

Immigration Inbox: News You Can Use

U.S. Immigration:

- 1. FY 2013 H-1B Filing Season Rapidly Approaches - Beginning on April 2, 2012 (because April 1 is a Sunday), employers may file cap-subject H-1B petitions for fiscal year (FY) 2013, for employment starting on October 1, 2012, or later.*
- 2. March Visa Bulletin Continues Advances for India, China EB-2 Category – The category has advanced well over a year in just a few months.*
- 3. Passenger Pre-Screening Initiative Expands to Additional Airports – More than 336,000 passengers have been screened through TSA PreCheck™ lanes.*
- 4. House Judiciary Committee Approves Bill Adding Israel to Nonimmigrant Investor Visa Eligibility List – The bill would allow Israelis to apply for E-2 visas if similarly situated U.S. nationals are eligible for such visas in Israel.*
- 5. U.S. Embassy in London Discusses Visa Availability for Olympics, Expansion of Visa Reissuance Program for H-1, H-4 Applicants – Visa services will be limited during July and August for all nonimmigrant visa categories; the Embassy encourages applications during the spring and early summer.*
- 6. DOL Publishes Final Rule on Labor Certifications for H-2B Temporary Nonagricultural Employment – The final rule revises the process by which employers obtain a temporary labor certification to employ a nonimmigrant worker in H-2B status.*
- 7. USCIS Launches ‘Entrepreneurs in Residence’ Initiative at Silicon Valley Summit – A tactical team will identify ways to enhance USCIS policies, practices, and training across a range of existing nonimmigrant visa categories used by entrepreneurs.*
- 8. EB-5 Investor Lawsuit Could Threaten Construction of South Dakota Beef Facility – A new lawsuit could threaten construction of a Northern Beef Packers cattle processing facility in South Dakota.*
- 9. DS-230 Expires for Certain Applicants, Online Forms Launched – The online forms eventually will be implemented worldwide and required for all immigrant visa applications.*
- 10. USCIS Ombudsman Recommends Improving Adjudication Quality for Extraordinary Ability and Other Employment-Based Adjudications – Recent concerns have focused on the subjective nature of final merits determinations.*
- 11. Witnesses Discuss Controversial DHS OIG Report at House Hearing – The report, which indicates that adjudicators are pressured to approve applications quickly with insufficient scrutiny, was based on testimonials and not empirical data; some say the data tell a different story.*

Seyfarth Workforce Authorization Team (SWATeam)

1. *Over One Million Employers Use E-Verify; USCIS Announces Expansion of Self-Check* – Employers are now using E-Verify at more than one million worksites. Also, USCIS announced that Self Check is now available in all 50 states; Washington, DC; Guam; Puerto Rico; the U.S. Virgin Islands; and the Commonwealth of the Northern Mariana Islands.

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Seyfarth Immigration Events and News

U.S. Immigration

1. FY 2013 H-1B Filing Season Rapidly Approaches

Beginning on Monday, April 2, 2012 (because April 1 is a Sunday), employers may file cap-subject H-1B petitions for fiscal year (FY) 2013, for employment starting on October 1, 2012, or later.

On November 22, 2011, U.S. Citizenship and Immigration Services (USCIS) received a sufficient number of petitions to reach the statutory cap for FY 2012. USCIS also received more than 20,000 H-1B petitions on behalf of persons exempt from the cap under the advanced degree exemption as of October 19, 2011. With the improving economy, H-1B numbers could be exhausted earlier this year. Seyfarth Shaw recommends that employers file early and allow for processing of the labor condition application with the DOL. Contact your Seyfarth attorney now for guidance and help with the process.

