

# Immigration Inbox: News You Can Use

## U.S. Immigration:

1. *USCIS Begins Accepting Deferred Action Requests for DREAMers* - USCIS has released forms, instructions, and additional information relevant to the deferred action for childhood arrivals (DACA) process. Employers should be cautious about honoring requests for verification of employment.

2. *Rep. Smith Letter Denounces DACA, Requests Anti-Fraud Measures; NAFSA Applauds Obama Administration Policy; ICE Officers file Anti-DACA Suit* - Rep. Lamar Smith (R-Tex.) recommended various anti-fraud measures; NAFSA called the Obama administration's action a "major step forward"; USCIS postponed its July 9 engagement with no new date set.

3. *DOL Requests Comments on LCA for H-1B, H-1B1, and E-3 Applications* - The changes in the H-1B LCA would appear to make it difficult or at least more cumbersome for any employer sending H-1B workers off site.

4. *EB-5 Immigrant Investor Update: New Office; Stats, Summary Released* - USCIS has announced formation of a new EB-5 program office. Also, USCIS released the latest third-quarter statistics at its quarterly stakeholder meeting in July, and released a summary of questions and answers from the previous stakeholder meeting in May. USCIS also announced that it plans to release a new version of its draft EB-5 policy memo within a month.

5. *Senate Holds Hearing on Student Visa System* - Discussed at the hearing were findings from the GAO's June 2012 report assessing ICE's oversight of the Student and Exchange Visitor Program.

6. *U.S., Canada Issue Joint Statement on 'Beyond the Border' Initiative* - The action plan includes 32 initiatives and calls for enhancements to programs that help trusted businesses and travelers move efficiently across the border; introduces new measures to facilitate movement and trade; and invests in improvements to shared infrastructure and technology.

7. *Global Entry Program Expands to Ireland's Shannon and Dublin Airports* - Global Entry kiosks are now available in CBP preclearance facilities at Ireland's Shannon and Dublin airports.

## Seyfarth Immigration Compliance Center

1. *I-9s Do Not Spoil -- Toss Your Milk, Not Your Forms on August 31st* - Employers should continue to use the current I-9 employment eligibility verification form even after the August 31, 2012, OMB control number expiration date passes.

2. *DOL Reaches Agreement Resulting in Record Back Wage Amount for H-2A Temporary Agricultural Workers* - Peri & Sons, a Nevada-based onion grower, has agreed to pay a record total of \$2,338,700 in back wages to 1,365 workers, along with a civil money penalty of \$500,000, for violations under the H-2A program.

## Also in this issue:

[Seyfarth Immigration Events and News](#)

# U.S. Immigration

## 1. USCIS Begins Accepting Deferred Action Requests for DREAMers

U.S. Citizenship and Immigration Services (USCIS) has released forms, instructions, and additional information relevant to the deferred action for childhood arrivals (DACA) process. USCIS has begun accepting requests for consideration of deferred action for childhood arrivals.

As background, on June 15, 2012, Secretary of Homeland Security Janet Napolitano announced that certain young people who came to the United States as children and meet other key guidelines may be eligible, on a case-by-case basis, to receive deferred action. USCIS is finalizing a process by which potentially eligible individuals may request consideration of deferred action for childhood arrivals.

At a stakeholder meeting on August 14, USCIS Director Alejandro Mayorkas said that the agency will not share information about applicants and their families with U.S. Immigration and Customs Enforcement (ICE) for enforcement purposes.

Individuals requesting consideration of deferred action for childhood arrivals must submit Form I-821D, Consideration of Deferred Action for Childhood Arrivals, accessible [here](#).

While DACA may present an opportunity for many to gain employment authorization, it may place the employers of those same individuals in a difficult situation.

An employer who becomes aware that an employee has applied for DACA benefits may be deemed to have constructive knowledge that the employee lacks employment authorization, placing that employer at a major risk for fines and/or criminal prosecution if the employer fails to investigate, provide the individual an opportunity to reverify identity and employment eligibility or else terminate employment.

Additionally, employers with policies prohibiting dishonesty, willful misrepresentation, fraud, falsification of documents, and/or similar acts need to consider how those policies apply when an employee granted DACA benefits comes forward to provide his/her "real" information and documents.

Finally, because DACA applicants are likely to request proof of employment to submit as part of their DACA applications (as evidence of "continuous presence"), employers may worry that such letters will trigger an ICE inspection or investigation at the worksite. While information submitted in a DACA application will typically not be used in removal proceedings (deportation) against an applicant or his/her family members, it is not clear whether the evidence or information may be used against an employer.

