

Immigration Inbox: News You Can Use

U.S. Immigration:

- 1. USCIS Undercounts H-1B Usage* - The data show that the agency has approved approximately 45,000 too few overall H-1Bs between fiscal years 2008 and 2012.
- 2. November Visa Bulletin Shows Second Preference Employment-Based (EB) Category Improved* - The previously backlogged EB-2 has become current for all except persons born in India or China.
- 3. US Customs and Border Protection (CBP) Announces Delays in Processing I-94 Arrival/Departure Records* - CBP is experiencing delays in processing foreign nationals' travel information in the Form I-94 Arrival/Departure Record database.
- 4. U.S. Citizenship and Immigration Services (USCIS) Announces New Filing Option for Canadian TN Nonimmigrants, Reminds Employers of Canadian L-1 Options* - On October 1, USCIS began accepting the Form I-129, Petition for Nonimmigrant Worker, filed on behalf of Canadian citizens outside the United States who seek classification as TN (Trade NAFTA) nonimmigrants.
- 5. Department of Labor (DOL) Delays Effective Date of H-2B Wage Rule, Announces Electronic Filing for H-2A, H-2B Labor Cert Applications* - If a state benefit-granting agency rejects an unstamped Form I-20/DS-2019, applicants may make an appointment with USCIS online through InfoPass and take their I-20/DS-2019 to their local USCIS office to be stamped. This transitional step will end on November 21, 2012.
- 6. Congress Extends Four Immigration Programs for Three Years* - The extended programs include the EB-5 regional center program, the E-Verify program, the special immigrant religious worker program, and the Conrad State 30 J-1 visa waiver program for certain foreign doctors working in medically underserved areas.
- 7. Details Released on Diversity Visa (DV) -2014 Lottery Program; DV-2013 Entrants Should Keep Confirmation Numbers* - Online registration for the DV-2014 Program begins on October 2, 2012, at noon EDT, and concludes on November 3, 2012, at noon EDT. The Department of State also said it may select more DV-2013 entries on October 1, 2012, so DV-2013 entrants should keep their confirmation numbers even if they have not been selected yet.
- 8. Department of Homeland Security (DHS) Extends Haiti Temporary Protected Status (TPS)* - Secretary of Homeland Security Janet Napolitano has extended TPS for Haiti for an additional 18 months until July 22, 2014.

Seyfarth Workforce Authorization Team (SWATeam)

1. *Federal District Court Upholds 'Show Papers' Provision of Arizona Law* - Judge Susan Bolton said the law must take effect before it can be challenged, but she left the door open to potential future challenges.

2. *Office of Special Counsel (OSC) Offers Guidance to Employers of DACA Beneficiaries* - The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices confirmed that beneficiaries of the new Deferred Action for Childhood Arrivals (DACA) program will be treated no differently from other employees when it comes to completing the Form I-9.

3. *Office of Special Counsel (OSC) Addresses Social Security Card and Number Issues* - The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices reminded employers that the Social Security Number (SSN) field in Section 1 of the Form I-9 is optional for employees of non-E-Verify employers

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U.S. Immigration

1. USCIS Undercounts H-1B Usage

Reports have surfaced that U.S. Citizenship and Immigration Services (USCIS) has undercounted H-1B usage by almost 15 percent over the past five years. USCIS must approve 65,000 H-1B visas per year but the data show that the agency has approved approximately 45,000 too few overall between fiscal years 2008 and 2012. Sources attribute the discrepancy to inaccurate estimates of denial rates.

2. November Visa Bulletin Shows Second Preference Employment-Based (EB) Category Improved

The Department of State had expected that the worldwide EB-2 visa numbers for advanced degree holders and persons of exceptional ability would become current once the new fiscal year began on October 1, 2012. Instead, the EB-2 worldwide category saw an October cut off date of January 1, 2012. Instead, not until November will the EB-2 category show immigrant visa availability, except for those born in India and China. Similarly, the EB-2 category for persons born in India and China, which became unavailable in June, has not move forward significantly. China was at July 15, 2007 in October; it will move to September 15, 2007 in November. India advanced to September 1, 2004 in October and will remain there in November. Additional EB-2 movement is not expected for India and China during the first half of the new fiscal year.

