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# IMMIGRATION LAW UPDATE

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## Special points of interest:

- June 2007 Visa Bulletin Published—continued progress for EB-3: [www.state.gov](http://www.state.gov)
- White House & a bipartisan group of senators unveil "Grand Bargain" on CIR.
- Department of Labor looks to end labor certification substitution of beneficiary process.
- H-1B lottery ends.

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## Comprehensive Immigration Reform Debate Begins in the Senate

On May 18, 2007, a group of Republican and Democratic senators and the Bush administration came to an agreement on a Comprehensive Immigration Reform (CIR) bill. The discussion in the Senate on specifics of the bill began on May 21st. The opening discourse on the CIR bill has been contentious as both parties have voiced serious concerns over the wording of the CIR bill.

The Bush administration and a key core group of senators would like the CIR legislation to get through the Senate by May 25th. However, the cantankerous debate which broke out in the Senate and the hallways of the Capital on the 21st would seem to indicate that the CIR bill will still be on the floor of the Senate after the Memorial Day recess and perhaps even longer.

Key components of the CIR

legislation which likely hold up this legislation include: elimination of four of the current family preference categories (1, 2B, 3, and 4); overhaul of the current employment-based immigration system and replace it with a "merit-based" point system; maintenance of annual green card numbers at their current levels, guaranteeing continued systemic dysfunction from burgeoning backlogs; and preclusion of a meaningful path to permanent residence for new temporary workers.

The group of sponsoring senators, including Senate Majority Leader Harry Reid (D—NV) won a key procedural vote on Monday, May 21st that allowed the opening of "official" debate on the senate floor of the CIR bill. This vote had already been postponed twice to date, as it was to be held on May 14th and May 16th. Now the bill is on



The senate began a contentious debate about immigration on May 21st after the White House and a bipartisan group of senators unveiled a CIR bill.

the Senate floor and open to debate. There should be some changes to this bill before it is complete.

## H-1B Saga Continues: Almost 100,000 Applications Returned to Employers

The H-1B lottery is almost complete. US Citizenship & Immigration Services (USCIS) received approximately 150,000 H-1B applications for approximately 65,000 H-1B visas. USCIS began receiving applications for the FY 2008 H-1B visas on April 2, 2007 and by midnight April 3, 2007 they had calculated that there were enough

applications received to fill the annual quota. USCIS then conducted a lottery after taking in all of the cases and assigning them a number. USCIS randomly drew from the entire load of April 2nd and April 3rd submissions to fill out the quota. Once the quota was filled USCIS conducted a secondary lottery to retain an additional

unspecified number of applications as a pool to choose from should any of the original applications chosen fail to be accepted due to filing defects or eligibility defects. By the end of June the reserve pool should either be selected or returned to the applicant. USCIS should have all rejected files back to the applicants in a few weeks.

## Department of Labor Ends Practice of Substitution of Beneficiaries

The Department of Labor (DOL) issued a Final Rule in regard to new anti-fraud initiatives. DOL has included several major changes in the Final Rule. The Final Rule does the following: (1) prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications; (2) provides a 180-day validity period for approved labor certifications; (employers will have 180 calendar days within which to file an approved permanent labor certification in support of a

Form I-140 Immigrant Petition for Alien Worker (Form I-140 hereafter) with the Department of Homeland Security (DHS)); (3) prohibits the sale, barter or purchase of permanent labor certifications and applications; (4) requires employers to pay the costs of preparing, filing and obtaining certification (an employer's transfer to the alien beneficiary of the employer's costs incurred in the labor certification or application process is strictly prohibited; but the rule makes clear an alien may pay his or

her own legitimate costs in the permanent labor certification process, including attorneys' fees for representation); (5) reinforces existing law pertaining to the submission of fraudulent or false information and clarifies current DOL procedures for responding to incidents of possible fraud; and (5) establishes procedures for debarment from the permanent labor certification program.

The Final Rule goes into effect July 16, 2007.



The Department of Labor has amended their regulations to end the beneficiary substitution process on approved labor certifications.

