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# Immigration Newsletter

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## This Month's Contents:



### *Immigration Fee Increases: New Fees Now in Effect for Nonimmigrant Visas; USCIS Proposal to Increases Fees Under Consideration*

Effective June 4, nonimmigrant visa and border crossing card application processing fees are now $140 for most non-petition-based nonimmigrant visas (machine-readable visas or MRVs) and $14 for Border Crossing Cards (BCCs). The Department of State also established a new, higher fee for certain categories of petition-based nonimmigrant visas and treaty trader and investor visas (all of which are also MRVs): H, L, O, P, Q, and R nonimmigrant visa fees are now $150; E visas, $390; and K visas, $350.

In early June, U.S. Citizenship and Immigration Services (USCIS) announced its plans to increase fees that will amount to an average increase of about 10% across the board, citing lower than projected fee revenues for 2010-2011. USCIS issued its formal proposal on June 11 with a 45-day period during which the public can comment.

While most of the proposed fee increases for individual petitions and application are not shocking in and of themselves, when combined with the 66% fee increase that was implemented just three years ago, the fee increase constitutes a hefty hit for a variety of immigration service users. Here are some examples of the proposed fees: an I-130 petition for an alien relative will increase from $355 to $420; an I-140 petition for an immigrant worker will increase from $475 to $580, and an I-485 application to adjust status will increase to $1,070 (with biometrics). A significant increase is proposed for premium processing, currently $1,000; it will cost, if adopted, $1,225. Fees for administrative appeals will increase $45, from $585 to $630.

When announcing the proposals, USCIS Director Alejandro Mayorkas stated that USCIS is closely reviewing the adjudicatory process to improve consistency and quality, but immigration practitioners and their clients are not holding their breath. In recent years, the quality of USCIS decision-making and the agency's ability to correct even minor errors or address fundamental, systemic problems are at an all time low. As one colleague remarked, "USCIS is going to have to dig deep, confront some difficult structural issues, and implement some massive, culture-changing fixes if the agency wants its products and services to be worthy of their new price tag." We can't agree more.

## *Be Prepared: H-1B Fraud Detection Site Visits on the Rise*

Over 16,000 fraud detection site visits have been conducted since July 2009 when USCIS instituted a new Administrative Site Visit and Verification Program (ASVVP) within its Fraud Detection & National Security Directorate (FDNS). The FDNS is the arm of USCIS tasked with investigating potential immigration fraud. The stated goal of the site visit program is to verify that the H-1B business actually exists and that there is "on-site awareness of the H1-B petition and the beneficiary." While FDNS randomly selects H-1B employers after an H-1B petition has been approved, FDNS conducts site visits of all religious worker visa sponsors as part of the adjudication process. H-1B employers should expect increased site visits and should make sure their LCA audit and other files are complete. Should you be visited, contact counsel immediately.

## *"Green Cards" are Green Again and More Secure*

USCIS has redesigned the permanent resident card, or "green card" to make it more secure, and began issuing the new card in green last month. While originally issued as a green colored card, hence its nickname, the card has long since been issued in white. The card (also known as I-551) serves as proof of lawful permanent resident status, which includes authorization to live and work in the United States on a permanent basis. USCIS advises that the new design incorporates several new state-of-the art security features as part of its ongoing efforts to prevent immigration fraud.

A green card is valid for ten years (two years for conditional residents) and must be renewed when it expires. Existing cards, however, remain valid until they expire. While some older permanent resident cards do not have an expiration date and remain valid, USCIS recommends that holders of such cards replace them. But, they are not required to do so. The current cost of renewing or replacing a green card is $370, and application is made on Form I-90 available on the USCIS website.

## *Visa Bulletin for July: Waits Increase for Most Employment-Based Applicants*

The U.S. Department of State's (DOS) Visa Bulletin for July 2010 makes clear that employment-based immigrant visa applicants will have to wait longer and longer. Across all categories with backlogs, there's been very little movement over the last several months and no movement for unskilled "other workers." Mexicans, for example, face an especially bleak outlook: visas for the entire employment-based third preference – the classification for professionals, skilled and unskilled workers – have been unavailable since May and will remain so until the next fiscal year, which begins October 1, 2010. When visas do become available, the wait is expected to be at least eight years. DOS also cautions that a cut-off date for religious

worker immigrant visas may appear in September.

On the family side, immigrant visa backlogs have eased up, with backlogs in most categories eliminated by about six months. This improvement reflects lower demand. Nevertheless, significant waits remain for most family members. For example, unmarried sons and daughters (children over 21) of U.S. citizens must wait a little more than five years (Mexicans and Filipinos wait more than 15 years), and brothers and sisters of U.S. citizens wait nine years (Mexicans and Filipinos wait 15 or more years).
What does this all mean and how does the system operate? For those who are unfamiliar with the Visa Bulletin and what it actually means, a brief summary is provided below:

The immigration law sets out limitations on the total worldwide number of immigrant visas that can be issued by category per fiscal year. Approximately 140,000 immigrant visas are allocated for employment and 480,000 for family-based petitions. The law also establishes an annual per-country limitation of 7%, which visa issuances from any single country may not exceed. The country limitation serves to avoid visa monopolization by applicants from only a few countries. However, the limitation is not a quota to which any particular country is entitled. Thus, visa applicants compete for visas on a worldwide basis and within their country.