2. March Visa Bulletin Continues Advances for India, China EB-2 Category

The March 2012 Visa Bulletin shows that the priority date for the India and China employment-based second preference (EB-2) categories is May 1, 2010, which is a four-month advance over the February cut-off date of January 1, 2010. In January, the date was January 1, 2009, so the category has advanced well over a year in just a few months. The Department of State's Visa Office explained:

- The China and India Employment Second preference cut-off date has been advanced at a rapid rate in recent months. As previously noted, this action was intended to generate significant levels of new filings for adjustment of status at U.S. Citizenship and Immigration Services (USCIS) offices. USCIS has reported that the rate of new filings is currently far below that which they had anticipated, prompting an even more aggressive movement of the cut-off date for January and possibly beyond. While this action greatly increases the potential for an eventual retrogression of the cut-off at some point during the year, it also provides the best opportunity to utilize all numbers available under the annual limit.

The March bulletin is available [here](#).

3. Passenger Pre-Screening Initiative Expands to Additional Airports

The Department of Homeland Security (DHS) announced in February 2012 the expansion of TSA PreCheck™, a passenger pre-screening initiative, to additional airports across the country following its launch at seven pilot locations.

More than 336,000 passengers have been screened through TSA PreCheck™ lanes. Under this initiative, the Transportation Security Administration (TSA) focuses its efforts on passengers the agency knows less about while providing expedited screening for travelers who volunteer information about themselves before flying.

TSA PreCheck™ is currently operating with American Airlines at airports in Dallas, Miami, Las Vegas, Minneapolis, and Los Angeles, and with Delta Air Lines at airports in Atlanta, Detroit, Las Vegas, and Minneapolis. US Airways, United Airlines, and Alaska Airlines are all opting in new passengers and will begin operations later this year. TSA will continue expanding TSA PreCheck™ to additional airlines and airports as they are ready.

Eligible participants include certain frequent flyers from participating airlines as well as members of U.S. Customs and Border Protection's Trusted Traveler programs (Global Entry, SENTRI, and NEXUS) who are U.S. citizens and fly on a participating airline. If TSA determines a passenger is eligible for expedited screening following the TSA PreCheck™ vetting process, information will be embedded in the barcode of the passenger's boarding pass. TSA will read the barcode at the security checkpoint and then may refer the passenger to a TSA PreCheck™ lane, where they will undergo expedited screening, which could mean no longer removing certain items, such as shoes, laptops, light outerwear, belts, and 311-compliant bags from carry-ons.

The announcement, which includes a list of airport locations where TSA Pre™ will be implemented in 2012, is available [here](#). Those interested in participating in the pilot may apply via Global Entry [here](#).

4. House Judiciary Committee Approves Bill Adding Israel to Nonimmigrant Investor Visa Eligibility List

On February 28, 2012, the U.S. House of Representatives' Committee on the Judiciary approved legislation that would add Israel to the E-2 nonimmigrant visa eligibility list of countries. The bill would allow Israelis to apply for E-2 visas if similarly situated U.S. nationals are eligible for such visas in Israel. Rep. Howard Berman (D-Cal.), said the legislation would bring Israeli business and innovations in "security and defense technologies, medicine, agriculture, high-tech, and clean energy" to the United States.

Last May, the Senate introduced a companion bill but has not yet moved it through the Senate Judiciary Committee.

5. U.S. Embassy in London Discusses Visa Availability for Olympics, Expansion of Visa Reissuance Program for H-1B, H-4 Applicants

The U.S. Embassy in London recently released a notification of limited nonimmigrant visa services during the Olympics and an expansion of the Visa Reissuance Program to include H-1B and H-4 visa applicants.

The embassy noted that visa services will be limited during July and August for all nonimmigrant visa categories. The embassy encourages applicants "to apply for visas during the spring and early summer as appointment availability cannot be guaranteed." Appointments are scheduled through the Operator Assisted Information Service.

Also, the embassy noted that travelers planning on entering the United States visa-free under the Visa Waiver Program by air or sea carrier who do not have travel authorization approval under the Electronic System for Travel Authorization (ESTA) are encouraged to register now for summer travel. If registration is denied, visas will be required.

