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IMMIGRATION LAW UPDATE

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Special points of interest:

- September 2007 Visa Bulletin Published—a return to some availability: www.state.gov
- Social Security no-match letters take on new meaning.
- ICE keeps the pressure on.
- It may be time to renew your green card.

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Employment –Based July Visa Bulletin Filing Frenzy Ends

On August 17, 2007 the July Visa Bulletin employment-based adjustment of status filing frenzy came to an end. Thousands of employment-based applicants filed their applications on or before this date with US Citizenship & Immigration Services (USCIS). Since August 17th the next question from employment-based applicants and their employers has been: ‘do you have a receipt notice yet?’ A perfectly acceptable and reasonable question however, does not have a satisfactory response: “no.”

As expected, USCIS was flooded with immigrant visa applications (I-140), adjustment of status applications (I-485), employment authorization document requests (I-765) and advance parole requests (i-131) at their regional service centers. As a result, USCIS has announced that they have a “front log” of cases awaiting data entry. This means that employ-

ment-based applicants, their employers, family members and attorneys will have to wait for receipt notices to be issued.

USCIS issued an update on August 24, 2007 stating the approximate “received dates” that they were working on with a margin of error of plus “14 days.” For example, the Nebraska Service Center (NSC) states that it is issuing receipts for I-485 employment-based applications received on July 24, 2007 while the Texas Service Center (TSC) was working on June 30, 2007.

In the meantime, everyone involved will have to wait for the receipt notices to issue to have the peace of mind that the applications are accepted and properly in queue at their respective service center. Once the receipt notices issue, the next question will likely be in regard to adjudication of the applica-



USCIS has issues a statement regarding a new phenomena in light of the July Visa Bulletin employment-based filing frenzy: “front log.”

tions. This is a question best left to the next USCIS news release.

USCIS to Eliminate Residency Cards without Expiration Dates

US Citizenship & Immigration Services (USCIS) announced that they will move to eliminate the former legal permanent residency cards (“green card”) that did not contain an expiration date. USCIS has not issued this type of green card since August of 1989 and estimates that approximately 750,000 of the cards are still in use today.

USCIS will publish a rule in the Federal Register requiring those 750,000 permanent residents to apply for a new biometric card with an expiration date that is used today between October 22, 2007 and February 19, 2008.

The timing of this new rule is rather unfortunate for these green card holders as the filing fees to replace or extend a

green card (I-90) increased on July 30, to \$370.00 from \$260.00. It is estimated that the timing of this rule will generate therefore \$277.5 million dollars in fees for USCIS. Had this rule been implemented prior to July 30, 2007, this amount would have been \$86.25 million less revenue to USCIS.

ICE Final Rule on “No-Match” Letters to Commence

Immigration & Customs Enforcement’s (ICE) final rule regarding employers who receive “no-match” letters from the Social Security Administration for an employee, will become effective on September 14, 2007. The final rule describes a “safe harbor” procedure for the employer to follow in response to such a letter that would protect the employer from a finding by the Department of Homeland Security (DHS) that the employer had constructive knowledge that the employee referred to

in the letter was not authorized to work in the US.

The safe harbor procedures include instructions for the employer on how to attempt and resolve the no-match. These procedures include checking records for errors within 30 days of receiving the letter. If this does not resolve the issue, then the employer must “promptly” re-verify the employee’s identity and employment authorization through employee contact and/or dealing with the appropriate

agencies to resolve the discrepancy. The employer has 30 days to complete this task. If after 90 days of receipt of the no-match letter a discrepancy is not resolved the employer must take action to terminate the employee or face the risk that DHS may find that the employee had constructive knowledge that the alien was an unauthorized alien and in violation of the new regulation. Such a finding could place the employer at risk of receiving criminal or civil penalties.



The days of employers considering a potential no-match violation with SSA as “the cost of doing business” appear to be coming to an end.

