

NOVEMBER 2007

The law firm of **Klasko, Rulon, Stock & Seltzer, LLP** is pleased to present our *November 2007* newsletter covering immigration topics that are of interest to our clients.

Headlines:

- **1. Two Leading Immigration Lawyers Join Firm** – Klasko, Rulon, Stock & Seltzer, LLP, is pleased to announce that **Elise Fialkowski** and **Theodore J. Murphy** have joined the Firm.
- **2. USCIS Releases “New” Form I-9 to Match Document Regulations** – USCIS releases a new Form I-9 that brings “List of Acceptable Documents” into conformity with 1997 regulations.
- **3. Backlogged Immigration Cases “Could Take Years” to Process, USCIS Says; H-1B Pre-registration Option Being Considered for FY 2009** – USCIS faces huge backlogs in adjudication of employment-based AOS applications; Aytes considers ways to alleviate repeat H-1B fiasco for FY 2009.
- **4. Talent Pool Increasingly Global: EU Blue Cards Proposed, Migrant Policy Web Site Launched** Will the European Union and other countries' aggressive recruitment strategies leave the U.S. in the dust?
- **5. USCIS Streamlines Readmission for Certain H and L Adjustment Applicants** – A new final rule removes the requirement that such persons present a receipt notice for their adjustment applications when returning to the U.S. from travel abroad.
- **6. Labor Dep’t Cracks Down on PERM Fraud, Increases Audits** – The risks are high for both employers and attorneys.
- **7. H-2B Half-Year Cap Reached** – USCIS has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the first half of FY 2008.
- **8. USCIS Announces H-2A Centralized Filing Location** – USCIS has established a unit dedicated to processing H-2A petitions at the California Service Center.
- **9. GAO Report Released: Removal Decisions** – The GAO recommended that ICE update its guidance and ensure that officers are provided timely information on legal developments affecting their decisions.
- **10. Klasko News** – Upcoming speaking engagements, recent publications, and more.
- **11. Government Agency Links**

1. Two Leading Immigration Lawyers Join Firm

Klasko, Rulon, Stock & Seltzer, LLP, is pleased to announce that **Elise A. Fialkowski**, formerly the head of the Immigration Law practice at Schnader Harrison Segal & Lewis LLP, and **Theodore J. Murphy**, the former Assistant Chief Counsel of the U.S. Immigration and Customs Enforcement (ICE) division of the U.S. Department of Homeland Security, have joined the Firm.



Elise A. Fialkowski, "one of the true stars in the immigration bar" as described by Firm Chairman Ron Klasko, regularly assists U.S. and international corporate clients who seek to hire or transfer foreign employees as well as foreign individuals seeking employment in the United States as health care professionals, executives, managers, and scientists. She also has particular expertise in advising employers with regard to compliance with the Immigration Reform and Control Act including I-9 Employment Eligibility verification and worksite enforcement issues. Elise has handled immigration matters for a wide range of clients, including pharmaceutical and drug ingredient companies, universities, health care facilities, research centers, information technology companies, financial management and investment companies, among many other clients in diverse industries. A member of the American Immigration Lawyers Association, Elise serves as treasurer of its Philadelphia Chapter. Elise is a graduate of the University of North Carolina (*Phi Beta Kappa*) B.A. 1987, and of Villanova University School of Law (*magna cum laude*) J.D. 1991. KRSS's announcement on Elise joining the Firm is available at <http://www.klaskolaw.com/library/Elise%20Fialkowski%20%20Press%20Release.pdf>.