The embassy also said that the Visa Reissuance Program has been expanded to include H-1 visa applicants and their derivatives who are renewing a visa of the same classification that has expired in the last 12 months. Other qualifying criteria apply and can be found [here](#). The Program continues to be available to O, P, J and C-1/D visa applicants. Applicants must be physically present in the United Kingdom to use the Visa Reissuance Program, and a consular officer reserves the right to request that an applicant appear in person for an interview after reviewing his or her application.

Callers within the United Kingdom should dial 09042-450-100. Calls to this line are charged at £1.23 per minute plus network extras. Callers from the United States should dial 1-866-382-3589. U.S. callers are charged a fixed rate of \$16 payable by credit card (Visa, MasterCard, or American Express only).

6. DOL Publishes Final Rule on Labor Certifications for H-2B Temporary Nonagricultural Employment

The Wage and Hour Division (WHD) of the Department of Labor's (DOL) Employment and Training Administration published a final rule effective April 23, 2012, revising the process by which employers obtain a temporary labor certification from the DOL for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. WHD chose to revert to a compliance-based rather than the current attestation-based certification process. The regulations are also intended to provide increased worker protections for both U.S. and foreign workers.

The final rule creates a national registry for all H-2B job postings and increases the recruitment period for U.S. workers. The rule also requires the rehiring of former employees when available. In addition, the rule extends H-2B program benefits, such as transportation costs and wages, to U.S. workers performing substantially the same work as H-2B workers.

The final rule was published in the February 21 edition of the Federal Register. The H-2B program is limited by law to a cap of 66,000 visas per year.

The final rule is available [here](#) and the announcement is available [here](#). Fact sheets and other information are available [here](#) and [here](#).

7. USCIS Launches 'Entrepreneurs in Residence' Initiative at Silicon Valley Summit

On February 22, 2012, U.S. Citizenship and Immigration Services (USCIS) Director Alejandro Mayorkas met with more than 150 Silicon Valley entrepreneurs, academics, and government officials at NASA Research Park in Moffett Field, California, to launch the Entrepreneurs in Residence (EIR) initiative and gather information.

USCIS said that the panel discussions and breakout sessions held at the summit would inform the work of a newly formed EIR tactical team, which will "work collaboratively over the next several months to ensure that immigration pathways for foreign entrepreneurs are clear and consistent, and better reflect today's business realities. The tactical team will identify ways to enhance USCIS policies, practices and training across a range of existing nonimmigrant visa categories used by entrepreneurs."

USCIS's announcement is available [here](#).

8. EB-5 Investor Lawsuit Could Threaten Construction of South Dakota Beef Facility

A new lawsuit could threaten construction of a Northern Beef Packers (NBP) cattle processing facility in South Dakota. NBP decided not to pay a \$50,000-per-investor commission (with potentially up to double that as a "success fee") for recruiting EB-5 investors to Henry Global Consulting Group because it did not bring in as many investors as it had agreed to recruit. According to reports, Henry Global then persuaded several investors to sue the regional center. The lawsuit alleges that investors did not receive crucial facts about the project and were not included in key decisions as agreed upon. Almost six years after developers purchased the site, the project has been delayed continually by lawsuits, liens, and tax problems.

The complaint is available [here](#).

9. DS-230 Expires for Certain Applicants, Online Forms Launched

A new DS-260 form has replaced the DS-230 for certain applicants. The DS-260, Online Immigrant Visa Application & Registration, and DS-261, Choice of Address and Agent, are electronic visa application forms completed and submitted online to the Department of State via the Internet through the Consular Electronic Applications Center. The forms may be partially completed, saved online to finish, and submitted later; or they can be completed and submitted in a single session.

The forms eventually will be implemented worldwide and required for all immigrant visa applications. Additional information, such as the current conditions and limitations on applicability of the forms, is available [here](#).