ICE Enforcement Continues to Pressure Employers & Illegals

On August 9, 2007 Immigration & Customs Enforcement (ICE) issued a Fact Sheet regarding Worksite Enforcement that highlighted a number of work site raids and indictments against corporate executives for hiring and retaining illegal aliens. Some of the highlighted actions included: indictments against 10 workers and a work site raid at Fresh Del Monte Produce in Portland, OR netting 160 illegal workers; indictments against 28 workers and

Arrests of 136 workers in Butterfield, MO; as well as multiple other actions in Arkansas (El Nopal); Illinois (Quality Service Integrity, Inc.); Mississippi (Tarrasco Steel); Maryland (Jones Industrial Network); Massachusetts (Michael Bianco, Inc.); and others. Subsequent to this Fact Sheet being issued, ICE raided Koch Foods in Cincinnati, OH on August 28, 2007 and arrested 160 workers. ICE also raided Koch’s corporate office in Chi-

cago executing criminal search warrants.

In addition to work site enforcement, ICE removed 168 illegal aliens with criminal records on a special flight to Africa on August 15, 2007. It was the largest flight to Africa in two years and stopped in Liberia, Ghana and Nigeria. Finally, ICE arrested 60 foreign nationals with ties to street gangs as well as 68 other illegal aliens in San Diego, CA between August 3—17, 2007.

Immigration & Customs Enforcement continues to press employers and illegal aliens across the US

September 2007: EB-1& EB-2 Numbers Available

The September 2007 Visa Bulletin is less depressing than what we saw last month when the Department of State moved the EB-1, EB-2 and EB-3 visa numbers back from current to “unavailable.”

The Department of State moved the visa numbers ahead in most categories from unavailable, EB-1 and EB-2 moved to January 1, 2007. EB-3 moved to August 1, 2002. China, India and Mexico EB-1 moved

to January 1, 2007. China EB-2 moved to January 1, 2006, while China EB-3 remained “unavailable.” India EB-2 moved to April 1, 2004 while India EB-3 remained “unavailable.” Mexico EB-2 moved to January 1, 2007 while Mexico EB-3 remained “unavailable.”

On the Family-Sponsored side the news continued to be less than spectacular with the continued slow progression. The

entire world, as well as China and India had the same visa numbers with some progress: F-1 is October 1, 2001; F-2A is October 8, 2002; F-2B is July 1, 1998; and F-3 January 1, 2000. F-4 varied with 1997 & 1996 dates. Mexico and the Philippines lagged well behind the above dates. As always the visa bulletin can be located online: www.state.gov.



Unexpected availability of EB-1 and EB-2 employment-based immigrant visas was a welcome sight in the September 2007 Visa Bulletin.

Notes of Interest

Here are some noteworthy items that came in over the past 30 days...

- Temporary Protected Status (TPS) for nationals of El Salvador has been extended for 18 months until March 9, 2009. El Salvador was first designated for TPS in 2001 due to severe earthquakes. TPS has been extended four times since then.
- The Texas Attorney General has charged 3 individuals from the Kaweah Indian Nation for scheming to sell tribal membership to illegal aliens for \$400.00 with the promise that tribal membership would result in a Social Security card, protection from deportation and US Citizenship. Since the tribe was not federally recognized by the US Bureau of Indian Affairs and the sale of membership was a fraud, there was no benefit to the aliens involved.
- President Bush is still lobbying to expand the Visa Waiver Program (VWP) and pledged additional legislation to expand VWP into additional countries including other European Union countries.
- ICE is being sued for deporting a US Citizen to Mexico in May of 2007 after he completed his jail sentence. The man who was developmentally disabled has been returned to the United States.



BIA Rules on “Grandfathering Provisions”

The Board of Immigration Appeals (BIA) recently held in *Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267 (BIA August 15, 2007) that an alien seeking to use a previously filed visa petition to grandfather a currently pending visa petition and adjustment of status application must show that the original visa petition was “meritorious” and approvable as filed. The law defines approvable as filed to mean that “as of the date of filing for the

qualifying immigrant visa petition... or qualifying application for labor certification, the qualifying petition or application was properly filed, meritorious in fact and non-frivolous...” Grandfathering provisions allow aliens to use the law as it was written on the date of the original visa application and apply it to the subsequent visa petition.