Theodore J. Murphy (Ted) has been involved with immigration for the past 14 years -- over a decade with ICE and the former INS. As one of the government's most experienced attorneys, he represented the Agency in all matters before the Immigration Courts and Board of Immigration Appeals, handling criminal, national security, fraud, and employer sanction cases. Ted has served as a Special Assistant United States Attorney and as an Adjunct Professor of Law at Temple University Beasley School of Law. In addition, he is a veteran of the United States Army's 82nd Airborne Division. Ted received his undergraduate degree at Georgetown University (B.A. 1983) and his Law Degree (J.D. 1994) and Masters of Law (International Law) (LL.M. 1997) from Temple University. Our press release announcing Ted's arrival is at posted at http://www.klaskolaw.com/library/Theodore%20J_%20Murphy%20Press%20Release.pdf. Ted's extended biography is available at <http://www.klaskolaw.com/our-team.php?action=view&id=10>.

2. USCIS Releases "New" Form I-9 to Match Document Regulations

On November 7, 2007, U.S. Citizenship and Immigration Services (USCIS) released a new version of Form I-9, Employment Eligibility Verification. All employers are required to complete with respect to all new or rehired employees on or before the first day of employment. Employers also are required, within three days of hiring a new employee, to examine original documents presented by the employee (such as a U.S. passport, or a driver's license and Social Security card), and ensure that those documents confirm the employee's identity and employment authorization.

While USCIS will require use of the new form as of December 7, 2007, employers should be aware that the "new" version of the form is, in fact, identical to the current version of the form (only the version date has

changed). The change precipitating the Dec. 7 version to the form is in the "List of Acceptable Documents," found on the reverse of the form, which now has been amended to make the form's instructions match regulations promulgated in 1997. Those regulations eliminated certain rarely-presented identification documents from the list of documents that employers may accept to document an employee's identity and employment authorization.

The release of the revised document list at this time, when the Department of Homeland Security recently advised that no changes to the I-9 were imminent, is explained in the updated Form M-274, Handbook for Employers, released at the same time as the revised Form I-9. USCIS explains: "While DHS still intends to pursue other changes to the Form I-9 in a future update, it decided to update the Form I-9 to bring it in compliance with existing law before making any further changes. Therefore, the Form I-9 has been amended to reflect those changes made by the 1997 regulations, but any changes that would have required the drafting of a new regulation are being saved for a future update of the Form I-9." Those substantial changes in the I-9 still are not imminent.

In light of the new form instructions, employers should continue to refuse to accept the following documents, which have been unacceptable since 1997: (1) the Certificate of United States Citizenship (Form N-560 or N-561); (2) the Certificate of Naturalization (Form N-550 or N-570); (3) the Form I-151, a long out-of-date version of the Alien Registration Receipt Card ("green card"); (4) the Reentry Permit (Form I-327); and (5) the Refugee Travel Document (Form I-571). The Form's instructions also now are clearer with respect to the acceptability of a foreign passport and I-94 card, which have always been acceptable only if the I-94 documents employment authorization for the employer completing the I-9 (for example, H-1B status based on a petition filed by the employer).

The new I-9 form can be downloaded from the Firm's website at http://www.klaskolaw.com/library/files/new_i-9_form.pdf. The revised Handbook for Employers can be found at http://www.klaskolaw.com/library/files/uscis_i-9_handbook_for_employers.pdf, and a press release announcing the update can be downloaded at http://www.klaskolaw.com/library/files/uscis_press_release_regarding_new_i-9.pdf.

3. Backlogged Immigration Cases "Could Take Years" to Process, USCIS Says; H-1B Pre-registration Option Being Considered for FY 2009

U.S. Citizenship and Immigration Services (USCIS) faces a large backlog of immigration cases because of fee changes that led to a rush in applications filed in advance of the increases, combined with the Department of State (DOS) and Department of Homeland Security confusion regarding the availability of employment-based categories for filing adjustment of status applications and fear that employment-based visa numbers would no longer be available for the remainder of the fiscal year.

The Visa Bulletin for December 2007 shows that there has been no forward movement of the employment-based category cut-off dates, and retrogression for Indian and Chinese natives in the second preference due to heavy demand from USCIS. Depending on the rate of demand being received from USCIS offices for adjustment of status cases, DOS warns that further retrogression may be possible later in the fiscal year.

