

## NOVEMBER 2008

The law firm of **Klasko, Rulon, Stock & Seltzer, LLP** is pleased to present our *November 2008* newsletter covering immigration topics that are of interest to our clients.

### Headlines:

- **1. Employment-based First Preference Category Will Remain "Current" for December 2008; Fourth Preference Subcategory for Certain Religious Workers Becomes Available** – The employment-based First Preference category will remain "current" for December 2008 as will the employment-based Second Preference category except that cut-off dates for China-Mainland born and India will remain stuck at June 1, 2004 and June 1, 2003, respectively; Fourth Preference subcategory for Certain Religious Workers becomes available.
- **2. New Rule Requires Federal Contractors to Enroll in E-Verify System** – A Final Rule that becomes effective January 15, 2009 requires all federal contractors and subcontractors to use the E-Verify System to confirm their employees' eligibility to work in the United States.
- **3. USCIS to Implement Paperless Case Management System** – The *Washington Post* reports that the Bush Administration has announced a 5-year, \$500 million effort to convert U.S. Citizenship and Immigration Service's case management system from a paper-based system to an electronic one.
- **4. DHS Issues Supplemental Final Rule on Social Security No-Match Letters** – On October 23, 2008, the Department of Homeland Security (DHS) published a Supplemental Final Rule regarding the procedures an employer must follow to obtain safe harbor protection after it receives a "no-match letter" from the Social Security Administration (SSA) or a "notice of suspect document" letter from DHS casting doubt on the employment eligibility of an employee. Implementation of the Supplemental Final Rule remains blocked pending a decision by the U.S. District Court for the Northern District of California on DHS' motion to dissolve the preliminary injunction previously issued by the court.
- **5. Seven Countries To Be Added to Visa Waiver Program** – The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea are to be added to the countries participating in the Visa Waiver Program.
- **6. DHS Reminds Visa Waiver Program Travelers about New e-Passport Requirement** – The Department of Homeland Security has issued a reminder on its website clarifying the passport requirement timeline for individuals traveling to the United States under the VWP. Travelers who obtained new passports on or after October 26, 2006 must present an e-Passport to be admitted as VWP nonimmigrants.
- **7. State Dept. Issues Final Rule on Foreign Health Care Worker Certifications** – The Final Rule, adopted without change, requires certain health care workers seeking admission to the U.S., excluding physicians, to present certificates establishing competency in a specific health care field.
- **8. State Dept. Eliminates Board of Appellate Review** – The State Department issued a Final Rule effective October 20, 2008 that eliminates the Office of the Legal Adviser's Board of Appellate Review

(L/BAR), which had been authorized to review certain Department determinations, most importantly those related to loss of citizenship and passport denials.

- **9. DHS Exempts Certain Systems From Privacy Act Requirements, Including Legal Records, SEVIS** – DHS has published final rules exempting certain systems from some provisions of the Privacy Act because of “criminal, civil, and administrative enforcement requirements.”
- **10. FOIA Reveals Source of CBP’s Increased Screening and Secondary Inspection Authority of International Travelers** – Immigration and Customs Enforcement has released documents pursuant to a Freedom of Information Act request that explain that its authority to screen and save documents from international travelers has dramatically increased in recent years due to a gradual relaxing of a 20-year old policy.
- **11. Government Agency Links**
- **12. Klasko News** – NEW microsite, upcoming and recent speaking engagements, publications, and more.

---

## 1. Employment-based First Preference Category Will Remain “Current” for December 2008

For the month of December 2008, the employment-based First Preference category will be “current,” as will the employment-based Second Preference category for World-wide, Mexico, and the Philippines. However, the Second Preference cut-off dates for China-Mainland born and India will remain stuck at June 1, 2004 and June 1, 2003 respectively. The cut-off dates in the Third Preference category for Other Workers will remain at January 15, 2003 in all categories while the Professional/Skilled Workers Subcategory cut-off dates will stay stalled at May 1, 2005 for Worldwide and the Philippines; February 1, 2002 for China-Mainland born; October 1, 2001 for India; and September 1, 2002 for Mexico. The employment-based Fourth Preference subcategory for Certain Religious Workers will become available again in December 2008. The December 2008 Visa Bulletin is available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4384.html#](http://travel.state.gov/visa/frvi/bulletin/bulletin_4384.html#).