The State Department is responsible for administering these annual numerical limitations. At the beginning of each month, the DOS Visa Office (VO) receives a report from each consular post listing totals of documentarily qualified immigrant visa applicants in categories subject to numerical limitation. Applicants entitled to immigrant status become documentarily qualified at their own initiative by filing and obtaining, for example, an approved I-140 or I-130 immigrant visa petition. Cases are grouped by foreign state "chargeability," "preference category," and "priority date." "Chargeability" is generally determined by the applicant's birth country, "preference category" is the classification under which the individual is eligible, and "priority date" is the date on which the petition to accord the applicant immigrant status was filed.

The VO subdivides the annual preference and foreign state limitations specified by law into monthly allotments. The totals of qualified applicants that have been reported to VO are compared each month with the numbers available for the next regular allotment. Next, the VO considers a number of factors to determine how many numbers are available. These include past use, estimates of future use and return rates, and estimates from USCIS. Once this calculation is done, cut-off dates are established and visas are allocated in order of an applicant's priority date. Cut-off dates and visa availability then are published in the monthly DOS Visa Bulletin.

If there are sufficient numbers in a particular category to satisfy demand, the category is considered "current" and reported as such in the Visa Bulletin. This means there is no backlog or wait. When, however, the total of qualified applicants in a category exceeds the supply of visa numbers available for the particular month, the category is considered to be "oversubscribed," and a visa availability cut-off date is established. The cut-off date is the priority date of the first applicant who could not be accommodated for a visa number. For example, if the monthly target is 3,000 and there is demand for 8,000 visas, the VO establishes a cut-off date so that only the first 3,000 numbers would be allocated. In this case, the cut-off would be the priority date of the 3,001st applicant. Only persons with a priority date earlier than a cut-off date would be entitled to apply for a visa.

When visa demand from a particular country exceeds the amount of visa numbers available under the annual numerical limitation, that country is considered to be oversubscribed. Oversubscription generally requires the establishment of a cut-off date in a particular visa category that is earlier than on a worldwide basis. This results in a separate listing of that country on the DOS Visa Bulletin.

Not all numbers allocated are actually used for visa issuance; some are returned to VO and are reincorporated into the pool of numbers available for later allocation during the fiscal year. The rate of return of unused numbers often fluctuates from month to month; demand also fluctuates. These fluctuations cause cut-off dates to slow, stop, or even retrogress.

Retrogression is common near the end of the fiscal year as visa issuance approaches the annual limitations.

***DHS Eliminating Paper I-94W Forms for Visa Waiver Travelers***

The U.S. Department of Homeland Security (DHS) is eliminating the use of paper I-94W forms ("green" I-94s) for Visa Waiver Program (VWP) travelers with an approved Electronic System for Travel Authorization (ESTA) arriving in the United States at all airports by the end of this summer.

VWP travelers are encouraged to submit ESTA applications – online at https://esta.cbp.dhs.gov – as soon as they begin making travel plans. ESTA applications may be submitted at any time before travel, but at least 72 hours in advance of travel. ESTA authorizations are valid for two years or until the applicant's passport expires. ESTA authorization for VWP travel is currently available to citizens and eligible nationals of 36 designated countries.

***USCIS Ombudsman Recommends Transparency and Uniformity in I-601 Waiver Application Adjudication Process***

For many individuals seeking to immigrate to the United States, and for others who are already here but want to apply for a green card, oftentimes grounds of inadmissibility stand in their way. There are dozens of grounds of inadmissibility based on criminal, health, immigration, or security violations that can render a foreign national ineligible from entering the U.S., adjusting status, and obtaining citizenship. Certain foreign nationals are, however, eligible to apply for and obtain waivers of these grounds. Waivers of inadmissibility are one of the few means of relief available to such individuals, but many applicants are reluctant to file them because of the high risks involved and the length of time it takes for a decision.

In a June 9th report, the USCIS Ombudsman's Office proposed a new set of rules to revamp how the government adjudicates and decides these waivers. In reviewing the process, the Ombudsman found a number of problems, including the lack of access to case processing information, hugely disparate processing times – ranging from three days to more than a year—and discrepancies in interpretation of the "extreme hardship" standard. Its recommendations for improving transparency and consistency in the adjudication process include: (1) centralize processing all I-601 applications into one office; (2) provide for the concurrent filling of I-601 applications together with I-130, Petitions for Alien Relative; (3) prioritize the finalization of the overseas case management system in order to allow for posting processing times and tracking; (4) publish clear filing instructions for expedited processing; (5) improve coordination between consular officers and USCIS adjudicators; and (6) permit USCIS employees to request and obtain digitized files upon receipt of interview schedules.

Waivers of inadmissibility remain an avenue of last resort for many foreign nationals including those married to U.S. citizens. We commend the Ombudsman's Office for reviewing this important form of relief, and encourage USCIS to implement these recommendations as soon as possible.