Michael Aytes, USCIS's Associate Director for Domestic Operations, was quoted in the *Report* as noting that USCIS received over 2.5 million applications during July and August, including 300,000 employment-based adjustment applications. "It could take years to process all of the applications and issue all the visas," Mr.

Aytes said. The *Report* noted that applicants have some protection in the form of more portability for their current visas, allowing them to change jobs more easily. Mr. Aytes said that USCIS is considering some streamlining measures to speed things up, including the possibility of handling specific industries within a single USCIS office that is familiar with the unique demands of that industry, similar to what already has been done for sports teams.

Mr. Aytes also said that USCIS does not want a repeat of last year's H-1B debacle, where the H-1B numerical limit for fiscal year 2008 was met the first day applications were received, resulting in a lot of wasted time on preparing and processing applications that went nowhere. "While there was a significant use of resources by USCIS, I am even more concerned about the time and effort used [by employers] in preparing the applications," he said. USCIS is considering a pre-registration option that would allow the filing of a more limited application, with the remaining portions to be filed if the applicant succeeds. Mr. Aytes added that he wants "to do everything I can to dissuade" employers from filing multiple petitions for one worker based on different criteria.

The December Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3841.html.

4. Talent Pool Increasingly Global: EU Blue Cards Proposed, Migrant Policy Website Launched

The European Union (EU) has proposed a renewable EU blue card that would allow workers to live and work in an EU nation for three years after an application process taking three months, and would allow them to bring their immediate families. Further encouraging migration to the EU of scientists and engineers, the British Council and Migration Policy Group, leading a consortium of 25 organizations, has launched a Website, the Migrant Integration Policy Index (MIPEX), which measures policies to integrate migrants in 25 EU Member States and three non-EU countries. MIPEX, which is co-financed by the EU, uses over 100 policy indicators to create a multi-dimensional picture of migrants' opportunities to participate in European societies. MIPEX covers six policy areas that shape a migrant's journey to full citizenship: labor market access, family reunion, long-term residence, political participation, access to nationality, and anti-discrimination. The site includes country profiles and an interactive mapping and charting function.

Leonard Lynn, a professor of management policy at Case Western Reserve University, and Harold Salzman, a sociologist and senior research associate at the Urban Institute in Washington, D.C., recently authored "The Real Global Technology Challenge" for *Change* magazine. The authors believe that the United States is "no longer the universally preferred home for the global technology elite," observing that increasing numbers of scientists and engineers who were educated and have built successful careers in the United States are returning to China, India, and other countries, and that many in the younger generation are simply not coming here in the first place. Noting these trends, the authors note that "the policy and technology communities are sounding the alarm about an impending U.S. fall from scientific and technological dominance." The declining appeal of science and engineering for American students is compounding the problem, the authors argue, while the numbers of engineers and scientists trained in China and India continue to rise.

MIPEX is available at <http://www.integrationindex.eu/>. A summary of the Lynn and Salzman article is available at <http://www.heldref.org/change/feas1.php>.

5. USCIS Streamlines Readmission for Certain H and L Adjustment Applicants

U.S. Citizenship and Immigration Services (USCIS) published a final rule on November 1, 2007, to streamline the readmission of certain H and L nonimmigrants who have applied for adjustment of status to become permanent residents. The rule removes the requirement that such persons present a receipt notice (Form I-797, Notice of Action) for their adjustment applications when returning to the United States from travel abroad.

H-1 nonimmigrants affected by this rule include those under the H-1B classification for specialty occupation workers and the H-1C classification for certain registered nurses. L-1 nonimmigrants affected by this rule include those under the L-1A classification for certain intracompany transferees who are managers or executives, and the L-1B classification for specialized knowledge workers. Dependents of affected H-1s and L-1s, who are admitted as H-4s and L-2s, also are relieved of the receipt requirement.