The EB-3 quota for professionals and skilled workers worldwide is also backlogged. The EB-1, EB-4, and EB-5 categories remain current for October.

The November Visa Bulletin is available [here](#).

3. US Customs and Border Protection (CBP) Announces Delays in Processing I-94 Arrival/Departure Records

U.S. Customs and Border Protection (CBP) has announced that the agency is experiencing delays in processing foreign nationals' travel information in the Form I-94 Arrival/Departure Record database. CBP said this does not affect the majority of foreign travelers visiting for business or leisure and will not affect any visitor's record of departure. However, this may affect

the ability of foreign nationals to obtain certain benefits, such as social security numbers and drivers licenses, as many federal and state agencies verify Form I-94 information prior to issuing benefits to foreign nationals.

CBP is exploring how best to automate the I-94 process in order to allow for the electronic collection of arrival/departure information and streamline the arrival and inspection process for nonimmigrants. CBP is coordinating with other agency stakeholders and is considering rulemaking.

The announcement is available [here](#).

4. U.S. Citizenship and Immigration Services (USCIS) Announces New Filing Option for Canadian TN Nonimmigrants, Reminds Employers of Canadian L-1 Options

U.S. Citizenship and Immigration Services (USCIS) has begun accepting the Form I-129, Petition for Nonimmigrant Worker, filed on behalf of Canadian citizens outside the United States who seek classification as TN (Trade NAFTA) nonimmigrants.

With respect to the TN classification, until this change USCIS only accepted the I-129 in connection with a request to extend a TN nonimmigrant's stay or to change a nonimmigrant's status to TN. Canadian citizens continue to have the option of applying to CBP for TN classification in conjunction with an application for TN admission to the United States.

USCIS also issued a reminder that an employer has the option of filing an I-129 individual petition with USCIS on behalf of a Canadian L-1 nonimmigrant. A U.S. employer that has an approved L-1 blanket petition also has the option to file a Form I-129S, Nonimmigrant Petition Based on Blanket L Petition, along with supporting documentation, with the USCIS service center that approved the L-1 blanket petition, on behalf of a Canadian citizen (or any visa-exempt beneficiary) who is outside the United States. As before, Canadian citizens may apply for L-1 classification in conjunction with an application for L-1 admission to the United States by presenting the I-129 (individual petition) or I-129S (under an approved blanket petition) and supporting documentation to CBP.

The USCIS announcement, available [here](#), includes links to additional information.

5. Department of Labor (DOL) Delays Effective Date of H-2B Wage Rule, Announces Electronic Filing for H-2A, H-2B Labor Cert Applications

The U.S. Department of Labor (DOL), in anticipation of Congress's enactment of H.J. Res 117, which prohibits the Department of Labor from expending funds to implement the 2011 H-2B wage rule for the duration of that continuing resolution, the Department expects to publish a final rule extending the effective date of the 2011 wage rule to March 27, 2013. It has not yet been published in the Federal Register but is available [here](#).

Also, DOL announced the implementation of electronic filing for nonimmigrant temporary labor certification applications under the H-2A and H-2B visa programs through the iCERT Visa Portal System (iCERT System), available [here](#). Employers or their authorized representatives may submit H-2B applications electronically beginning on October 15, 2012, and H-2A applications beginning on December 10, 2012.

DOL will hold four webinar training sessions (two for filing in the H-2B program and two for filing in the H-2A program) to orient program users to electronic filing through the iCERT system. These sessions will be announced on the OFLC's Web site (<http://www.foreignlaborcert.doleta.gov/>) once dates are finalized. Employers or their authorized representatives choosing not to use this new filing option must continue to file their H-2A and H-2B applications with DOL using the traditional paper-based filing method.

The electronic filing notice is available [here](#).

6. Congress Extends Four Immigration Programs for Three Years

Congress has extended four immigration programs for three years, to September 30, 2015. The programs are the EB-5 regional center program, the E-Verify program, the special immigrant religious worker program, and the Conrad State 30 J-1 visa waiver program for certain foreign doctors working in medically underserved areas.