---

## 2. New Rule Requires Federal Contractors to Enroll in E-Verify System

The U.S. Citizenship and Immigration Services (USCIS) published a Final Rule requiring certain federal contractors to enroll in and use the E-Verify system to check the employment authorization of new hires and of employees assigned to federal contracts. This Final Rule amends the Federal Acquisition Regulations (FAR) and implements President Bush’s June Executive Order mandating electronic employment eligibility verification by federal contractors. E-Verify is an Internet-based system administered by USCIS that allows employers to verify the employment eligibility of their employees based on the information provided by an employee on his or her Form I-9. E-Verify checks this information electronically against records contained in Social Security Administration (SSA) and Department of Homeland Security (DHS) and Social Security Administration (SSA) databases.

Consistent with the Executive Order, the Final Rule requires certain contractors to verify work authorization of their new hires through enrollment in and use of the E-Verify system. These contractors must also verify the

employment eligibility of any current employee assigned by the contractor to perform work within the United States on the federal contract.

The Final Rule will be effective on January 15, 2009. It applies only to solicitations issued and contracts awarded after January 15, 2009. In addition, the Final Rule requires that the contract contain language specifically requiring participation in E-Verify. Thus, the E-Verify requirement only applies to contracts awarded after January 15, 2009 that contain the FAR E-Verify clause. When a contractor wins the bid on a federal contract on or after January 15, 2009 that contains the FAR E-Verify clause, the contractor will be required to enroll in the E-Verify program within 30 calendar days of the contract award date. After enrollment, there is a 90 day phase-in period for the contractor to begin verifying both new and current employees under E-Verify.

The Final Rule also provides a narrower definition of affected contracts than the original proposed rule. The Final Rule requires the insertion of the E-Verify clause only in prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000). Subcontracts are only covered where such contracts flow from a prime contract that includes the E-Verify clause if those subcontracts are for services or for construction with a value over \$3,000. The rule also does not apply to contracts to be performed outside the United States, or for acquisition of commercially available off-the-shelf items.

While most current contracts are not affected, contractors with indefinite-delivery/indefinite-quantity contracts modified after the January 15<sup>th</sup>, 2009 effective date of the rule to include the FAR E-Verify clause for future orders will be required to enroll in E-Verify once their contracts are modified.

Federal contractors will generally be required to verify the employment eligibility of all new hires, whether they will work under the contract or not. Certain contractors (institutions of higher education, state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency) will have the option of using E-Verify only for employees assigned to a covered federal contract.

The introductory comments to the Final Rule also clarify that the term "contract" as used in the rule does not extend to federal grants and cooperative agreements.

The Final Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-26904.pdf>. USCIS has also provided FAQs, available at [http://www.uscis.gov/files/article/FAR\\_FAQ\\_13nov08.pdf](http://www.uscis.gov/files/article/FAR_FAQ_13nov08.pdf). To print this KRSS issued Client Alert in PDF, click here:

[http://www.klaskolaw.com/library/files/final\\_rule\\_requiring\\_federal\\_contractors\\_to\\_use\\_e-verify.pdf](http://www.klaskolaw.com/library/files/final_rule_requiring_federal_contractors_to_use_e-verify.pdf). If you have further questions regarding the Final Rule, please contact one of the firm's attorneys.

---

### 3. USCIS to Implement Paperless Case Management System

The Washington Post reports that the Bush Administration has announced a 5-year, \$500 million effort to convert USCIS's case management system from a paper-based system to an electronic one. Currently, USCIS maintains over 70 million manila case file folders at 200 different locations. According to the Washington Post, "government investigators have reported that the agency's pre-computer-age paper filing system incurs \$100 million a year in archiving, storage, retrieval and shipping costs; has led to the loss or misplacement of more than 100,000 files; and has contributed to backlogs and delays for millions of cases." It is believed that the

conversion to an electronic system could reduce backlogs and processing delays by at least 20 percent, and possibly up to 50 percent. The Washington Post article is available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/06/AR2008110602068.html>.

---

#### 4. DHS Issues Supplemental Final Rule on Social Security No-Match Letters

On October 23, 2008, the Department of Homeland Security published a Supplemental Final Rule regarding the procedures an employer must follow to obtain safe harbor protection after it receives a "no-match letter" from the Social Security Administration (SSA) or a "notice of suspect document" letter from DHS casting doubt on the employment eligibility of an employee. The Supplemental Final Rule addresses failings in the August 2007 No-Match Final Rule, which was scheduled to go into effect on September 14, 2007. Implementation of the No-Match Rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007 in a decision that pointed out several failings in the Rule as it was then written. Specifically, the Northern District of California questioned whether DHS had: 1) supplied a "reasoned analysis" to justify its new position that a no-match letter may give an employer constructive knowledge that an employee was not authorized to work in the United States; 2) encroached on the authority of the Department of Justice by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA); and 3) violated the Regulatory Flexibility Act by failing to conduct a regulatory flexibility analysis.