Previously, holders of these nonimmigrant classifications were required to present a receipt for their adjustment application at the time of readmission to the U.S. following foreign travel. The final rule eliminates the "unnecessary burden" of presenting this receipt, USCIS said, because the information in the receipt is in USCIS databases available to immigration inspectors and adjudicators. Upon application for readmission to the U.S., they still must provide evidence to a U.S. Customs and Border Protection (CBP) Inspector at the port of entry that they are:

- Still eligible for H-1 or L-1 status,
- Coming to resume employment with the same employer for whom they were previously employed, and
- In possession of a valid H-1 or L-1 visa, if required.

In the case of H-4 or L-2 dependents, the spouse or parent through whom they received their H-4 or L-2 status must meet the above requirements and the dependent must remain eligible for admission in H-4 or L-2 classification.

The full text of the final rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-21506.pdf>.

6. Labor Department Cracks Down on PERM Fraud, Increases Audits

In response to the Department of Labor's (DOL) final rule, effective July 16, 2007, requiring, among other things, that employers pay the costs of applications filed under the Program Electronic Review Management (PERM) program, Catherine L. Haight, a Los Angeles-based immigration attorney, said the risks are high for both employers and attorneys and that DOL would not hesitate to enforce the rule. She was quoted in the *Daily Labor Report*, noting that "[t]hey are taking this rule very seriously and are willing to consider any attempt to get around the rule as fraud." Others suggested that DOL would seek out employers and attorneys as examples and conduct more audits to show they are serious about rooting out fraud. On the positive side, wait times for certification have been reduced. DOL sources have confirmed a trend toward increasingly frequent and random audits. If audit frequency continues to climb, processing times will climb once again. Klasko, Rulon, Stock & Seltzer, LLP advises filing PERM applications with great care. Contact your KRSS attorney for guidance.

7. H-2B Half-Year Cap Reached

U.S. Citizenship and Immigration Services (USCIS) announced on October 1, 2007, that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the first half of fiscal year 2008. USCIS established September 27, 2007, as the "final receipt date" for new H-2B worker petitions requesting employment start dates before April 1, 2008. The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 33,000 H-2B workers for the first six months of FY 2008.

Under current law, a returning worker who was counted toward the H-2B numerical limit during FYs 2004, 2005, or 2006 was exempt from being counted against the FY 2007 H-2B cap. USCIS noted that Congress has not yet reauthorized or extended the returning worker provisions for FY 2008. Absent such reauthorization or extension, USCIS must count all petitions requesting H-2B workers for new employment with an employment start date of October 1, 2007, or later toward the FY 2008 H-2B cap.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on September 27, 2007. Petitions for workers who are currently in H-2B status do not count toward the congressionally mandated bi-annual H-2B cap. USCIS will continue to process petitions filed to extend the stay of a current H-2B worker in the United States; change the terms of employment for current H-2B workers and extend their stay; or allow current H-2B workers to change or add employers and extend their stay.

The announcement is available at http://www.uscis.gov/files/pressrelease/H2B_1oct07.pdf.

8. USCIS Announces H-2A Centralized Filing Location

U.S. Citizenship and Immigration Services (USCIS) has established a unit dedicated to processing H-2A petitions at the California Service Center (CSC). The CSC has established mailing addresses (one for U.S. Postal Service and one for all other couriers) for all H-2A filings. Effective October 17, 2007, H-2A petitioners are encouraged to use the addresses listed in the announcement for all H-2A petitions, although the change only becomes mandatory once USCIS publishes a notice in the *Federal Register*. The announcement, which contains additional advice about filing H-2A petitions, is available at <http://www.uscis.gov/files/pressrelease/H2AUpdate17Oct07.pdf>.

