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# IMMIGRATION LAW UPDATE

Volume 2, Issue 1

January 1, 2007

## Special points of interest:

- Happy New Year to all of our clients and friends around the world!
- January 2007 Visa Bulletin Published: [www.state.gov](http://www.state.gov)
- Florence now a nonimmigrant visa issuing post.
- USCIS announced on December 11, 2006 that the H-2B visa cap had been reached for the first part of 2007 (start dates prior to April 1, 2007).

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## USCIS release new Naturalization Exam questions

In an effort to refocus the Naturalization Exam on the concepts of democracy and the civic responsibilities of US Citizenship, US Citizenship & Immigration Services (USCIS) has released 144 new questions and answers. As discussed in the December 2006 issue, the 144 pilot questions will be offered to Naturalization applicants in 10 jurisdictions (Albany, Boston, Charleston, Denver, El Paso, Kansas City, Miami, San Antonio, Tucson and Yakima) during the trial period.

Beginning in January of 2007, volunteers can choose to take the pilot exam in the above jurisdictions. Volunteers can also choose to take the current exam if they answer any of the pilot questions incorrectly. USCIS will evaluate the results of the pilot questions and revise the exam from 144 to 100 questions, implementing those pilot questions that were evaluated

as fair and successful during the trial period.

The new questions focus on concepts and can have more than one right answer in some cases. USCIS hopes to change the way Naturalization applicants study for the Naturalization Exam, so that applicants don't just memorize facts, but rather become familiar with the broader concepts of American democracy, as well as system of government, rule of law, rights and responsibilities, American History and geography. For example, one of the new questions asks: "Name one important idea found in the Declaration of Independence?" USCIS will accept any one of the following answers: people are born with natural rights; the power of government comes from the people; the people can change their government if it hurts their natural rights; and all people are created equal.



The new naturalization exam will be implemented nationwide in the Spring of 2008. The exam will feature new questions such as: "What is the tallest mountain in the United States?" and "Where is the Grand Canyon?"

All of the 144 new questions and answers can be accessed at [www.uscis.gov](http://www.uscis.gov) or from our office.

## 110th Congress Convened on Thursday

On January 4, 2007, the 110th Congress will convene for the first time. Democratic members now control both the House and Senate.

After performing the usual housekeeping issues such as selecting committee and subcommittee members and electing a Speaker, the Democratic

members of the House are expected to commence work on their "first 100 hours" agenda. A Comprehensive Immigration Reform (CIR) bill is expected to be presented in late January or February. CIR supporters hope that H-1B relief in the form of more cap space for additional H-1B visas, as well as the addition of EB visa numbers and

family-based visa numbers to reduce the current backlog which is causing immense pain for everyone involved. Several bills which were introduced during the last legislative session would help alleviate the current immigrant visa back log. It is believed that CIR would incorporate the beneficial measures written into these bills.

## ICE continues worksite raids and enforcement across the country

"Operation Wagon Train" moved into six states on December 12, 2006, as Immigration & Customs Enforcement ("ICE") agents raided six Swift & Company meatpacking plants located in Greeley, Colorado; Green Island, Nebraska; Cactus, Texas; Hyrum, Utah; Marshalltown, Iowa; and Worthington, Minnesota. The raids resulted in 1,282 undocumented immigrant workers being arrested by ICE and placed into removal/deportation proceedings. Swift & Company is

the country's third largest processor of fresh pork and beef.

The Department of Homeland Security (DHS) took the opportunity to discuss their achievements in enforcement for Fiscal Year 2006. Secretary Michael Chertoff noted that DHS has set a new record in 2006 for worksite enforcement having charged 716 individuals for criminal violations of immigration laws. These charges are the result of the overall strategy of worksite enforcement by ICE and

DHS.

A note of interest to employers is that Swift was sued by the Justice Department's Special Counsel for Unfair Immigration-Related Employment Practices in 2000 for document-based discrimination against job applicants whom they believed were foreign. Swift settled the claim for \$200,000. This story shows the problem employers face in trying to determine eligibility to work and not discriminate against job applicants.



**ICE raids at Swift & Company resulted in the arrest of 1,282 undocumented immigrants in six states.**

## Supreme Court issues ruling in drug possession case

On December 5, 2006 the Supreme Court ruled that a drug possession conviction that qualifies as a state felony, but does not qualify as a felony under federal law, is not an aggravated felony as defined under the Immigration & Nationality Act (INA) §101 (a)(43)(B).

The Supreme Court had granted certiorari to resolve conflict in the US courts of appeals about conduct that is treated as a felony by the

state but treated as a misdemeanor under the federal Controlled Substances Act (CSA).

Subsequent to this decision by the Supreme Court, several pending cases were remanded to the appeals courts for further consideration in light of the court's decisions. Convictions for state felonies which were found to be aggravated felonies even though they were misdemeanors under the

CSA, were remanded in the 5th, 9th and 11th circuits.

This decision is important because it allows aliens in removal proceedings for these types of convictions to apply for certain forms of relief to remain in the United States for which they would not be eligible if found to be an aggravated felon under the INA.

***The Supreme Court ruled that a conviction for state felony that would not qualify as a felony under federal law is not an aggravated felony under the INA.***

## January Visa Bulletin: no good news for employment-based applicants

The January 2007 Visa Bulletin did little to ease the frustration of pending green card applicants. The Department of State failed to move the EB visa numbers ahead in most categories. While EB-1 and EB-2 thankfully remained current, EB-3 showed no progress and remained at August 1, 2002. EB-3 Other Works also remained at the previous bulletin date of October 1, 2001.