Please contact your Seyfarth attorney if you have questions about these issues.

## 2. Rep. Smith Letter Denounces DACA, Requests Anti-Fraud Measures; NAFSA Applauds Obama Administration Policy; ICE Officers file Anti-DACA Suit

The Rep. Lamar Smith (R-Tex.), chairman of the House of Representatives' Committee on the Judiciary, sent a letter on July 3, 2012, to John Morton, Director, U.S. Immigration and Customs Enforcement, denouncing the new Obama administration plan to exercise its prosecutorial discretion to grant deferred action and work authorization to certain children of undocumented persons. Rep. Smith called it an "overreach of executive branch authority," a "magnet for fraud," and a "blatantly political" action that is an "unprecedented breach of faith with the American people and ignores the rule of law."

Rep. Smith recommended various anti-fraud measures, including matching and verifying school transcripts for applicants, requiring applicants to seek relief in person, and requiring applicants to demonstrate physical presence through documentation.

Rep. Smith expressed concerns that deferred action is already being applied, and asked a number of questions, including how many individuals had been granted deferred action and whether any evidentiary standard was in place. Rep. Smith said that the "lack of forethought" about processing and implementation before the policy was announced was a "dereliction of the duty the President vowed to uphold." "Unfortunately, this administration continues to place partisan politics and illegal immigrants ahead of the American people and the rule of law," he said. Rep. Smith asked for ongoing briefings to be kept informed about the policy as it is developed and implemented.

Not everyone was displeased by the new Obama administration policy, however. NAFSA: Association of International Educators applauded the action and called it a "major step forward." NAFSA said it has long urged making deferred action official government policy for undocumented students in the United States. "It will offer urgently needed reprieve, on a rigorous case-by-case basis, for individuals who currently find themselves, through no fault of their own, in an untenable and

frightening legal limbo,” NAFSA said, noting that undocumented students, brought to the United States by their parents as children, “today live under the constant threat of deportation and are unable to contribute productively to the only country they call home.”

NAFSA also called for Congress to pass the DREAM Act and confer the benefits in that act by law.

In addition, to further inject the courts into the DACA debate, ten ICE officer have sued the Homeland Security Department, challenging its deployment of DACA as beyond Executive Branch authority.

Rep. Smith’s letter to Director Morton is available [here](#).

NAFSA’s statement is available [here](#).

A copy of the ICE officers lawsuit against DHS challenging DACA is available [here](#).

### 3. DOL Requests Comments on LCA for H-1B, H-1B1, and E-3 Applications

The Department of Labor’s Employment and Training Administration has requested comments on the labor condition application (LCA) and instructions for H-1B, H-1B1, and E-3 nonimmigrants; ETA Forms 9035, 9035E, and 9035CP; and the Wage and Hour Division’s Nonimmigrant Worker Information Form WH-4 (extension with revisions). Among other things the changes in the H-1B LCA would appear to make it difficult or at least more cumbersome for any employer sending H-1B workers off site; clarify what employers are attesting to regarding prevailing wage determinations; and clarify what H-1B dependent employers are attesting to.

The notice, which includes information on the Department’s rationale for proposed changes and instructions on how to comment, was published on July 9, 2012, and is available [here](#).

### 4. EB-5 Immigrant Investor Update: New Office; Stats, Summary Released

USCIS has announced formation of a new EB-5 program office. Also, USCIS released the latest third-quarter statistics at its quarterly stakeholder meeting in July, and released a summary of questions and answers from the previous stakeholder meeting in May. USCIS also announced that it plans to release a new version of its draft EB-5 policy memo within a month. Highlights of the latest developments are included below.

**New EB-5 program office:** On July 18, 2012, USCIS Director Alejandro Mayorkas announced the creation of a new office to oversee administration of the EB-5 immigrant investor visa program. The office will be led by a new Chief of Immigrant Investor Programs. The position opening was announced the same day. At USCIS’ quarterly stakeholders meeting held on July 26, USCIS official Rob Silvers said the EB-5 chief will have a background in business.

Director Mayorkas noted that the EB-5 program “has spurred the creation of tens of thousands of new jobs and the injection of billions of dollars into the U.S. economy since Congress created the program in 1990.” Interest in the EB-5 program has grown exponentially in recent years, he noted, both from domestic project developers seeking capital and foreign investors who have the capital that can fuel economic growth.

