

# IMMIGRATION UPDATE

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**This update discusses recent developments in immigration law from the U.S. Departments of Homeland Security, Labor, and State, and additional related matters.**

## Department of Homeland Security

### Updated FY 2010 H-1B Count

Congress sets annual numerical limitations (caps) on H-1B visas. The current annual cap on the H-1B category is 65,000. 6,800 visas are set aside for nationals from Chile and Singapore, leaving 58,200 visas for foreign nationals from other countries. An additional 20,000 H-1B visas are designated for foreign workers with a Master's or higher level degree from a U.S. academic institution.

As of December 10, 2009, approximately 62,500 H-1B cap-subject petitions had been received by the U.S. Citizenship and Immigration Services (USCIS). USCIS noted that it has approved sufficient H-1B petitions to meet the allotment for aliens with advanced degrees. Any H-1B petitions filed on behalf of an alien with an advanced degree therefore will be counted toward the general H-1B cap of 65,000. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limit, recognizing that some of these petitions may be denied, revoked, or withdrawn. Additional information may be found [here](#).

### USCIS to Temporarily Accept H-1B Petitions Without Certified Labor Condition Applications

Effective November 5, 2009, the USCIS began accepting H-1B petitions filed without Labor Condition Applications (LCAs) that have been certified by the Department of Labor (DOL). Such petitions will be accepted only temporarily, through March 4, 2010.

The USCIS is implementing this measure due to processing delays stemming from DOL's new "iCERT" system. In certain cases, DOL is taking beyond 7 calendar days to issue LCA certifications, causing delays in the H-1B filing process.

Employers wishing to file an H-1B petition without a certified LCA may do so only after at least 7 calendar days have passed since the LCA was filed with DOL. The H-1B petition must include a copy of DOL's e-mail acknowledging receipt of the LCA as evidence that the LCA was filed.

Once an H-1B petition has been filed without a certified LCA, the petitioning employer must wait to receive a request for evidence (RFE) before submitting the DOL-certified LCA to USCIS in



connection with the pending petition. Once an RFE is issued, employers will have 30 calendar days to respond with a copy of a DOL-certified LCA.

### **USCIS Announces Publication of New Notice of Entry of Appearance Forms for Attorneys or Accredited Representatives**

On October 1, 2009, USCIS released two forms that may be used to indicate that an attorney or accredited representative may appear on behalf of the petitioner/applicant:

- **Revised Form G-28, Notice of Entry of Appearance as Attorney or Representative.** This form is used to alert USCIS of the attorney or accredited representative to appear on behalf of the petitioner/applicant in connection with a case within the United States.
- **New Form G-28I, Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States.** This form is used to alert USCIS of an attorney to appear on behalf of the petitioner/applicant in connection with a case outside the United States.

Please note that attorneys filing a Form G-28I must be admitted to practice law in a country outside of the United States (presumably in the country in which the petition/application will be processed). Acceptance of the completed Form G-28I by DHS does not ensure that the attorney may represent the applicant/petitioner listed on the Form G-28I. Furthermore, the Form G-28I may not be filed for DHS matters within the United States.

As of October 30, 2009, USCIS is still accepting older versions of Form G-28 as USCIS continues to refine the new version of the form.

### **USCIS Revises Form I-601**

USCIS has revised Form I-601, Application for Waiver for Grounds of Inadmissibility (Revision Date 04/06/09 N). Applicants may now select from a list of grounds of inadmissibility on the form itself and mark all which apply to them in order to request a waiver. In addition, the revised form includes a section where applicants can describe, in their own words, why they believe they are inadmissible.

As of November 21, 2009, USCIS will accept only the revised Form I-601 (dated 04/06/09 N) and will reject all requests using previous editions of the form.

The revised Form I-601 and its filing instructions can be found at [www.uscis.gov](http://www.uscis.gov).