The Supplemental Final Rule attempts to address the issues raised in the Court's decision. However, the Supplemental Final Rule makes no substantive change to the August 2007 No-Match rule.

Following the issuance of the Supplemental Final Rule, DHS filed a motion in the United States District Court for the Northern District of California to vacate the preliminary injunction and grant summary judgment in favor of DHS. Both motions remain undecided. Should the preliminary injunction be dissolved and the case decided in DHS's favor, employers will be required to immediately comply with the provisions of the August 2007 No-Match Rule re-issued in the October 23, 2008 Supplemental Final Rule.

The Supplemental Final No-Match Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf>. A DHS Press Release is available at [http://www.dhs.gov/xnews/releases/pr\\_1224771455239.shtm](http://www.dhs.gov/xnews/releases/pr_1224771455239.shtm), and a fact sheet issued by the National Immigration Law Center on the Supplemental Rule is available at [http://www.nilc.org/immsemplymnt/SSA\\_Related\\_Info/no-match\\_PI\\_2008-10-23.pdf](http://www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_2008-10-23.pdf). The DOJ's Office of Special Counsel's "Antidiscrimination Guidance for Employers Following the Department of Homeland Security's Safe-Harbor Procedures" is available at [http://www.usdoj.gov/crt/osc/pdf/publications/FR\\_Oct28\\_osc.pdf](http://www.usdoj.gov/crt/osc/pdf/publications/FR_Oct28_osc.pdf). See also KRSS' summary of the August 27, 2007 No-Match Final Rule at <http://www.klaskolaw.com/client-alerts.php?action=view&id=102>.

---

#### 5. Seven Countries to Be Added to Visa Waiver Program

The Department of Homeland Security published a Final Rule effective November 17, 2008 that adds seven countries to the list of nations authorized to participate in the Visa Waiver Program (VWP) -- the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea. Eligible citizens and nationals of these seven countries are now able to travel to the U.S. without first obtaining a nonimmigrant visa. However,

as will be required of all persons entering the United States under the VWP after January 12, 2009, individuals from these seven countries must obtain an approved travel authorization through the new Electronic System for Travel Authorization (ESTA) prior to traveling to the United States. In addition, they must carry an e-Passport.

The Final Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-27062.pdf>, and a DHS Fact Sheet regarding the rule is available at [http://www.dhs.gov/xnews/releases/pr\\_1226931856715.shtm](http://www.dhs.gov/xnews/releases/pr_1226931856715.shtm). A White House fact sheet on the VWP expansion is available at <http://www.whitehouse.gov/news/releases/2008/10/20081017-15.html>.

---

## 6. DHS Reminds Visa Waiver Program Travelers about New e-Passport Requirement

The Department of Homeland Security has issued a reminder on its website, available at [http://www.dhs.gov/xtrvlsec/programs/content\\_multi\\_image\\_0021.shtm](http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0021.shtm), clarifying the passport requirement timeline for individuals traveling to the United States on the VWP. (Note that this timeline does not apply to citizens and eligible nationals of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea, the seven countries just admitted to the VWP, who are required to hold e-Passports when traveling under the VWP regardless of when their passport was issued, renewed, or extended. See above.)

- Travelers issued new passports on or after October 26, 2006 must carry an e-Passport. An e-Passport contains an embedded microchip that stores information from the passport biographical data page as well as biometric information for the traveler and is marked by a special symbol on its front cover. If a passport holder was issued a new passport on or after October 26, 2006 but it is not an e-Passport, he must obtain a visa prior to traveling to the United States.
- Travelers issued new passports or who had their passports renewed/extended between October 26, 2005 and October 25, 2006 must have a digital photo printed on their passport biographical data page. Digital photographs can be identified by the fact that they are printed directly onto the passport page, rather than glued or laminated onto the passport. If the passport holder does not have a digital photo on the biographical data page, he cannot travel without obtaining a visa unless he has an e-Passport or was issued a valid passport before October 26, 2005 with a machine-readable zone (see below).
- Travelers issued new passports or who had their passports renewed/extended before October 26, 2005 must have a machine-readable zone on their passports. A "machine-readable zone" consists of two lines of text—letters, numbers and chevrons—located at the bottom of the passport biographical data page. If the traveler's passport was issued or renewed/extended before October 26, 2005 and is not machine-readable, the traveler will be unable to travel on the Visa Waiver Program unless he obtains a new qualifying passport or obtains a visa at a U.S. consulate abroad prior to traveling to the United States.

