

Immigration Inbox: Immigration News You Can Use

Headlines

1. **Outlook on Immigrant Visa Availability Grim for India, China Employment-Based Categories**– The July cut-off date for the India and China EB-2 categories is January 1, 2010; both could become unavailable in August or September and remain unavailable indefinitely.
2. **E-Verify Federal Contractor Rule Delayed Until September 8, 2009**– The effective date to require federal contractors to use the E-Verify system to confirm the work authorization of new hires has been delayed again.
3. **USCIS Resumes Premium Processing for Most Employment-Based I-140 Immigrant Petitions**– Effective June 29, 2009, USCIS will again accept Premium Processing requests for immigrant petitions in certain categories.
4. **USCIS Ombudsman Reports on Denials of Adjustment of Status Applications Following a Change of Employment**– The USCIS Ombudsman has received inquiries stating that the agency is not issuing Notices of Intent to Deny following a change of jobs, as required.
5. **Court Orders USCIS To Accept Concurrently Filed Religious Worker, Adjustment Applications**– The court ordered USCIS to begin accepting concurrently filed special immigrant religious worker petitions and adjustment of status applications, along with related employment authorization applications.
6. **DHS Proposes To Expand E-Verify Monitoring and Compliance Efforts**– USCIS Verification Division has created a Monitoring and Compliance (M&C) Branch.
7. **SEVP Posts New Information on Upcoming SEVIS II**– The Student-Exchange Visitor Program (SEVP) of U.S. Customs & Immigration Enforcement has announced that it is moving to a second-generation database to track students (F-1 and M-1) and exchange visitors (J-1). SEVP will retire the original SEVIS (Student-Exchange Visitor Information System) when it deploys SEVIS II. The new system will involve data entry by the F-1, M-1 and J-1 visa holders directly rather than through universities and schools.
8. **DOS Proposes Electronic Submission of SEVIS Annual Reports**– Annual reports from designated program sponsors assist the U.S. Department of State (DOS) in oversight and administration of the J-1 visa program.
9. **DHS Begins Exit Pilot Test of Fingerprint Collections at Two Airports**– The Department of Homeland Security (DHS) has begun collecting digital fingerprints from non-U.S. citizens leaving the United States from Hartsfield-Jackson Atlanta International Airport and Detroit Metropolitan Wayne County Airport.
10. **DHS Establishes Interim Relief for Widows and Widowers of U.S. Citizens**– DHS has granted deferred action for two years to surviving spouses of U.S. citizens, and their unmarried children under 21 years old, who reside in the United States and were married for less than two years before their spouse's death.
11. **ABIL Global: EU Adopts Blue Card for Highly Skilled Foreign Workers**– The Council of the European Union has created a fast-track procedure for third-country citizens in highly qualified employment.

Seyfarth Shaw Events and News

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1. Outlook on Immigrant Visa Availability Grim for India, China Employment-Based Categories

The July cut-off date for the India and China EB-2 categories is January 1, 2000. The Department of State (DOS) reports that these categories could become unavailable in August or September and remain unavailable indefinitely. The DOS said there is a backlog of at least 25,000 India EB-2 cases awaiting visa numbers. Charles Oppenheim of the DOS Visa Office reportedly stated that without legislative relief, the waiting time for Indian EB-2 applicants may be measured in years, even decades.

Meanwhile, the EB-1 category for India and China is not likely to stay current, although the EB-1 category worldwide is expected to remain current. EB-3 visa numbers worldwide and for India, China, and Mexico are expected to remain unavailable for at least the remainder of this fiscal year. The EB-3 category for India could remain unavailable indefinitely.

The third preference and “other workers” employment categories are unavailable in July.

The Visa Bulletin for July 2009 is available [here](#).

2. E-Verify Federal Contractor Rule Delayed Until September 8, 2009

The federal government has extended, for a fourth time, the effective date of the E-Verify requirement for federal government contractors. The regulation is now set to take effect on September 8, 2009. The effective date is being delayed to give the Obama administration additional time to review the regulation, which was originally scheduled to be implemented on January 15, 2009.

There is strong bipartisan support for electronic verification of new hires using federal systems, so employers not already using E-Verify should be prepared for its wide implementation in 2010.

For a history of the relevant regulation and its delays, see our alerts: [E-Verify Federal Contractor Rule Delayed Until June 30](#); [E-Verify Rule for Federal Contractors Suspended Until May 21, 2009](#); [E-Verify Rule for Federal Contractors On Hold Until February 20, 2009](#); [Federal Contractors Required to Use E-Verify Beginning in January 2009](#); and [Federal Contractors to be Required to Use E-Verify](#).

