notice and CBP guidance are available at http://www.aila.org/content/default.aspx?docid=29899.

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7. International Educators Ask President To Restore Academic Travel To Cuba

NAFSA: Association of International Educators, along with a group of 17 organizations, sent a letter on July 22, 2009, to President Obama urging him to remove restrictions on academic travel to Cuba. The letter cites the benefits of academic exchanges and notes that opportunities for Americans to study abroad in Cuba have declined precipitously since the Bush administration imposed restrictions on academic travel to Cuba in 2004. NAFSA noted that 220 American college students studied in Cuba during the 2006-2007 academic year; three years earlier, 10 times as many students had done so. The letter also supports granting U.S. visas to Cubans coming to the U.S. for exchange purposes, and a policy favoring academic, cultural, religious, sports, and professional visits. The letter further urges Cuban authorities to grant exit visas for students and scholars accepted by U.S. academic institutions.

The letter is available at http://www.nafsa.org/_/File/_/POTUS_Cuba_July_09.pdf.

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8. Congress Examines Foreign Investment, Verification, Real ID Issues At Recent Hearings

The Senate and House recently held hearings on various employment-based immigration issues:

- The Senate Judiciary Committee held a hearing on July 22, 2009, "Promoting Job Creation and Foreign Investment in the United States: An Assessment of the EB-5 Regional Center Program." Sen. Patrick Leahy (D-Vt.) noted in his opening statement that the EB-5 Immigrant Investor Regional Center Program is set to expire at the end of September, and that making the program permanent "is a critical first step to its continuing success." Sen. Leahy noted that the program "has been responsible for the investment of hundreds of millions of dollars, and the creation of tens of thousands of jobs in American communities since 1993. The program has paved the way for ski resort expansion in Vermont, dairy operations in Iowa, energy development in Oklahoma and Texas, and the manufacture of hurricane-resistant housing in Alabama. These are just a few examples of projects financed by foreign investment through the Regional Center program, and all indications are that interest in the program is growing." Witnesses at the hearing included Michael Dougherty, Robert Kruszka, Alliance of Business Immigration Lawyers member Stephen

Yale-Loehr, William Stenger, and Ron Drinkard. Their testimony, and Sen. Leahy's statement, are available at http://judiciary.senate.gov/hearings/hearing.cfm?id=3998.

- The Senate Judiciary Committee held a hearing on July 20, 2009, "Time Change - Ensuring a Legal Workforce: What Changes Should Be Made To Our Current Employment Verification System?" Sen. Russ Feingold (D-Wis.) said in his opening statement that he is concerned about recent efforts to make E-Verify mandatory and to expand its use to federal contractors "without first fixing the current problems with the system." He noted that according to a 2006 report by the Social Security Administration's Inspector General, "the data set on which E-Verify relied contains errors in 17.8 million records, affecting 12.7 million U.S. citizens. If E-Verify becomes mandatory before these errors are fixed, millions of Americans could be misidentified as unauthorized to work." Witnesses at the hearing included Rep. Luis Gutierrez, Michael Aytes, James Ziglar, and Lynden Melmed. Their testimony, and Sen. Feingold's statement, are available at http://judiciary.senate.gov/hearings/hearing.cfm?id=3982.

- The Senate Committee on Homeland Security and Governmental Affairs held a hearing on July 15, 2009, "Identification Security: Reevaluating the Real ID Act." Witnesses at the hearing included Janet Napolitano, Jim Douglas, Stewart Baker, Leroy Baca, David Quam, and Ari Schwartz. Their testimony, and committee member statements, are available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=3d9a52cd-c442-4dee-9a1f-b02ed3b38000.

The House of Representatives' Committee on Oversight and Government Reform held a hearing on July 23, 2009, "E-Verify: Challenges and Opportunities." Witnesses at the hearing included Angelo Amador, David Rust, Gerri Ratliff, and Jena Baker McNeill. Their testimony is available at http://governmentmanagement.oversight.house.gov/story.asp?ID=2552.

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9. ABIL GLOBAL: Belgian Corporate Immigration Update

The Belgian regulations regarding corporate immigration have been updated on a regular basis since 2007.

The Belgian regulations are influenced by European Union (EU) legislation. Citizens from almost all EU/European Economic Area (EEA) Member States (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland,

France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), as well as some of their family members, can now work in Belgium without a work permit on the basis of their citizenship. However, this does not apply to Bulgaria and Romania, which joined the EU on January 1, 2007. Nationals of those two countries still need to obtain a work permit to work in Belgium until December 31, 2011. Until that time, Bulgarian and Romanian citizens can gain easier access to the Belgian labor market if they work in a "labor shortage profession."