The Senate passed the extenders bill (S. 3245), as it was called, in early August. The House of Representatives passed the bill on September 13 by a vote of 412-3. The bill now goes to the President for signature.

Congress is unlikely to pass any other immigration bills before the November elections. According to one newspaper article, this session of Congress "is on track to be the least productive in modern history." Major immigration reform will likely not occur until 2013.

The text of S. 3245 is available [here](#). The newspaper article about Congress's lack of productivity is [here](#).

7. Details Released on Diversity Visa (DV) -2014 Lottery Program; DV-2013 Entrants Should Keep Confirmation Numbers

Online registration for the DV-2014 Program began on October 2, 2012, and concludes on Saturday, November 3, 2012, at noon EDT. Applicants must submit entries electronically during this registration period using the electronic DV entry form (E-DV) at the link [here](#). Paper entries will not be accepted. The Department of State strongly encourages applicants not to wait until the last week of the registration period to enter. Heavy demand may result in website delays.

Selectees for the DV program are chosen by a computer-generated, random drawing. The visas are distributed among six geographic regions, with a greater number of visas going to regions with lower rates of immigration to the United States, and with no visas going to nationals of countries sending more than 50,000 immigrants to the United States over the past five years. No single country may receive more than seven percent of the available diversity visas in any one year.

For DV-2014, natives of Guatemala are now eligible to enter the program.

Natives of the following countries are not eligible to apply because the countries sent more than 50,000 immigrants to the United States in the previous five years: Bangladesh, Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. A "native" ordinarily means someone born within a particular country, regardless of the individual's current country of residence or nationality. Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

For DV-2014, the Department of State once again will implement an online process to notify entrants of their selection and to provide information about the immigrant visa application and interview. Beginning May 1, 2013, DV-2014 entrants will be able to use their confirmation number provided at registration to check online through Entry Status Check [here](#). Successful entrants will receive instructions on how to apply for immigrant visas for themselves and their eligible family members. Confirmation of visa interview appointments will also be made through Entry Status Check.

For detailed information about DV-2014 entry requirements, along with frequently asked questions about the DV program, see the instructions for the DV-2014 Diversity Visa program, available [here](#). The related Federal Register notice was published on September 28, 2012, available [here](#).

The Department of State also noted that DV-2013 entrants should keep their confirmation numbers until at least September 2013, even if they were not selected on May 1, 2012. The Department said it may select more DV-2013 entries on October 1, 2012. Entrants in the DV-2013 program may check the status of their entries through Entrant Status Check (<https://www.dvlottery.state.gov/ESCI>) through September 30, 2013.

8. Department of Homeland Security (DHS) Extends Haiti Temporary Protected Status (TPS)

Secretary of Homeland Security Janet Napolitano extended Haiti's Temporary Protected Status (TPS). The Department of Homeland Security (DHS) published a notice in the Federal Register on October 1, 2012 announcing this decision. Napolitano also extended the suspension of certain requirements for F-1 nonimmigrant Haitian students.

The extension of TPS for Haiti will begin January 23, 2013 and end July 22, 2014. Secretary Napolitano first designated Haiti for TPS on January 21, 2010, after major earthquakes devastated the country.

Current Haitian TPS beneficiaries, who have continuously resided in the U.S. January 12, 2011, and seek to extend their TPS status, must re-register during the 60-day re-registration period that runs through November 30, 2012, if they wish to maintain their TPS. USCIS encourages beneficiaries to re-register as soon as possible within the 60-day period. USCIS is currently accepting applications and will continue to do so through November 30, 2012.

The 18-month extension also allows TPS re-registrants to apply for a new Employment Authorization Document (EAD). Eligible Haitian TPS beneficiaries who timely re-register will receive a new EAD, if requested, with an expiration date of July 22, 2014. Because all re-registrants may not receive their new EADs until after their current EADs expire, USCIS is extending currently valid TPS Haiti EADs bearing a January 22, 2013 expiration date for an additional six months, through July 22, 2013.

In addition, DHS is extending the suspension of certain requirements for F-1 nonimmigrant Haitian students. The extension will enable these F-1 students to continue to obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while maintaining their F-1 student status. The suspension of the regulatory requirements will remain in effect for an additional 18 months, through July 22, 2014. Further details about this extension may be found in the Federal Register at <http://www.gpo.gov/fdsys/pkg/FR-2012-10-01/pdf/2012-23825.pdf>.