***Hondurans and Nicaraguans Eligible to Re-Register for TPS Must Do So By July 5, 2010; Haitians Must Register by July 20, 2010***

In May, USCIS extended temporary protected status (TPS) designations for Honduras and Nicaragua for 18 months, effective July 6, 2010 through January 5, 2012, and announced that the 60-day re-registration period runs from May 5, 2010 through July 5, 2010. Accordingly, eligible Hondurans and Nicaraguans must re-register by July 5, 2010 in order to maintain TPS status. Re-registration, however, is limited to persons who already registered for TPS under the previous designations and whose applications have been granted or remain pending. Certain nationals of Honduras and Nicaragua (or those having no nationality who last habitually resided in those countries) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. USCIS announced that new employment authoriza-

tion documents (EADs) with a January 5, 2012 expiration date would be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. But, given the timeframes involved with processing these applications, all re-registrants may not receive new EADs until after their current EADs expire on July 5, 2010 and thus USCIS is automatically extending the validity of current EADs for 6 months, or through January 5, 2011.

Questions about verification of employment authorization arise when an individual's EAD has expired. Can, for example, such a TPS beneficiary use his or her expired card for I-9 employment authorization purposes? Yes. USCIS specifically advises that individuals whose EAD is automatically extended under these rules can still use their expired EAD for I-9 employment verification purposes with their employers. USCIS recommends that such employees provide the employer with a copy of the Federal Register notice stating the automatic extension of the EAD. However, if an auto-extended, TPS-based EAD is presented to an employer, the employer will be required to re-verify employment authorization on the I-9 form at the end of the automatic EAD extension period, or January 5, 2011. At that time, the employee will be required to present the new TPS-related EAD containing an updated, valid expiration date, or any other acceptable document evidencing employment authorization.

In granting the extension of TPS, Homeland Security Secretary Janet Napolitano had determined that the conditions that prompted TPS designation in 1999 following the environmental disaster caused by Hurricane Mitch persist and prevent Honduras and Nicaragua from adequately handling the return of its nationals. There are approximately 66,000 nationals of Honduras and 3,000 nationals of Nicaragua (and people having no nationality who last habitually resided in Honduras or Nicaragua) who may be effected and eligible for re-registration. TPS does not, however, apply to such nationals who entered the United States after December 30, 1998.
Meanwhile, Haitian nationals who have continuously resided in the United States since January 12, 2010 and who meet other TPS eligibility requirements must file their first time TPS registration applications no later than July 20, 2010. TPS was granted to eligible Haitian nationals in January in response to the January 12, 2010 earthquake that devastated much of Port-au-Prince, Haiti. TPS designation for Haiti will remain in effect through July 22, 2011.

USCIS advises that by early April it received almost 45,000 Haitian TPS application packages; however, more than 10% were rejected. The most common reasons for rejection include: (1) inappropriate fees or a fee waiver request; (2) missing biographical information; (3) lack of signatures on forms; and (4) filing an incorrect form.

## ***More on Arizona's Draconian Immigration Law***

It has been more than a month since Arizona passed its draconian immigration law (S.B. 1070), which garnered national attention and thrust the issue of comprehensive immigration reform back on the political front burner. S.B. 1070 requires police to demand proof of immigration status from anyone who they have a "reasonable suspicion" of being in the country illegally. Despite widespread protests and numerous constitutional challenges to the Arizona law – slated to go into effect in late July – many other states are following suit. Eleven have introduced similar immigration enforcement proposals, which also seek to deter unlawful entry and presence of undocumented immigrants by empowering state and local police officers to investigate immigration status. The various proposals also cite the lack of a federal comprehensive immigration solution as justification for assuming broader powers to enforce immigration laws. (At the time of S.B. 1070's enactment, President Obama also had cited Congress's failure to fix the broken immigration system as the reason for enactment of a patchwork of inconsistent and often misguided state and local immigration enforcement actions.)

In the weeks following S.B. 1070's passage, a diverse coalition came together in opposition to the new law. Police chiefs of several major cities including Los Angeles, Houston, and Philadelphia said that the law would increase crime by driving a wedge between police and immigrant communities. The government of Mexico condemned the law and issued a warning to its citizens against traveling to the state. Numerous

professional organizations that represent and count immigrants among their ranks are boycotting Arizona and cancelled conferences there. Finally, many well-known musicians cancelled shows and tour stops in the state.

Nevertheless, a recent poll shows that 58% of likely voters nationwide support an Arizona-style law in their state. If many other states pass these laws, the nation will have a hodgepodge of disparate and confusing immigration requirements and enforcement directives that will inevitably lead to violations of an individual's civil rights. The only rational solution to this problem is a federal comprehensive immigration package. This would eliminate states' justification for these laws as well as preempt future state action. The onus clearly is on Congress and the President to take swift and decisive action.

The uptick in attention to immigration issues makes this year's mid-term elections particularly crucial. The composition of the House and Senate will change, and control of one or both chambers may switch hands on Election Day. The party in the majority will dictate if and when a comprehensive reform bill will be considered.