For more on this topic, see U.S. Citizenship and Immigration Services' (USCIS) response to the USCIS Ombudsman on E-Verify, available [here](#).

3. USCIS Resumes Premium Processing for Most Employment-Based I-140 Immigrant Petitions

After reviewing its I-140 backlog, USCIS has announced that it is again able to provide Premium Processing Service for I-140s (Immigrant Petition for Alien Worker).

The USCIS will accept Premium Processing requests for Form I-140 in the following categories:

- EB-1 Aliens with Extraordinary Ability;
- EB-1 Outstanding Professors and Researchers;
- EB-2 Members of Professions with Advanced Degrees or Exceptional Ability *not seeking a National Interest Waiver*;
- EB-3 Professionals;
- EB-3 Skilled Workers; and
- EB-3 Workers other than Skilled Workers and Professionals.



Premium Processing Service is still not available for the EB-1 Multinational Executives and Managers category and for individuals seeking a National Interest Waiver under the EB-2 Members of Professions with Advanced Degrees or Exceptional Ability category.

Under the Premium Processing Service, USCIS guarantees petitioners that, for a \$1,000 processing fee, it will issue at least a preliminary decision on a case—most commonly an approval or a request for additional evidence—within 15 calendar days of receipt. If the agency misses the deadline, the \$1,000 fee is refundable.

4. USCIS Ombudsman Reports on Denials of Adjustment of Status Applications Following a Change of Employment

USCIS Ombudsman has received inquiries stating that the agency is not issuing Notices of Intent to Deny following a change of jobs, as required by the American Competitiveness in the 21st Century Act (AC21) and USCIS policy guidance, but instead is immediately denying pending Form I-485 (Application to Register Permanent Residence or Adjust Status) applications.

If a foreign national is: (1) the beneficiary of an approved Form I-140 (Petition for Immigrant Worker); and (2) has a Form I-485 pending for 180 days or more, he or she is eligible to change to a same or similar position. If the underlying approved I-140 is withdrawn, and no evidence of a new qualifying offer of employment was submitted, then USCIS must issue a Notice of Intent to Deny the pending I-485.

However, the ombudsman noted that USCIS may deny

the I-485 in cases of portability (the ability to change jobs) before first issuing a Notice of Intent to Deny in certain limited circumstances. These include, for instance, where the beneficiary is ineligible for the benefits of the I-485 by statute, e.g., where the individual changes to a job bearing no similarity to the prior employer's offered post, or the I-140 immigrant visa petition is withdrawn before the adjustment of status application had been pending for at least 180 days.

If you think your case was erroneously denied, Seyfarth's immigration lawyers can help with this type of improper denial.

For more information, including links to USCIS Interoffice Memoranda further clarifying USCIS processing of these cases, click [here](#).



5. Court Orders USCIS to Accept Concurrently Filed Religious Worker, Adjustment Applications

In *Ruiz-Diaz v. U.S.*, the U.S. District Court for the Western District of Washington has found that the bar against concurrent filings on behalf of religious workers for adjustment of status is invalid and unenforceable. The court ordered USCIS to begin accepting concurrently filed special immigrant religious worker petitions and adjustment of status applications, along with related employment authorization applications.

Ruiz-Diaz potentially provides religious workers who have filed I-360 petitions with the ability to concurrently file adjustment of status applications. This would allow religious workers whose underlying R visa status is expiring (the R is valid for five years) to remain in the United States as adjustment of status applicants while the green card process is pending. At present, the I-360 approval process is lengthy due in part to the need to conduct a site investigation on each filing. Because religious workers are ineligible to file the adjustment application until the I-360 is approved, many religious workers run out of time in R visa status and must depart the United States—or risk deportation—before they become eligible to file the adjustment application.

In a related case, Seyfarth Shaw’s pro bono client, Monk Phra Bunphithak Jomthong, was featured in the June 9, 2009 edition of the *Wall Street Journal* in the article “Buddhist Monk Faces Worldly Green-Card Matters.” The article discussed how the U.S. government is threatening to deport Mr. Jomthong, who entered the United States four years ago on a religious visa and has since devoted himself to serving the Buddhist community in Southern California. According to the article, the U.S. government recently denied him permanent U.S. residency, or a green

card, on the grounds that he was employed without authorization after his temporary religious visa lapsed.

Mr. Jomthong, who is a citizen of Thailand, is now fighting in federal district court and immigration court for the right to remain in the country.