For information on the TPS application process and eligibility requirements, visit [here](#).

Seyfarth Workforce Authorization Team (SWATeam)

1. Federal District Court Upholds 'Show Papers' Provision of Arizona Law

U.S. District Judge Susan Bolton of Phoenix ruled on September 5, 2012 that the "show me your papers" provision of Arizona's immigration law will stand, at least for now. The provision allows Arizona police officers to question immigration status while carrying out enforcement of other laws.

Judge Bolton said the law must take effect before it can be challenged, but she left the door open to potential future challenges.

Allesandra Soler, executive director of Arizona's American Civil Liberties Union, predicted "rampant racial profiling and prolonged detention for countless Latinos, a majority of whom are U.S. citizens and permanent residents." Jan Brewer, Arizona Governor, said the ruling "will empower state and local law enforcement, as part of a legal stop or detention, to inquire about an individual's immigration status when the officer has reasonable suspicion."

Judge Bolton's September 5 opinion is available [here](#).

2. Office of Special Counsel (OSC) Offers Guidance to Employers of DACA Beneficiaries

In a September letter, the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) confirmed that beneficiaries of the new DACA (Deferred Action for Childhood Arrivals) program will be treated no differently from other employees when it comes to completing the Form I-9.

While employers may not specifically request a particular document for I-9 purposes, DACA beneficiaries will generally only be able to present an Employment Authorization Card (I-766) as a List A document. This means that DACA beneficiaries must wait until the Employment Authorization Card has been received in order to be eligible for employment. The OSC also indicated that DACA beneficiaries who hold valid EAD cards should not face issues when their employers submit E-Verify queries to confirm their employment eligibility.

Additionally, the OSC indicated that employers may refuse to hire DACA beneficiaries on the basis that the DACA-based employment authorization is temporary; such refusal would not constitute discrimination, as DACA beneficiaries are not protected individuals under the relevant federal law. However, the OSC warned that employers must not discriminate based on national origin, stating that "employers may not use the "temporary nature" of an individual's employment authorization as a pretext for discrimination on the basis of national origin." The OSC also reminded employers that "employers should ensure that beneficiaries of the DACA program are not subjected to unfair documentary practices in the employment eligibility verification and reverification process."

3. Office of Special Counsel (OSC) Addresses Social Security Card and Number Issues

The U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), in an August letter, reminded employers that the Social Security Number (SSN) field in Section 1 of the Form I-9 is optional for employees of non-E-Verify employers. In the letter, the OSC reminded employers that some employees may not have an SSN on the first day of work: "no federal law prohibits either the employment of, or payment of wages to, a person solely because that person lacks a Social Security account number." (Employees who have not yet received an SSN may indicate that they have "applied for" a number.)

While IRS guidance instructs employers by stating "[y]ou should ask your employee to show you his or her social security card," available [here](#), the OSC warns against such a practice. An employer's request to see a specific document in the I-9 context represents a clear case of document abuse. If employers will require employees to present the Social Security card itself in any other context, the OSC reminds employers to make the purpose of the request very clear. The OSC states that even employers requesting the card "for purposes other than employment eligibility verification may create the appearance of violating the anti-discrimination provision."

This OSC guidance may be of particular concern to employers who use electronic onboarding systems that combine I-9 requirements with elements from other forms. While we typically recommend that the I-9 portion of any such system be "quarantined" so that the I-9 elements are not changed (in order or content), this OSC letter reiterates such concerns.

Global

United Kingdom

In November 2008, several UK companies applied for UK sponsor licenses according to the points-based system. As UK Sponsor licenses need to be renewed every four years, many UK employers need to start the renewal process now.

A UK company must hold a valid sponsor license to sponsor Tier 2 visas for non-EU nationals. If Tier 2 sponsors do not renew

its licenses, those sponsors will be unable to sponsor new non-EU workers.