The BIA agreed with the Immigration Judge that the initial

visa petition which was based upon a sham marriage to a US Citizen was not meritorious in fact and therefore not approvable as filed due to the facts presented at trial. Therefore, because the original visa petition was not meritorious, it could not be used to grandfather a subsequent immigrant visa petition that would allow the aliens to adjust status to that of legal permanent residents.

The original visa petition must be “meritorious” and approvable as filed to be used under the grandfathering provisions.

AAO Rules on “Equivalency” Regarding an EB-3 Beneficiary

The Administrative Appeals Office (AAO) approved an employment-based third preference immigrant visa petition involving equivalency for a skilled worker or a professional worker. The decision was issued on June 14, 2007 for an employment-based immigrant visa petition filed at the Nebraska Service Center in 2004.

The position was for a product manager/sales representative. The requirements for the posi-

tion were a US bachelor’s degree or related field or equivalent. The Nebraska Service Center denied the petition because they found that the applicant did not possess a US bachelor’s degree or a foreign equivalent. Moreover they determined that the applicant was not eligible to be considered a skilled worker either.

On appeal the AAO did not find that the applicant had the equivalent of a US bachelor’s

degree and therefore was a professional worker under INA §203(b)(3)(A)(ii), but did find that the beneficiary qualified for the position as a skilled worker under INA §203(b)(3)(A)(i). The AAO concluded that because the ETA 750 required “or equivalent” and not or equivalent “degree” it was permissible to find that the applicants experience equivalent qualified him for the position as a skilled worker.



The Administrative Appeals Office found that an applicant could be a skilled worker under the particular use of “equivalency” in the ETA 750.

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Links of Interest:

www.state.gov
www.uscis.gov
www.foreignlaborcert.doleta.gov
<http://pds.pbils.doleta.gov>

[http://
maiona.lawoffice.com](http://maiona.lawoffice.com)


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Attorney Maiona has been the keynote speaker at seminars for the Employment Management Association of New England and Sterling Education Services, as well as private recruiting firms on the topic of business immigration law. Attorney Maiona is a contributing author to the Massachusetts Continuing Legal Education's two volume treatise: *Immigration Practice Manual*. Attorney Maiona received his B.A. cum laude from Boston College and his J.D. from Suffolk University Law School. Attorney Maiona is a member of the American Immigration Lawyers Association and on the Executive Board for the New England Chapter of the American Immigration Lawyers Association. Attorney Maiona can be reached at 617-695-2220 x103 or by email at mjm2@gis.net.

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The Aftermath of the July Visa Bulletin

As discussed in the story on page one, the unprecedented 30 day filing period for employment-based immigrant visa applications came to an end on August 17th. In its aftermath is a block of questions which no one can answer accurately at this point.: "when will I receive my receipt notices?" or "when will my employment authorization or advance parole arrive?" or the ultimate "when will my green card finally be approved and arrive in my mail box?"

These are all excellent questions. What we can say at this point is that all of the above will happen, it is just going to take time. Receipt notices for cases filed at the mid to end of June and the first of July are now just arriving. With these notices come biometrics appointments. One would as-



sume that if US Citizenship & Immigration Services (USCIS) is requesting biometrics 6-8 weeks after filing that they may not make the 90 day window for employment authorization documents. Moreover, do they

We all will await what it next in the mail from USCIS as they move to recover from the July Visa Bulletin filing frenzy.

even have the resources, both human and machine, to produce this great number of documents? While I am certain every effort will be made to eliminate this "front log" and produce the employment and travel documents, USCIS will be pressed for the foreseeable future allocating human resources to these problem areas. This could cause other applicants requesting different benefits to suffer.

What is clear is that it may be some time before the July/August 2007 applicants for adjustment of status have their case approved and see a green card in the mail. It will take action from Congress to increase the yearly immigrant visa numbers to make the distant dream a present reality.