Angelo Paparelli, partner and immigration attorney at Seyfarth Shaw, who is representing Mr. Jomthong, noted that at issue is the meaning of “employment.” Angelo commented that “[t]he monk may work at his religious labors but he is not employed by the temple. He took an oath of poverty and doesn’t receive wages.” The article also discussed how the monk’s situation illustrates that “an increasingly backlogged and cautious immigration system can trip up some applicants striving to obey the law.” Angelo further noted how, in Mr. Jomthong’s case, the government isn’t alleging fraud; just illegal employment. Angelo asserted in the article that the monk can’t be considered an “employee” of Wat Buddhapanya Temple and therefore can’t be deported on the grounds of working illegally. Angelo added that Mr. Jomthong’s work is of a voluntary nature and he “doesn’t receive any wages or other remuneration.”



Most recently, the government denied Mr. Jomthong a green card again, maintaining in the decision that he had been “remunerated since [his] admission, albeit on a modest, non-salaried basis....” Since then, Angelo filed a lawsuit against the government asking that the judge reverse the green card denial and send the case back to the government with a legal finding that volunteer and unpaid religious services aren’t disqualifying forms of employment.

The *Ruiz-Diaz* case is available [here](#). The *Wall Street Journal Article* is available [here](#) (subscription required). Angelo Paparelli’s blog post about the Jomthong case is available [here](#).

6. DHS Proposes To Expand E-Verify Monitoring and Compliance Efforts

USCIS Verification Division has created a Monitoring and Compliance (M&C) Branch, which will seek to “identify potential cases of misuse, abuse, discrimination, breach of privacy, or fraudulent use of SAVE [Systematic Alien Verification for Entitlements] and E-Verify.”

The M&C Branch is developing detailed procedures for both monitoring verification transactions and performing compliance activities on defined non-compliant behaviors. For example, DHS notes, with respect to the misuse of Social Security numbers, M&C will identify when a single social security number is used multiple times for employment authorization verifications through E-Verify. DHS acknowledges that it would not be uncommon for a single individual to be verified several times through E-Verify because one person may hold multiple jobs or change jobs frequently, but it would be unusual for a single individual to hold 30 or 40 jobs simultaneously. M&C has developed procedures for identifying when a certain threshold number of verifications of a single

SSN would be likely to indicate misuse. If this threshold is met, M&C may contact or visit an employer to research the issue and determine if there is a system problem the Verification Division needs to correct; a user misunderstanding that requires additional training for the employer; or potentially fraudulent activity that may need to be reported to a law enforcement agency. Information also may be shared with other government agencies.

The management of compliance activities and storage of the supporting information will be handled by the Compliance Tracking and Management System (CTMS). Activities that will be monitored may include:

- Fraudulent use of Alien Numbers (A-Numbers) and SSNs by E-Verify users;
- Termination of an employee because he receives a tentative nonconfirmation (TNC);
- Failure of an employer to notify DHS, as required by law, when an employee who receives a final nonconfirmation (FNC) is not terminated;
- Verification of existing employees (as opposed to new hires);
- Verification of job applicants, rather than new employees (pre-screening);
- Selectively using E-Verify or SAVE for verifications based on foreign appearance, race/ethnicity, or citizenship status;
- Failure to post the notice informing employees of participation in E-Verify;
- Failure to use E-Verify, consistently or at all, once registered;
- Failure of a SAVE agency to initiate additional verification when necessary;
- Unauthorized searching and use of information by a SAVE agency user; and



- Fraudulent use of visas, permits, and other DHS documents by SAVE users.

DHS also notes that employers are required to post notification of their participation in E-Verify conspicuously for their employees. This notification provides the employees with information concerning their rights and responsibilities regarding E-Verify, including contact information. M&C compliance activities on this front most likely would occur based on a complaint or hotline report, or during a compliance visit investigating other areas of suspected noncompliance. M&C might also identify potential noncompliance from media reports or tips from law enforcement agencies.

The related proposed rule is available [here](#). The Privacy Act notice is available [here](#).

7. SEVP Posts New Information on Upcoming SEVIS II

The Student and Exchange Visitor Program (SEVP) has added a new section to its website on the development of the SEVIS (Student-Exchange Visitor Information System) II database. SEVIS II supports the application and admission of students and exchange visitors

under the F, M, and J classifications. SEVIS II maintains personal information about these foreign nationals and any accompanying dependents. In addition, SEVIS II maintains information on officials of approved schools and designated exchange visitor sponsors who host nonimmigrant students and exchange visitors. The new system will also require foreign students and exchange visitors to input current addresses and other required information.

SEVIS II will deploy in two phases: the first phase is expected to occur in October 2009, and the second, final phase will occur in March 2010. With the full deployment of SEVIS II, U.S. Immigration and Customs Enforcement says it will retire the original SEVIS system. All necessary data from the original system will be migrated to SEVIS II before the deployment of the first phase.