The changes to corporate immigration legislation also reflect the need to meet business needs. For instance, if a foreign employee can be considered to be key personnel or, effective from May 29, 2009, executive-level personnel employed by Belgian headquarters of a multinational company or of a group of companies, he or she will not need a work permit, provided that he or she earns at least 59.460 EUR (amount for 2009) gross on a yearly basis. To qualify as Belgian headquarters, several conditions, linked to tax and corporate law, must be met. This exemption is not limited in time.

Social security is an important aspect of corporate immigration. Belgium has been quite active over the past few years in negotiating and entering into bilateral social security agreements with several countries. One of these countries is India. Belgium and India reached a bilateral agreement on social security on November 3, 2006. The "Agreement of Social Security between the Kingdom of Belgium and the Republic of India" was approved by the Act of February 12, 2009, and was published in the Belgian State Gazette on August 21, 2009. The agreement, which took effect on September 1, 2009, allows a Belgian or Indian employee (i) who is employed by a Belgian or Indian employer, (ii) who pays contributions under the Belgian or Indian legislation, and (iii) who is posted to India or Belgium, to remain subject to the Belgian or Indian legislation regarding social security for employees, provided that the foreseeable duration of the work does not exceed, in principle, 60 months.

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Recent News from ABIL Members

Stephen Yale-Loehr (bio: http://www.abil.com/lawyers/lawyers-loehr.cfm) was quoted in an article about EB-5 investors published August 13, 2009, in the *Christian Science Monitor*. The article notes that foreign entrepreneurs with at least $500,000 to invest in a designated "regional center" can get a green card in months rather than years. Mr. Yale-Loehr noted that "[f]or certain countries like China and India, we have long green card

backlogs in most categories - but not in the EB-5 category." The article is available at http://features.csmonitor.com/economyrebuild/2009/08/13/want-a-us-green-card-bring-cash/.

Charles Kuck (bio: http://www.abil.com/lawyers/lawyers-kuck.cfm) was quoted in the *New York Times* on August 14, 2009. The article is available at http://www.nytimes.com/2009/08/15/us/15utah.html?_r=1&emc=eta1. He noted that shadowy lawyers emerge whenever immigration reform legislation is considered. "Every state has a...man or a woman who has been arrested or indicted, or should be arrested or indicted, for engaging in fraudulent activity."

Mr. Kuck recently represented Youssef Megahed, an Egyptian student who had been acquitted in federal court of terrorism charges but held on immigration charges. On August 20, 2009, an immigration judge found that there was insufficient evidence that Mr. Megahed was engaged in terrorist activities. Mr. Megahed was freed pending the government's appeal. For more on this case, see http://www.nytimes.com/2009/08/22/us/22deport.html.

Angelo Paparelli (bio: http://www.abil.com/lawyers/lawyers-paparelli.cfm) recently co-authored an article, "Form(s) Over Substance - USCIS Plunges to New Low," published in the *New York Law Journal*. The article notes that USCIS officers, "enmeshed in a culture of 'no,' are more focused on detecting fraud than interpreting the law with commonsense notions of fairness and justice." The article refers to a blog posting by Mr. Kuck, "USCIS--H-1B Investigations Run Amok!" (Aug. 7, 2009), accessible at http://ailaleadership.blogspot.com/2009/08/uscis-h-1binvestigations-run-amok.html. The article is available at http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/Form(s)overSubstance.pdf.

Mr. Paparelli was quoted on August 28, 2009, by the Society for Human Resource Management. In "Drop in H-1B Visa Petitions: Blip or Lasting Trend?", Mr. Paparelli noted that U.S. Citizenship and Immigration Services has been "quite sensitive" to political pressures, and that its requests for evidence (RFEs) are becoming increasingly burdensome. For example, Mr. Paparelli noted, an RFE might demand to see how a contract specifies that services will be performed by a worker in a specialty occupation, but "[m]any contracts don't do that." He noted that once USCIS receives a copy of a contract, it may then be subject to a Freedom of Information Act request, which carries a risk of disclosure of confidential company information to competitors. For a link to the article, available to SHRM

members, see
http://www.shrm.org/LegalIssues/FederalResources/Pages/default.aspx.

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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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