9. GAO Report Released: Removal Decisions

In a new Government Accountability Office (GAO) report, "Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making," the GAO found that U.S. Immigration and Customs Enforcement (ICE) has begun to update and enhance training curricula to better support officer decision-making, but that the agency has not taken steps to ensure that written guidance to promote the appropriate exercise of discretion during apprehension and removal is comprehensive and up to date; nor has it established time frames for updating guidance. For example, field operational manuals have not been updated to provide information about the appropriate exercise of discretion in light of a recent expansion of ICE worksite

enforcement and fugitive operations, in which officers are more likely to encounter persons with humanitarian issues or who are not targets of investigations. Also, ICE does not have a mechanism to ensure the timely dissemination of information on legal developments that would enable officers to make decisions in line with the most recent interpretations of immigration law. As a result, the GAO said, ICE officers are "at risk of taking actions that do not support operational objectives and making removal decisions that do not reflect the most recent legal developments."

The GAO recommended that ICE update its guidance to include factors officers should consider when making apprehension and removal decisions and establish time frames for this task; ensure that officers are provided timely information on legal developments affecting their decisions; and evaluate the costs and alternatives for developing a mechanism to analyze officer decision-making systematically. The Department of Homeland Security agreed and identified actions ICE plans to take to implement the GAO's recommendations. The report, GAO-08-67, is available at <http://www.gao.gov/new.items/d0867.pdf>.

10. Klasko News

Upcoming Speaking Engagements



New York partner **Suzanne B. Seltzer** will be giving a talk today, November 15, at the New Jersey Institute of Technology in Newark, NJ. Suzanne will speak on "What You Should Know if you are Considering Permanent Residence Status." She will cover basics such as permanent residence, and more complex issues including nonimmigrant status during the permanent residence process and employment-based (EB) permanent residence for researchers and physicians. This presentation is now posted at www.klaskolaw.com on the Events Calendar page (direct link: <http://www.klaskolaw.com/events-calendar.php?action=view&id=65>).

William A. Stock (Bill) will give a seminar at the Fox Chase Cancer Center in Philadelphia on Friday, November 16, entitled "Foreign National Physicians and Researchers: Institutional Immigration Law Considerations." Topics to be covered include developing institutional policies, visa issues, types of J-1 waivers, obtaining O-1 visas, sponsorship for permanent residence, and PERM policy issues, among many others. Materials for this event, including a PowerPoint presentation and selected articles, are now available at <http://www.klaskolaw.com/events-calendar.php?action=view&id=64> for review or download.

H. Ronald Klasko (Ron) will speak at the American Immigration Lawyers Association (AILA) New York Chapter Immigration Symposium in New York, NY, on December 13, 2007. More information on this program will be forthcoming.

Recent Speaking Engagements

Bill Stock presented at the Weill Medical College of Cornell University and at New York University on Wednesday, November 14, 2007. At Weill Medical College, Bill talked to international scholars about immigration options available to them including H-1B visas, J-1 visas, O-1 visas, and other related topics including travel issues. Articles and the PowerPoint presentation used for this seminar are available at <http://www.klaskolaw.com/events-calendar.php?action=view&id=63>. At New York



University, Bill discussed possible immigration issues associated with starting a business in the United States in nonimmigrant status and other employment issues, including:

- How much work can be done "on campus"
- Investing in a Business
- Limitations on Volunteering
- Nonimmigrant Visas for Entrepreneurs
- Investment-based Permanent Residence

Materials for this talk are available at <http://www.klaskolaw.com/events-calendar.php?action=view&id=62>.

Suzanne B. Seltzer spoke at New York University on November 1, and Columbia University on November 9. Both talks dealt with immigration options in the post-student years. The PowerPoint for the Columbia lecture is available at http://www.klaskolaw.com/library/files/columbia_university_powerpoint.ppt, and a listing of suggested reading materials can be accessed at <http://www.klaskolaw.com/events-calendar.php?action=view&id=59>. Suzanne also participated at the NAFSA: Association of International Educators Region X conference in Brooklyn, NY, on November 13. Suzanne presented "212-eeeeeeeeee!: A Tricky 'Subject' for Advisors." The J exchange visitor program may subject researchers, scholars, professors, medical trainees, and others to a two-year home country physical presence requirement. The definition of who is subject and what it means to be subject is clearly stated at Immigration & Nationality Act (INA) §212(e), yet it remains one of the most confusing areas of immigration law. This program elucidates different perspectives and issues that arise in working with those in J status. For more information on this talk, write to Suzanne at sseltzer@klaskolaw.com.