In fiscal year (FY) 2012 to date, USCIS approved more than 3,100 Form I-526 (Immigrant Petition by Alien Entrepreneur) petitions. Director Mayorkas said this was more than triple the number approved in all of FY 2009. “Since 2009, we have quadrupled the size of the EB-5 adjudications team and brought on board eight expert economists dedicated to the EB-5 program to ensure that EB-5 cases are handled expeditiously and with appropriate expertise.”

By the end of July, a Review Board consisting of two Supervisory Immigration Services Officers and one economist “will review every pending application for regional center designation for which a denial has been recommended, with applicants receiving the opportunity to discuss their cases in-person before any final adverse decision is rendered,” Director Mayorkas said.

The announcement is available [here](#).

**Third-quarter statistics:** USCIS said it has approved over 3,000 I-526 (Immigrant Petition by Alien Entrepreneur) petitions so far this year, and that the number of I-829 (Petition by Entrepreneur to Remove Conditions) filings has decreased. USCIS expects to see more filed in the fourth quarter.

According to the latest EB-5 program statistics based on preliminary data for the third quarter of fiscal year (FY) 2012, USCIS received 4,156 I-526 (Immigrant Petition by Alien Entrepreneur) petitions and had approved 3,002 and denied 775 so far. This was a 79 percent approval rating, compared to an 81 percent approval rating for all of FY 2011 and an 89 percent approval rating for all of FY 2010. As of the third quarter of FY 2012, USCIS had received 546 I-829 (Petition by Entrepreneur to Remove Conditions) petitions and had approved 639 and denied 42 so far. This was a 94 percent approval rating, matching a 96 percent approval rating for all of FY 2011 and exceeding an 83 percent approval rating for FY 2010.

USCIS approved 209 regional centers as of the third quarter. The full list of RCs by state is available [here](#).

The next USCIS stakeholder engagement meeting is scheduled for October 23, 2012 (general EB-5 discussion). Details on the engagement meeting are available [here](#).

**Summary of May stakeholder meeting:** After USCIS's EB-5 stakeholders meeting held on May 1, 2012, attendees lamented that the agency provided little substantive information and did not answer many submitted questions. Over 250 people attended in person, and over 300 listened by phone. USCIS subsequently released a summary of the meeting that provided additional information.

The summary of the May stakeholder engagement meeting is available [here](#).

**EB-5 Article co-authored by Angelo Paparelli.** On August 22, 2012, The New York Law Journal published, "Dollars and Jobs for EB-5 Green Cards: A Challenging Route to U.S. Residency," co-authored by Seyfarth partner, Angelo Paparelli. The article, which analyzes recent EB-5 developments, discussed above, and warns prospective investors to look before leaping into the EB-5 program, is accessible [here](#).

## 5. Senate Holds Hearing on Student Visa System

The Senate's Subcommittee on Immigration, Refugees and Border Security held a hearing on July 24, 2012, on "Strengthening the Integrity of the Student Visa System by Preventing and Detecting Sham Educational Institutions." Witnesses included Rebecca Gambler, Director, Homeland Security and Justice, U.S. Government Accountability Office (GAO), and John Woods, Assistant Director for National Security Investigations, U.S. Immigration and Customs Enforcement (ICE).

Ms. Gambler discussed findings from the GAO's June 2012 report assessing ICE's oversight of the Student and Exchange Visitor Program (SEVP). The GAO reported that ICE does not have a process to identify and assess risks posed by schools in SEVP. Specifically, SEVP does not (1) evaluate program data on prior and suspected instances of school fraud and noncompliance, or (2) obtain and assess information from Counterterrorism and Criminal Exploitation Unit (CTCEU) and ICE field office school investigations and outreach events.

Moreover, the GAO found weaknesses in ICE's monitoring and oversight of SEVP-certified schools that contribute to security and fraud vulnerabilities. For example, the GAO noted that ICE has not consistently implemented internal control procedures for SEVP in the initial verification of evidence submitted in lieu of accreditation. In addition, ICE has not consistently followed the standard operating procedures that govern the communication and coordination process among SEVP, CTCEU, and ICE field offices.

The GAO recommended that ICE, among other things, identify and assess program risks, consistently implement procedures for ensuring schools' eligibility, and revise its standard operating procedure to specify which information to share among stakeholders during criminal investigations. Ms. Gambler reported that ICE concurred with all the recommendations the GAO made and "has actions planned or under way to address them."

Mr. Woods said that ICE has already made progress in implementing the GAO's recommendations. He noted that ICE's CTCEU is "the first national program dedicated to the enforcement of nonimmigrant visa violations." SEVP and CTCEU execute complementary missions to regulate foreign students and exchange visitors and to proactively develop investigations that bolster national security, he said.