10. USCIS Ombudsman Recommends Improving Adjudication Quality for Extraordinary Ability and Other Employment-Based Adjudications

In a recent report, the U.S. Citizenship and Immigration Services (USCIS) Ombudsman noted that stakeholders have raised concerns about consistency in adjudications of extraordinary ability and other employment-based petitions. Recent concerns have focused on the subjective nature of final merits determinations. Stakeholders report that an I-140 policy memo that USCIS issued in December 2010 has not resulted in a clearer adjudicatory standard. The Ombudsman noted that USCIS has been challenged in identifying an objective standard and application for a final merits determination, and some Immigration

Services Officers (ISOs) report that the I-140 policy memo did little to change their analysis of I-140 petitions.

The Ombudsman made the following recommendations to USCIS to improve fairness, consistency, and transparency in adjudications of these petitions:

1. Conduct formal rulemaking to clarify the regulatory standard and, if desired, explicitly incorporate a final merits determination into the regulations;
2. In the interim, provide public guidance on the application of a final merits determination; and
3. In the interim, provide ISOs with additional guidance and training on the proper application of the “preponderance of the evidence” standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.

The Ombudsman gave the following reasons for these recommendations:

- Stakeholders are concerned that the current I-140 policy memo allows for too much subjectivity for adjudicative petitions.
- Stakeholders presented in an amicus curiae briefing to USCIS’s Administrative Appeals Office that the decision in *Kazarian v. USCIS*, 596 F. 3d 1115 (9th Cir. 2010), does not require USCIS to implement a two-part review as provided for in the I-140 memo, and that application of the I-140 policy memorandum has not resulted in a clearer adjudicatory standard.
- ISOs lack guidance that clearly demonstrates the nature and type of evidence that typically establishes whether an individual possesses “extraordinary ability,” may be classified as an “outstanding professor or researcher,” or has “exceptional ability.”
- USCIS has not clearly explained the objective factors that USCIS adjudicators should consider when conducting a final merits determination.

The report and recommendations are available [here](#). The December 2010 I-140 policy memo, which the Ombudsman noted rescinded and superseded all previously published USCIS policy guidance regarding EB-1 adjudications, is available [here](#).

11. Witnesses Discuss Controversial DHS OIG Report at House Hearing

The House of Representatives’ Subcommittee on Immigration held a hearing on February 15, 2012, “Safeguarding the Integrity of the Immigration Benefits Adjudication Process,” at which witnesses discussed a new report by the Department of Homeland Security’s (DHS) Office of Inspector General (OIG). Judiciary Committee Chairman Lamar Smith (R-Tex.) opened the hearing. Witnesses included Alejandro Mayorkas, Director, USCIS; Charles K. Edwards, Acting Inspector General, Department of Homeland Security (DHS); Mark Whetstone, President, National Citizenship and Immigration Services Council and American Federation of Government Employees, AFL-CIO; and Bo Cooper, Partner, Berry Appleman and Leiden LLP.

Chairman Smith noted that DHS’s Inspector General responded with a report in January 2012 based on a request from Sen. Chuck Grassley (R-Iowa) about whether “senior [USCIS] leaders are putting pressure on employees to approve more visa applications, even if the applications might be fraudulent or the applicant is ineligible.” The OIG report, Rep. Smith noted, states that “nearly 25 percent of immigration service officers who responded to the IG survey ‘have been pressured to approve questionable applications.’ ” He said, “This rubberstamp process leaves an ink trail of fraud and abuse.”

Inspector General’s report. In response to Sen. Grassley’s request, the Inspector General interviewed 147 managers and staff, received 256 responses to an online survey, and reviewed USCIS policies related to the effort to detect benefit fraud. The report was based on testimonials, not empirical data. The report recommended process improvements, such as instituting more training and collaboration to improve the fraud referral process; developing additional quality assurance or supervisory review procedures to strengthen identification of names and aliases of those seeking an immigration benefit; performing nationwide onsite outreach efforts to discuss the performance management system with Immigration Service Officers (ISOs); developing standards to permit more time for an ISO’s review of case files; revising policy on requests for evidence (RFEs) to clarify the role that the requests play in the adjudication process; and developing a policy to “establish limitations for [USCIS] managers and attorneys when they intervene in the adjudication of specific cases.” The report stated that “special treatment of complainants fosters a sense among ISOs that USCIS inappropriately grants benefits in certain cases.”