### **USCIS Clarifies Requirements for Agents Filing as Petitioners for O and P Visa**

On October 7, 2009, the USCIS issued guidance to clarify the circumstances under which an agent may file O and P visa petitions on behalf of multiple employers. O visas are available to non-immigrants with extraordinary ability in the sciences, arts, education, business, athletics, or in the motion picture and television field. P visas are available to internationally recognized

athletes and members of internationally recognized entertainment groups. O and P visa petitions may be submitted only by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. If the nonimmigrant intends to work concurrently for more than one employer within the same time period, the USCIS regulations permit an agent to file on behalf of multiple employers. The USCIS clarified, however, that if the petitioner is not regularly in the business of being an agent, then each employer must file a separate petition. An employer may not file on behalf of other employers unless the petitioning employer can establish that it is in the business of being an agent, and that the other employers are its clients.

### **USCIS Q&A on Pending Employment-Based I-485 Inventory**

USCIS has updated its website to include a new question-and-answer (Q&A) section that discusses the agency's inventory of pending employment-based adjustment of status applications (Form I-485). The Q&A provides information on why the wait for employment-based green cards is so long and includes six reports that provide applicants with additional information about the number of pending employment-based green card applications. Specifically, USCIS has posted the following reports on its website:

- Pending Employment-Based Form I-485 Report: This report provides the number of pending adjustment of status applications in each preference category with priority dates in a given month and year.
- All Other Chargeability Report: This report shows how many applicants from countries other than China, India, Mexico, and the Philippines have priority dates in a given month and year. The report is separated into different charts for each preference classification.
- Reports for China, India, Mexico, and the Philippines: Because of the higher demand for visas from China, India, Mexico, and the Philippines, USCIS has formulated separate reports for each of these countries. Each country report, again organized by preference classification, shows how many applicants from each country have priority dates in a given month and year.

### **DHS Publishes Formal Rescission of No-Match Rule**

On October 7, 2009, the U.S. Department of Homeland Security (DHS) published a final rule to formally rescind the agency's "no-match" regulation. The no-match regulation was issued on August 15, 2007 and described an employer's legal obligations following receipt of a letter from the Social Security Administration or a letter from DHS indicating that an employee's work authorization documents did not match government database records. The 2007 final rule also established procedures that employers could follow to acquire a safe harbor from certain adverse consequences associated with receipt of a no-match letter. The rule was never implemented because it was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. After further review, DHS has decided to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in

E-Verify, ICE Mutual Agreement Between Government and Employers, and other programs. Nonetheless, employers may continue to receive no-match letters, and rescission of the final rule leaves employers without any specific guidance on how they should proceed in such situations.

#### **CBP Announces Changes to Its FAST Program**

U.S. Customs and Border Protection (CBP) has announced that members of its Free and Secure Trade (FAST) program will not be able to use their old FAST cards in passenger lanes effective January 5, 2010. The FAST program allows for expedited processing for commercial carriers crossing the U.S.-Canada or U.S.-Mexico borders. Program members who have not yet received new cards from CBP should go immediately to their local enrollment center to either pick up their new cards or apply to have a new card issued (a process which takes approximately 10 to 14 days). After January 5, 2010, CBP officers will allow a one-time entry into the U.S. to travelers with old FAST cards, but will then seize the card from the traveler and refer that traveler to an enrollment center.

## DEPARTMENT OF LABOR

#### **DOL Provides Notice of Centralization of PWD Request Processing**

The DOL has provided notice of the centralization of the processing of prevailing wage determination (PWD) requests used in the H-1B, H-1B1, H-1C, H-2B, E-3, and permanent labor certification programs. Pursuant to DOL labor certification regulations, effective on January 1, 2010, the processing of all PWD requests for the above-referenced labor certification programs will be centralized in the National Prevailing Wage and Helpdesk Center (NPWHC) of the Office of Foreign Labor Certification (OFLC) in Washington, D.C. State Workforce Agencies (SWAs), and the Chicago National Processing Center (Chicago NPC), where PWD requests are currently submitted, will complete any PWD requests received on or prior to December 31, 2009. The Chicago NPC or relevant SWA will maintain responsibility for processing PWD requests and review requests (including challenges and appeals, so long as the original PWD request was received on or prior to December 31, 2009. Requests received by the SWAs or the Chicago NPC from January 1, 2010, up to and including January 15, 2010, will be forwarded to the NPWHC and requests received thereafter will be returned to the requestor.