Meanwhile, China, India, Mex-

ico and the Philippines remained current in the EB-1 category but varied in EB-2 and EB-3. China EB-2 remained at April 22, 2005 and China EB-3 remained at August 1, 2002. India EB-2 remained at January 8, 2003 and moved slightly ahead to May 8, 2001 for India EB-3. Mexico EB-1 and EB-2 remained current.

As always, the visa bulletins can be found online at

[www.state.gov](http://www.state.gov).

You can also subscribe to automatic monthly emails at the Department of State website and the bulletin will be emailed to you when it is published. Generally, the visa bulletin is published in the middle of the month for the upcoming month.



**The Visa Bulletin disappointed many in January, as it made no significant progress.**

## USCIS issues memo clarifying periods of admission for H&L

On December 5, 2006, USCIS released a memo which gives significant guidance on periods of admission for H and L non-immigrants.

The memo essentially breaks down into three points: (1) it clarifies that "time spent as an H-4 and L-2 dependent does not count against the maximum allowable periods of stay available to principals in H-1B and L-1 status"; (2) it clarifies that "H-1B aliens who qualify under AC21 need not be in H-1B status when requesting an addi-

tional period of stay beyond the six year maximum; and (3) it clarifies "how to determine the maximum period of admission in H-1B status for a beneficiary who was in the United States in valid H-1B status for less than the six-year maximum period of admission, but who has since been outside the United States for more than one year."

Point (1) is very important in that if married, it allows each spouse the opportunity to obtain 6 years of H-1B eligibil-

ity. It also allows the spouses to "switch" after six years to obtain another six years of nonimmigrant status. H and L spouses who are facing expiration of their respective status should consider, if eligible, having the L-2 or H-4 spouse change to H-1B in order to extend their nonimmigrant status.



**L-2 and H-4 status does not count against the 6 year cap on H-1 eligibility.**

## USCIS proposes background check service

US Citizenship & Immigration Services (USCIS) announced on December 4, 2006 in the Federal Register a proposal to add a new system of records that will consolidate all background check requests and results on immigration applicants. This system of records will go online on January 3, 2007.

Currently, USCIS conducts three different background checks on applicants. The three checks are: (1) a Federal

Bureau of Investigations (FBI) fingerprint check; (2) an FBI name check; and (3) a Treasury Enforcement Communication System/Interagency Border Inspection System (TECS/IBIS) name check. The results of these checks are then analyzed to determine if the applicant is eligible for the benefit sought. Where necessary, USCIS will refer the applicant to law enforcement agencies such as the FBI or Immigration & Customs Enforcement (ICE) for further

investigation.

The purpose of the new centralized repository is to keep the results of all of the above checks on each applicant under one roof for easy distribution to field offices for adjudication of applicant petitions.

**The new system of records that will consolidate all background check requests and results on immigration applicants will go online on January 3, 2007.**

## DHS and DOS issue final rule on Western Hemisphere Travel Initiative

On November 24, 2006, the Federal Register published the Department of Homeland Security (DHS) and Department of State (DOS) joint notice of final rule of the Western Hemisphere Travel Initiative (WHTI).

The result is that as of January 23, 2007, all US Citizens and nonimmigrant aliens from Canada, Bermuda and Mexico must present a valid passport at the airport when departing or

entering the United States from the Western Hemisphere.

The WHTI does not yet include sea ports. Sea ports will be addressed by a separate publication in the future we are told.

US Citizens and nonimmigrants from Canada, Bermuda and Mexico should apply for passports from their countries as soon as possible so as to avoid travel issues after January 23,

2007. There likely will be a surge in passport requests within these countries and delays will surely occur. Please take this change into account when planning future travel within the countries noted.



**As of January 23, 2007, WHTI will require passports be presented to exit/enter the United States.**

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**Links of interest:**

[www.state.gov](http://www.state.gov)  
[www.uscis.gov](http://www.uscis.gov)  
<http://www.foreignlaborcert.doleta.gov/>  
<http://pds.pbls.doleta.gov/>  
<http://usembassy.state.gov/>  
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**M&M, P.C.**

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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 New England chapter of the American Immigration Lawyers Association. Attorney Maiona can be reached at 617-695-2220 or by email at [mjm2@gis.net](mailto:mjm2@gis.net).

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## DOL-Employment and Training Administration issues Round 9 FAQ sheet

On November 29, 2006 the Department of Labor's Employment and Training Administration (ETA) issued Round 9 of an ongoing series of "Frequently Asked Questions" (FAQ) about the PERM labor certification program. The ETA issues FAQ sheets from time to time with questions and answers about hot issues. The entire set of FAQ can be found at <http://www.foreignlaborcert.doleta.gov/>.

PERM FAQ Round 9 has three questions regarding employer withdrawal of a PERM application; one question regarding training for the position offered; one question regarding timelines and recruitment; and one question regarding forms of acceptable publications.



**The Employment & Training Administration issued Round 9 of PERM FAQ containing 6 questions and answers.**

One of the particularly disappointing FAQ comments is in regard to acceptable publica-

tions. ETA continues to insist that an employer may not use an electronic national professional trade journal rather than a print journal. As more and more specialized publications move to electronic publishing, it is disappointing that the ETA will not evolve with the times and allow this form of recruitment. Not only is it likely to reach more potentially qualified US workers, it also tends to be a more economic form of advertising which is appealing to employers.

The PERM FAQ issued by ETA are a great source of information and a valuable resource to answer many PERM related processing and procedure questions.