## USCIS Responds to DOL Elimination of Substitution Process

In a response to the above Department of Labor (DOL) Final Rule, US Citizenship & Immigration Services (USCIS) announced on May 17, 2007 that as of May 18, 2007, USCIS would no longer accept Premium Processing applications for I-140 Immigrant Visa applications that request labor certification substitution., USCIS stated in a May 17, 2007 press release that they are terminating the Premium Processing service now because they feel

the DOL Final Rule will result in a deluge of applications that exceed the capacity of the Premium Processing Service.

As stated above, DOL has issued a Final Rule ending the process of alien substitution in approved labor certifications that are filed with USCIS with an I-140 immigrant visa application. This Final Rule will go into effect on July 16, 2007. The USCIS rejection of substitution Premium Processing

goes into effect as of May 18, 2007.

The Premium Processing Service currently provides adjudication of a petition or application within 15 calendar days of receipt at USCIS. This is an unfortunate reaction by USCIS to eliminate this useful option for employers and employees alike. It likely will have serious ramifications for employees hoping to extend an H-1B visa under AC21.

**As of May 18, 2007, USCIS will no longer accept Premium Processing requests for substitution based I-140 Immigrant Visa petitions.**

## June 2007 Visa Bulletin: EB-3 Moves Ahead Almost 2 Years!

The June 2007 Visa Bulletin provided good news as it continued the move forward that we saw last month. The Department of State moved the EB visa numbers ahead in most categories. More good news was that EB-1 and EB-2 remained current. Meanwhile EB-3 moved forward to June 1, 2005: an advance of 22 months from the May bulletin.

China, India, Mexico and the Philippines remained current in

EB-1 but varied in EB-2 and EB-3. China EB-2 moved forward 8 months to January 1, 2006 while China EB-3 moved forward 10 months to June 1, 2003. India EB-2 progressed 15 months to April 1, 2004 and India EB-3 progressed 2 years to June 1, 2003. Mexico and the Philippines remained current in EB-2. Mexico moved ahead 2 years to June 1, 2003 for EB-3 while the Philippines moved forward 22 months to June 1, 2005 for EB-3.

On the Family-Sponsored side the entire world, as well as China and India had the same visa numbers with some progress: F-1 is June 1, 2001; F-2A is April 22, 2002; F-2B is December 1, 1997; and F-3 May 15, 1999. F-4 varied with 1996 dates. Mexico and the Philippines lagged well behind the above dates. As always the visa bulletin can be located online: [www.state.gov](http://www.state.gov).

Department  
Of  
State



The Visa Bulletin made another surprising gain in the EB-3 category advancing twenty-two months from August 1, 2003 to June 1, 2005.

## Federal Court Update: Nonimmigrant Visa Extensions

The First Circuit of Appeals recently reminded all visa extension applicants to not take for granted that a nonimmigrant visa extension will be approved by US Citizenship & Immigration Services (USCIS).

In Royal Siam Corp. v. Chertoff, 2007 WL (1st Cir 2007) the US Court of Appeals for the First Circuit found that a USCIS denial of a petition for renewal of an H-1B visa as a restaurant manager was appropriate. The plaintiff's employee had obtained an H-1B visa as a

restaurant manager in 1999. The employee had the equivalent of a bachelor's degree in business administration. In 2002 when the visa was to expire, the plaintiff petitioned to USCIS to extend the employee's H-1B visa. USCIS denied the request for extension finding the position was not a "specialty occupation." The plaintiff appealed to the Administrative Appeals Office and then the US District Court without success.

USCIS argued that the approval

of the initial H-1B was clearly erroneous and that is why the extension was denied. The court agreed and found that a bachelor's degree is not necessary to be a restaurant manager. More importantly is the ultimate finding of the court: the court held that even though USCIS "by mistake or oversight approved a specialty occupation visa petition on one occasion does not create an automatic entitlement to the approval of a renewal petition." Royal Siam Corp. at 1083.



The US Court of Appeals issued a reminder that nonimmigrant visa extensions are not automatic.

## Department of Homeland Security Ends US-VISIT Exit Requirements

On May 4, 2007, the US Department of Homeland Security (DHS) announced the end of the US-VISIT (US Visitor and Immigrant Status Indicator Technology) biometric exit procedures which was operational at selected airports. US-VISIT had set up exit kiosks for international visitors to use prior to leaving the United States. While DHS states that the technology did work, they found that compliance was low. Therefore, DHS has stopped

the kiosk exit program as of May 6, 2007.