The Tier 2 Sponsor License Renewal Process

The UK Sponsor license can be renewed by using the online Sponsor Management System (SMS). The license renewal fee for most companies is £1,500, however smaller companies are required to pay a reduced renewal fee of £500.

It is important for a UK company to confirm that its license is up to date, in other words that the HR procedures are still in place when the initial license was granted.

The UK Border Agency (UKBA) usually sends renewal instructions via email to the UK company's key HR contact up to four months prior to the license's expiration date. The UK company's Level 1 users can complete the renewal process.

The Level 1 user must be very careful when renewing the license through the SMS as perceivably small mistakes will result in a failed application to renew and therefore the license will be lost. Even inadvertent errors such as clicking the "Declining the option to renew the license" button while attempting to renew the license, will lead to failed application to renew.

UKBA's projected processing times for renewal applications is 14 days from the receipt of the application for renewal. If a UK Sponsor's license expires while the application is pending, the validity of its license will be temporarily extended. Tier 2 employees would be eligible to continue working during this period and the UK sponsor could continue issuing Certificates of Sponsorship for new non-EU workers.

Germany

A guideline from the European Commission dating back to 2009 stipulates that skilled workers from non-EU nations should have similar regulations with respect to their residence status in Europe as foreign worker's status in the US. The EU Blue Card, the equivalent of the Green card in the U.S., is a residence permit issued by an EU member state in accordance with the new EU guidelines for highly qualified workers from non-EU nations.

On August 1, 2012 the law implementing the EU's Blue Card Directive entered into force in Germany. The new law will especially streamline visa application and right of residence procedures for skilled professionals from abroad.

The new legal situation specifically benefits professionals planning to engage in work in Germany. They will gain easier access to the labor market if they can produce a binding job offer with a gross annual salary of at least 44,800 Euros. For skilled workers in the fields of mathematics, IT, natural sciences and engineering as well as for doctors, the threshold is set at just under 35,000 euros.

Seyfarth Immigration Events and News

Recent News from Seyfarth Shaw's Immigration Attorneys

Jason Burritt was appointed President of Lawyers Alliance for New York Associate's Advisory Board. Lawyers Alliance for New York (LANY) is the leading provider of business and transactional legal services for nonprofit organizations in the New York City area. LANY's Associate's Advisory Board is comprised of select associates from firms in New York with the goal of promoting LANY to increase participation and to ensure that associates who work with LANY receive the appropriate support and guidance on matters. Jason has served on the Board since its creation in June 2011, and he was recently selected to serve as President for a two-year term.

Seyfarth Immigration Attorneys' Recent Media Exposure

Angelo Paparelli was recently featured on the LexBlog TV network, discussing the Democrats' and Republicans' positions and rhetoric on immigration. ([Tune in](#) at the 2:28 mark to see Angelo, in a single sentence, discuss Guest workers, the Diversity Visa lottery, STEM graduates and the green card quota as part of the Republican party's policy).

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

Seyfarth Shaw — Immigration Inbox

Immigration Lawyers to Join Big Bird in Unemployment Lines

Angelo expresses doubt -- contrary to the prediction of GOP Presidential Candidate, Mitt Romney -- that immigration law will ever be so reformed and simplified that "[you] shouldn't have to hire a lawyer to figure out how to get into this country legally."

Hey, Immigration Bureaucrats: Corporations Are NOT People!

In this post, Angelo chides USCIS adjudicators for placing job-destroying obstacles in the path of "working owners," foreign citizens who set up a company and use it to sponsor the owner for an H-1B work visa -- contrary to the instructions of USCIS headquarters and the President.

New York Times and Ann Coulter Refuted: Immigrant Rights ARE Civil Rights

Immigration makes for strange bedfellows, and none are stranger than the Grey Lady and the first lady of conservative ideology. Angelo marks Columbus day (which falls on his birthday) with a call to stop the use of the term "Illegal Immigrant," which is not only pejorative but also legally and grammatically incorrect.

Will Immigration Electrify the Presidential Debates?

Immigration is often dubbed the third rail of American politics, but a more accurate analogy is that of a downed power line snaking low across the ground and electrocuting whomever fails to give it respectful attention. Angelo offers some helpful advice to presidential debate moderators to focus the candidates on critical immigration issues.

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