Mr. Woods noted that each year, CTCEU "analyzes the records of hundreds of thousands of potential status violators using information from SEVIS and the United States Visitor and Immigrant Status Indicator Technology database, along with other information." The CTCEU resolves these records "by further identifying potential violations that would warrant field investigations, establishing compliance, or establishing departure dates from the United States. Since the creation of the CTCEU in 2003, analysts have resolved more than two million such records."

Ms. Gambler's testimony is available in "Student and Exchange Visitor Program: DHS Needs to Take Actions to Strengthen Monitoring of Schools" [here](#).

Mr. Woods' testimony is available [here](#).

The main hearing page, which includes a link to a webcast of the hearing, is available [here](#).

## 6. U.S., Canada Issue Joint Statement on 'Beyond the Border' Initiative

On June 28, 2012, the United States and Canada released a joint "Statement of Privacy Principles" as an "important milestone in the implementation of the Beyond the Border Action Plan," according to Secretary of Homeland Security Janet Napolitano. The Statement of Privacy Principles concerns the provision, receipt, and use of personal information exchanged between the two countries to "address shared threats to national security."

U.S. President Barak Obama and Canadian Prime Minister Harper announced the joint "Beyond the Border" declaration on February 4, 2011. The action plan includes 32 initiatives and calls for enhancements to programs that help trusted businesses and travelers move efficiently across the border; introduces new measures to facilitate movement and trade across the border while reducing the administrative burden for business; and invests in improvements to shared border infrastructure and technology. "By expediting lawful trade and commerce into and across our shared border, the United States and Canada seek to enhance our economic competitiveness, create jobs and support economic growth," a related announcement notes.

The announcement is available [here](#).

The Statement of Privacy Principles is available [here](#).

The joint declaration is available [here](#).

## 7. Global Entry Program Expands to Ireland's Shannon and Dublin Airports

U.S. Customs and Border Protection (CBP) announced on July 26, 2012, that Global Entry kiosks are now available in CBP preclearance facilities at Ireland's Shannon and Dublin airports. The Global Entry program allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States. Current Global Entry members can begin using these new kiosks immediately.

The Global Entry program is now available at 37 U.S. and preclearance airports. Over the last four years, CBP has enrolled more than 378,000 members in Global Entry, with more than 1.1 million travelers receiving Global Entry benefits. Travelers have used the kiosks more than 2.7 million times.

Travelers who use Global Entry kiosks on average experience reduced wait times of 70 percent over travelers going through traditional passport inspection, and more than 75 percent of travelers using Global Entry are processed in under five minutes, according to CBP.

The program is available to U.S. citizens, U.S. lawful permanent residents, and pre-approved Mexican nationals. In addition, citizens of the Netherlands may apply under a special reciprocal arrangement that links Global Entry with the Dutch Privium program. In a recently implemented arrangement, the Republic of Korea's Smart Entry Service program has been linked to Global Entry, allowing Korean citizens to participate in Global Entry. Canadian citizens and residents may participate in Global Entry through membership in the NEXUS program.

Applications for Global Entry must be submitted online using the CBP Global Online Enrollment System (GOES). A non-refundable fee of \$100 is also collected via the website for a five-year membership in Global Entry. CBP will review the applicant's information and conduct a background investigation. The applicant must complete an in-person interview at a CBP enrollment center, at which time fingerprints are collected.

GOES is available [here](#).

The announcement is available [here](#).

# Seyfarth Immigration Compliance Center

## 1. I-9s Do Not Spoil -- Toss Your Milk, Not Your Forms on August 31st

USCIS recently announced that employers should continue to use the current version of the Form I-9 (with a revision date in the lower right corner of "08/07/09") even past the OMB control number expiration date of 08/31/12 (found in the top right corner of the form).

This announcement indicates that the government has not yet finalized and/or is not yet prepared to release the revised form, a proposed version of which was released in March. A copy of the proposed form is available [here](#).

Our comment on the proposed form, submitted through the Alliance of Business Immigration Lawyers, is available [here](#).

## 2. DOL Reaches Agreement Resulting in Record Back Wage Amount for H-2A Temporary Agricultural Workers

Peri & Sons, a Nevada-based onion grower, has agreed to pay a record total of \$2,338,700 in back wages to 1,365 workers, along with a civil money penalty of \$500,000, for violations under the H-2A temporary agricultural worker program.