Ron Klasko spoke at the New Jersey Institute for Continuing Legal Education Annual Immigration Conference in Newark, NJ, on Wednesday, November 14, 2007, where he discussed advanced corporate immigration law issues. Additionally, Ron addressed the American Bar Association on November 9 at its Labor and Employment Law Conference in Philadelphia. Ron's presentation titled, "Advising Employers in the Era of Worksite Enforcement," included topics such as the social security "no match" regulation, areas of potential employer liabilities, and advising employers regarding ICE workplace raids and I-9 compliance issues.

Ron also participated on two panels at the NAFSA Region VIII conference in Baltimore, MD, on November 8. One panel focused on visa issues for post-doctoral candidates; Ron discussed appropriate visas for postdoctoral researchers and fellows and led a discussion of employer-sponsored and self-sponsored permanent residence applications. The second panel centered on how to deal with government adjudication delays, where Ron offered possible remedies including litigation options (mandamus).

In addition, Ron was a special guest speaker at Temple University in Philadelphia on October 31, where he lectured on immigration options for students and scholars. Ron also participated in a panel discussion on options for dealing with government adjudication delays at the NAFSA: Association of International Educators Region VII conference in Atlanta, GA, on October 29.

Ron spoke at the University of Texas School of Law 2007 Immigration Law Conference on October 19, in San Antonio, TX. Topics included "What's New with PERM in 2007" and "Mandamus and Other Options for Judicial Relief." For more information or to request presentation materials on any of the above noted events, e-mail Ron at rklasko@klaskolaw.com.

Ron Klasko and **Stephanie L. Browning** presented at the Business Lawyers' Institute forum offered by the Pennsylvania Bar Institute on October 17, in Philadelphia. Ron and Stephanie's talk, entitled "Immigration Issues for the International Executive," provided practical tips and insights into critical immigration issues facing

international executives by examining alternative visa categories, options available for spouses of foreign national executives, obtaining U.S. permanent residence, the process for U.S. citizenship, issues affecting retiring executives or expatriates, and more. They covered issues impacting both the U.S. citizen working abroad as well as the foreign national executive working in the United States. For more information on this topic or to request presentation materials, contact Ron at rklasko@klaskolaw.com.

Recent Publications

Suzanne B. Seltzer's recent article, "Employees Who Violate Immigration Laws Are No Match for ICE," was published on Wednesday, October 17, in *The Legal Intelligencer*. Write to Suzanne at sseltzer@klaskolaw.com to request your copy.

Ron Klasko continues to write extensively for legal publications and associations. Ron's recently authored article, "Litigation to Challenge Agency Delays: Frequently Asked Questions," was presented at several conferences, including several NAFSA regional programs. This article is in question and answer format, and addresses mandamus filing concerns and issues. Write to Ron at rklasko@klaskolaw.com to request your copy. Ron's latest publication, "Employment Options for Foreign Nationals in the US: Overview of US Immigration Process," was published in connection with the American Bar Association conference on November 9, in Philadelphia.

11. Government Agency Links

Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

- USCIS Service Center processing times online: <https://egov.uscis.gov/cris/jsps/ptimes.jsp>
- Department of Labor processing times and information on backlogs: <http://www.foreignlaborcert.doleta.gov/times.cfm>
- Department of State Visa Bulletin: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

Disclaimer/Reminder: *This newsletter does not constitute direct legal advice and is for informational purposes only. The information provided should never replace informed counsel when specific immigration-related guidance is needed. Copyright © 2007 Academy of Business Immigration Lawyers and Klasko, Rulon, Stock and Seltzer, LLP. All rights reserved.*