The DOL also provided notice that the January 1, 2010 effective date does not apply to PWD requests for a job opportunity in the Commonwealth of the Northern Mariana Islands. The DOL began processing such requests in the NPWHC on November 28, 2009.

The DOL notice further directs that all PWD requests be made using the Application for Prevailing Wage Determination, Form ETA-9141, and the employer documentation necessary pursuant to applicable regulations. Requests must be submitted to the NPWHC by U.S. mail or comparable physical delivery service at the following address: U.S. Department of Labor-ETA, National Prevailing Wage and Helpdesk Center, Attn.: PWD Request; 1341 G Street, NW., Suite

201, Washington, D.C. 20005-3142. Requests for OFLC review or PWD challenges must be mailed to the same address, but with attention drawn to "PWD Review" rather than "PWD Request." Requests for review by the Board of Alien Labor Certificate Appeals (BALCA) must similarly be mailed to the same address, but with attention drawn to "PWD Appeal."

### **PERM Frequently Asked Questions: Appeals**

On December 1, 2009, the DOL published answers to frequently asked questions (FAQs) regarding filing PERM appeals with the National Processing Center (NPC) and BALCA. The FAQs address how to properly navigate the DOL's three distinct appeals queues: (1) Requests for Reconsideration; (2) Requests for Review before BALCA; and (3) Requests for Reconsideration based on alleged DOL error. In addition, the FAQs explain what information to include in a reconsideration request, how to correct errors on denied applications, what to do if NPC upholds its decision, the interaction between NPC and BALCA appeals, how to claim Department error, and how to inquire about the status of an appeal. The FAQs document is available [here](#).

## DEPARTMENT OF STATE

### **January 2010 Visa Bulletin**

The Department of State (DOS) has released its Visa Bulletin outlining the availability of immigrant visa numbers for January 2010. For employment-based immigrant visa petitions, visa numbers remain available for all nationalities in the first-preference category.

The current priority dates for Indian nationals and Chinese nationals in the second-preference category are January 22, 2005 and May 1, 2005, respectively. Visa numbers remain current and available for all other nationalities in the second-preference category.

Visa numbers are available in the third-preference category as follows:

<u>Nationality</u>	<u>Priority Date</u>
China	August 1, 2002
India	June 22, 2001
Mexico	July 1, 2002
Philippines	August 1, 2002
All Others	August 1, 2002

Numbers are available for all nationalities in the fourth-preference, Certain Religious Workers, fifth-preference, Targeted Employment Areas/Regional Centers, and 5th Pilot Programs categories.

The [January 2010 bulletin](#) also provides detailed explanation of the numerical control system and priority date projections, including what causes the establishment of cut-off dates and how the per-country limit is calculated. In addition, the bulletin provides – based on current indications of demand – the following projections of the priority dates which will be reached by the end of fiscal year 2010 for employment-based immigrant visa petitions:

Second Preference Category

China: July through October 2005

India: February through early March 2005

Note that pursuant to INA Section 202(a)(5), if total demand is insufficient to use all available numbers in the second preference category, the State Department predicts that it will reach October through December 2005 priority dates for China and India.

Third Preference Category

Worldwide: April through August 2005

China: June through September 2003

India: January through February 2002

Mexico: January through June 2004

Philippines: April through August 2005

The State Department emphasizes in the bulletin that the above date ranges are estimates only and are subject to fluctuation based on demand.

**About the Immigration Update**

Hogan & Hartson regularly publishes the Immigration Update to track recent developments in various executive agencies, as well as new legislative matters. To have this publication sent to additional colleagues or for more information on any of the topics discussed, please contact one of the following authors.

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