Chairman Smith's opening statement and witness testimony are available [here](#).

The U.S. Chamber of Commerce's letter is available [here](#).

The National Foundation for American Policy's February 2012 brief, from which Mr. Cooper and the Chamber drew data analyses, is available [here](#).

The OIG report, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers," includes USCIS's response to the OIG's recommendations. It is available [here](#).

Seyfarth Workforce Authorization Team (SWATeam)

1. Over One Million Employers Use E-Verify; USCIS Announces Expansion of Self-Check

U.S. Citizenship and Immigration Services (USCIS) recently announced that in December 2011, E-Verify reached a milestone: employers are now using E-Verify at more than one million worksites.

Also, USCIS announced on February 9, 2012, that Self Check, a free online service of E-Verify that allows workers to check their own employment eligibility status, is now available in all 50 states; Washington, DC; Guam; Puerto Rico; the U.S. Virgin Islands; and the Commonwealth of the Northern Mariana Islands. Launched in March 2011, Self Check was developed through a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA) to provide a tool for workers to check their own employment eligibility status and guidance on how to correct their DHS and SSA records. It is the first online E-Verify service offered directly to workers. A Spanish version was added in August 2011.

The E-Verify announcement is available [here](#). The Self Check announcement is available [here](#). Self Check is available [here](#). A "Self Check Information Toolkit" is available [here](#). E-Verify is available [here](#).

Seyfarth Immigration Events and News

Recent News from Seyfarth's Immigration Attorneys

Angelo Paparelli co-authored an article that was published in the February 22, 2012 edition of the New York Law Journal. The article, entitled, "No More Waiting on Legal Immigration," discusses President Obama's American Jobs Act, and offers suggestions on how to spur the U.S. economy by reforming the immigration administration system. The article can be found [here](#).

Recent and Upcoming Speaking Engagements

Angelo Paparelli spoke on March 3, 2012 in Irvine, CA, He addressed legislative and media strategies promoting comprehensive immigration reform to the National Council of Catholic Women, San Francisco Province, as part of a panel that included Reverend Alexia Salvatierra and Hilda Cruz, both faith-based immigrant advocates.

Angelo Paparelli will serve as Discussant at a March 16-17, 2012 Chapman University Public Sociology Conference entitled *Faceless Latino/a Immigrants: Pathways to Resistance*. Angelo's panel will discuss: "Contextualizing the Immigration Debate and Making Sense of the Backlash against the Undocumented." Topics and speakers for his panel include:

- *Media Portrayals of the Undocumented and the Impact of Labeling*. Jennifer Merolla, Claremont Graduate University and Chris Haynes, UC Riverside
- *Immigrants in a Globalized World and the Role of Foreign Policy*. Karina Macias, Chapman University

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- *The 'New' Civil Rights: Is the 'New' Birmingham the Same as the 'Old Birmingham'?* Kevin Johnson, UC Davis
- *Understanding the Plight of Unaccompanied Minors, the Detained Immigrant and the 'Justice' System They Encounter.* Lisa Ramirez, Immigration Policy Center

Information on registering for the conference is available [here](#).

The complete conference program is available [here](#).

Attorney Nicole Kersey will deliver a presentation titled, "*Electronic I-9 Solutions: Jackpot or Crackpot?*" at the National Association of Professional Background Screeners 2012 Annual Conference, to be held April 15-17, 2010 in Nashville, Tennessee.

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

Stop the Immigration Profiling. Angelo describes his epiphany as a high school student in Detroit, when he realized that despite his Italian-American heritage he is just as American as those around him. Unfortunately, our U.S. immigration system is still rife with discrimination based on country of birth and ethnicity.

Stumbling through Parallel Immigration Universes. Angelo compares American political ambivalence toward immigration to the parallel universes described in Japanese fiction writer Haruki Murakami's novels.

By: *Angelo Paparelli, John Quill and Elaine Walsh*

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