An investigation by the Department of Labor's Wage and Hour Division determined that workers employed by Peri & Sons involved in irrigation, as well as in harvesting, packing, and shipping onions sold in grocery stores nationwide, were not paid properly for work performed. All of the workers came to the United States from Mexico under the H-2A temporary agricultural worker visa program. In most cases, their earnings fell below the hourly wage required by the program, as well as below the federal minimum wage of \$7.25 per hour for a brief period of time. Investigators also found that workers were not paid for time spent in mandatory pesticide training or reimbursed for subsistence expenses while traveling to and from the United States. Additionally, their return transportation costs at the end of the contract period were not paid as required.

A fact sheet on H-2A requirements is available [here](#).

The press release announcing the agreement is available [here](#).

## Seyfarth Immigration Events and News Recent Postings and Advocacy:

### Action Initiative to Support Uniting American Families Act

The "Uniting American Families Act" (UAF) is a bill before Congress that would permit permanent partners of U.S. citizens or lawful permanent residents to obtain "green card" status. The UAF would, for the first time in our nation's history, extend this right to same-gender partners.

Immigration Equality [www.immigrationequality.org](http://www.immigrationequality.org) is a highly respected organization dedicated to achieving fairness and consistency in the application of U.S. immigration laws. Immigration Equality has created the "Business Coalition for the Uniting American Families Act" to engage global companies who are frustrated with the loss of talented LGBT employees due to immigration restrictions. The Coalition is a group of global businesses calling on Congress to pass the Uniting American Families Act (S. 424/H.R. 1024). If you feel that that current law adversely affects businesses like yours, you may contact Congress through this initiative. More information may be found [here](#).

This site includes a list of the diverse group of companies that have joined the Coalition, and are helping to educate Congress on why passage of the UAF makes good business sense. Earlier this year, Senate leaders released a framework for Comprehensive Immigration Reform, and the UAF was included in it, along with expanded opportunities for highly skilled workers. To sign on to the letter, or you would like further information, please contact Chris Fleming, Senior Manager of Corporate Partnerships, at Immigration Equality. Chris Fleming may be reached by phone at 212 714-2904 (ext. 34) or by email at [cfleming@immigrationequality.org](mailto:cfleming@immigrationequality.org).

## In addition, Angelo Paparelli has posted several new blog entries on his *Nation of Immigrants* public policy blog:

### *Immigration Brainstorming and DREAMstorming*

“None of us is as smart as all of us.”

Angelo describes how collectives of immigration lawyers are brainstorming together to help them represent DREAMers who wish to apply for the new Obama Administration program, Deferred Action on Childhood Arrivals (DACA).

### *Immigration Good Behavior -- a Riddle Riddled with Riddles*

“[A] riddle, wrapped in a mystery, inside an enigma”

Winston Churchill could well have been talking about the American immigration system rather than describing Russia in 1939. Angelo opines that if Congress ever decides to tackle comprehensive immigration reform, it must both resolve major issues but also strive to simplify what has become a Byzantine set of laws, rules and regulations.

### *Immigration's Mad Men (and Women)*

The hit TV series *Mad Men* – set in the late 50s and early 60s – leads Angelo to reminisce about these supposedly halcyon decades of the 20th Century. While the notion of our romanticized past is often mythical, Angelo argues that America has forgotten that our comparatively more welcoming immigration policies of past eras have allowed immigrants to grow our economy by pursuing the American dream.

By: *Angelo Paparelli, Gabriel Mozes and John Quill*

*Angelo Paparelli* is a Partner in Seyfarth's Downtown Los Angeles office. *Gabriel Mozes* is an associate in the Boston and Atlanta offices. *John Quill* is Senior Counsel in the Boston office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Angelo Paparelli at [apaparelli@seyfarth.com](mailto:apaparelli@seyfarth.com), Gabriel Mozes at [gmozes@seyfarth.com](mailto:gmozes@seyfarth.com), John Quill at [jquill@seyfarth.com](mailto:jquill@seyfarth.com) or any Seyfarth Business Immigration attorney on our [website](#).

[www.seyfarth.com](http://www.seyfarth.com)

The logo for Seyfarth Shaw LLP features the firm's name in a serif font. 'SEYFARTH' is on the top line, 'ATTORNEYS' is in a smaller font below it, and 'SHAW' is on the bottom line with 'LLP' in a smaller font to its right. A horizontal line is positioned between 'ATTORNEYS' and 'SHAW'. To the left of the text is a stylized graphic consisting of overlapping blue and green geometric shapes.

Attorney Advertising. This Newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) © 2012 Seyfarth Shaw LLP. All rights reserved.

**Breadth. Depth. Results.**