For more information, see [here](#).

8. DOS Proposes Electronic Submission of SEVIS Annual Reports

The Department of State (DOS) has proposed allowing electronic submission of SEVIS annual reports. Yearly



reports from designated program sponsors assist DOS in the oversight and administration of the J-1 visa program. The reports provide statistical data on the number of exchange participants an organization has sponsored by category. The reports also summarize the activities in which exchange visitors were engaged and evaluate program effectiveness. Program sponsors include government agencies, academic institutions, and private sector entities.

Annual reports currently are completed through SEVIS, printed and signed by a sponsoring official, and sent to DOS by mail or fax. DOS is working with the Department of Homeland Security to expand SEVIS functions and enable the collection of electronic signatures. Annual reports will be submitted to the Department electronically as soon as the mechanism for doing so is approved and in place, DOS said.

For more information, see [here](#).

9. DHS Begins Exit Pilot Test of Fingerprint Collections at Two Airports

The Department of Homeland Security (DHS) has begun collecting digital fingerprints from non-U.S. citizens departing the United States as part of a pilot program at Hartsfield-Jackson Atlanta International Airport and Detroit Metropolitan Wayne County Airport.

Non-U.S. citizens leaving from Detroit and Atlanta airports should expect to have their fingerprints collected before boarding their flights. U.S. Customs and Border Protection (CBP) officers will collect fingerprints at the boarding gate from non-U.S. citizens departing from Detroit; U.S. Transportation Security Administration (TSA) officers will

collect fingerprints at security checkpoints from non-U.S. citizens departing from Atlanta. The pilot tests are expected to continue through early July. US-VISIT plans to begin implementing new biometric exit procedures based on these pilots for non-U.S. citizens departing the U.S. by air within the next year.

Non-U.S. citizens departing the United States from all other ports of entry will continue to follow current exit procedures, which require travelers to return their paper Form I-94 (Arrival-Departure Record) or I-94W (for Visa Waiver Program travelers) to an airline or ship representative.

Since 2004, the U.S. Department of State (DOS) and U.S. Customs and Border Protection (CBP) have collected biometrics from most non-U.S. citizens between the ages of 14 and 79, with some exceptions, when they apply for visas or arrive at U.S. ports of entry. The US-VISIT program has simultaneously worked to create a congressionally mandated automated biometric exit capability, which these pilots are testing.

For more information, see [here](#).



10. DHS Establishes Interim Relief for Widows and Widowers of U.S. Citizens

The Department of Homeland Security (DHS) has granted deferred action for two years to widows and widowers of U.S. citizens, and their unmarried children under 21 years old, who reside in the United States and were married for less than two years before their spouse's death.

U.S. Citizenship and Immigration Services (USCIS) will suspend adjudication of visa petitions and adjustment applications filed for widow(er)s where the sole reason for reassessment of immigration status was the death of a U.S. citizen spouse before the second anniversary of the marriage. Additionally, U.S. Immigration and Customs Enforcement (ICE) will defer initiating or continuing removal proceedings, or executing final orders of removal against qualified widow(er)s and their eligible children.

USCIS will also consider favorably requests for humanitarian reinstatement where previously approved petitions for surviving spouses had been revoked because of the law. DHS said it will soon issue guidance on how to apply for this relief.

While the directive provides a short-term arrangement for widow(er)s of deceased U.S. citizens, the agency noted that legislation is required to amend the definition of "immediate relative" in the Immigration and Nationality Act to permit surviving spouses to remain indefinitely after the U.S. citizen spouse dies, enabling them to seek permanent resident status. The DHS notice is available [here](#).

For more information, please contact the Seyfarth attorney with whom you work, or any [Business Immigration](#) attorney on our website.

11. Global Immigration: EU Adopts Blue Card for Highly Skilled Foreign Workers

The Council of the European Union has created a fast-track procedure for issuing a special residence and work permit, the "EU Blue Card," for third-country citizens in highly qualified employment. Under the rules set by the directive, EU Blue Card holders will enjoy equal treatment with nationals of the member state issuing the Blue Card regarding:

- working conditions, including pay and dismissal;
- freedom of association;
- education, training, and recognition of qualifications;
- a number of provisions in national law regarding social security and pensions;
- access to goods and services, including procedures for obtaining housing,
- information and counseling services; and
- free access to the entire territory of the member state concerned within the limits provided for by national law.

Following its publication in the *Official Journal of the EU*, the member states will have two years to incorporate the new provisions into their domestic legislation. The announcement is available [here](#).



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