In order to address the low traveler compliance, DHS will now incorporate the exit procedures into the existing departure process. This will require the assistance of the airline industry and the shipping industry. Upon exiting the United States the traveler will now do what they did before US-VISIT, simply give the I-94 card to the airline or ship representative

when leaving the United States.

DHS has stated that they will publish a regulation in the future outlining its plans for implementing the exit system. For now, it will be back to the system of turning in the I-94 card prior to leaving the United States. While this old system does result in more traveler compliance, it also relies heavily on the airline or ship representative which leaves open the possibility of human error.

***"DHS has stopped the kiosk exit program as of May 6, 2007"***

## The Texas Two Step: Why has my file gone to Texas?

In the past 60 days the question on many lips has been: 'why has my adjustment of status (I-485) been transferred to Texas?' US Citizenship & Immigration Services (USCIS) has transferred a number of adjustment of status applications that were pending at the USCIS Vermont Service Center. Most of the adjustment of status applications were filed prior to the visa retrogression and therefore final approvals could not be granted due to the lack of

visa numbers.

Recently, the Vermont Service Center's Adjudications Manager stated that the files transferred to the Texas Service Center were files that were already adjudicated and approvable but for the lack of visa numbers or clearance on security checks. Texas was chosen simply because they had the space for storage we are told.

The question has then becomes

with the movement in the EB-3 category, will USCIS adjudicate the file immediately or do we have to tell them? USCIS has long maintained that they have a system to alert adjudications officers to files that become current. USCIS maintains that they can and will adjudicate all files that have been worked and are approvable but for a visa number. With the significant movement in the EB-3 category for June, we should have our answer in a few weeks.



Recently, USCIS has transferred a number of adjustment of status applications to the Texas Service Center while awaiting visa numbers to become available or security checks to clear.

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Links of Interest:

[www.state.gov](http://www.state.gov)  
[www.uscis.gov](http://www.uscis.gov)  
[www.foreignlaborcert.doleta.gov](http://www.foreignlaborcert.doleta.gov)  
<http://pds.pbls.doleta.gov>

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



**Matthew J. Maiona** practices immigration law at Maiona & Maiona, P.C. in Boston, where he is a partner and head of the immigration law department. Attorney Maiona represents clients nation-wide ranging from hospitals, information technology companies, the hotel/hospitality industry, construction, architectural firms, retail, engineering and insurance companies to individuals seeking visas to work and live in the United States. Attorney Maiona represents both employers and employees before the United States Citizenship & Immigration Services, United States Department of Labor, The Department of Homeland Security, The Department of State, U.S. Embassies and state labor agencies.

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 and has been elected 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](mailto:mjm2@gis.net).

**Sara K. Ward** practices immigration law at Maiona & Maiona, P.C. in Boston, where she is an associate in the immigration law department. Attorney Ward represents families and individuals worldwide with immigrant visa processing at US Consulates and legal permanent residency at USCIS offices across the United States. Attorney Ward is fluent in Spanish.

Attorney Ward received her B.A. from Assumption College and her J.D. from Suffolk University Law School. Attorney Ward is a member of the New England chapter of the American Immigration Lawyers Association. Attorney Ward can be reached at 617-695-2220 x105 or by email at [skw@gis.net](mailto:skw@gis.net).

## Attorney Maiona Elected to AILA New England Executive Board

On May 17, 2007, Matt Maiona was elected to the Executive Board for the New England Chapter of the American Immigration Lawyers Association (AILA).

AILA is the national association of over 10,000 attorneys and law professors who practice and teach immigration law. AILA Member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA Members also represent thousands of U.S. businesses and industries who sponsor highly skilled foreign workers seeking to enter the United States in a temporary or -- having proven the unavailability of U.S. workers -- permanent



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basis. AILA Members also represent foreign students, entertainers, athletes, and asylum

seekers, often on a pro bono basis.

Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides its Members with continuing legal education, information, professional services, and expertise through its 35 chapters and over 50 national committees. AILA is an Affiliated Organization of the American Bar Association and is represented in the ABA House of Delegates.

As an Executive Board member of the New England Chapter of AILA, Mr. Maiona will have the opportunity to represent the interests of the 600 plus AILA New England attorneys and their clients both locally and nationally.