---

## 7. State Dept. Issues Final Rule on Foreign Health Care Worker Certifications

The State Department issued a Final Rule effective October 20, 2008, that adopts as final without change the Department's Interim Rule published at 67 Fed. Reg. 77158 (Dec. 17, 2002). The rule requires certain health

care workers seeking admission to the U.S., excluding physicians, to present certificates establishing competency in a specific health care field. This certification is issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or other credentialing organizations that have been approved by the Department of Homeland Security in consultation with the Department of Health and Human Services. DOS said this rule facilitates greater uniformity between the regulations of DHS and the Department of State.

The Final Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24474.pdf>. The interim rule is available at <http://edocket.access.gpo.gov/2002/pdf/02-31603.pdf>.

---

## **8. State Department Eliminates Board of Appellate Review**

The State Department issued a Final Rule effective October 20, 2008 that eliminates the Office of the Legal Adviser's Board of Appellate Review (L/BAR), which had been authorized to review certain Department determinations, most importantly those related to loss of citizenship and passport denials. Because L/BAR's jurisdiction has been superseded or made obsolete by review of loss of citizenship and passport matters by the Department of State's Bureau of Consular Affairs, the Final Rule eliminated L/BAR and authorized on a discretionary basis an "alternative, less cumbersome" review of loss of nationality determinations by the Bureau of Consular Affairs.

The rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24472.pdf>.

---

## **9. DHS Exempts Certain Systems from Privacy Act Requirements, including Legal Records, SEVIS**

The Department of Homeland Security (DHS) has published final rules exempting certain systems from some provisions of the Privacy Act because of "criminal, civil, and administrative enforcement requirements." The systems include the General Counsel Electronic Management System (GEMS). The DHS noted that Immigration and Customs Enforcement (ICE) attorneys work closely with investigators throughout the process of adjudicating immigration cases. ICE attorneys "must have access to investigative documents and related materials in order to form their decisions about how to handle particular cases." Additionally, DHS noted, ICE attorneys create attorney work product associated with immigration proceedings. The GEMS system will facilitate the collection and maintenance of materials used by ICE attorneys in immigration adjudications. "It will supplement and ultimately replace the current attorney work product paper files that are primarily stored and managed in the hardcopy alien file commonly known as the 'A-file,'" DHS noted.

DHS also is claiming exemption from certain requirements of the Privacy Act for the Student and Exchange Visitor Information System (SEVIS). DHS noted that because the purpose of the SEVIS system is to collect and maintain pertinent information on nonimmigrant students and exchange visitors, and the schools and exchange visitor program sponsors that host them while in the U.S., "it is possible that the information in the record system may pertain to national security or law enforcement matters." Disclosure of related information would therefore present a "serious impediment" to law enforcement and national security efforts, DHS said. Disclosure of the information also would permit an individual who is the subject of a record "to impede the investigation and avoid detection or apprehension, which undermines the entire system." DHS said this

exemption is “a standard law enforcement and national security exemption utilized by numerous law enforcement and intelligence agencies.”

DHS said it is establishing a new agency-wide system of records under the Privacy Act for DHS General Legal Records. This will ensure that all components of DHS follow the same privacy rules for collecting and handling general legal records. DHS is proposing to exempt its general legal records from provisions of the Privacy Act.

The GEMS Final Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24996.pdf>. The SEVIS Final Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-25000.pdf>. The General Legal Records proposed rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24997.pdf>.

---

## 10. FOIA Reveals Source of CBP’s Increased Screening and Secondary Inspection Authority of International Travelers

Immigration and Customs Enforcement (ICE) has released documents pursuant to a Freedom of Information Act request that explain that its authority to screen and save documents from international travelers has dramatically increased in recent years due to a gradual relaxing of a 20-year old policy. In July 2008, DHS publicly disclosed a “Policy regarding Border Search of Information” that permitted its agents to analyze and copy personal information, such as information contained by a traveler’s books, laptops, etcetera, without any individualized suspicion. However, this policy represents a dramatic departure from Customs Directive 3340-0006A, “Review, Copying and Seizure of Documents” issued on June 12, 1986 that required federal agents to possess a level of suspicion equal to probable cause before federal agents could copy a traveler’s personal material. The Washington Post has published an article on the FOIA release, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/22/AR2008092202843.html?hpid=topnews>.

---

## 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](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

## 12. Klasko News

### Klasko Unveils New Microsite Loaded with EB-5 Information and News

Come visit the firm's *NEW EB-5 Resource Center* microsite at <http://www.eb5immigration.com/>. The immigrant investor, or EB-5, program is an excellent permanent residence option for the wealthy individual. Since there is no quota waiting list in this preference category, the EB-5 enables a foreign national to obtain permanent residence status more expeditiously than with most other options. Our new microsite is loaded with all the information you would ever want to know about the EB-5 visa and boasts articles, a frequently asked questions section, information on regional centers, and much more. Information on an alternative to the EB-5, the E-2 Treaty Investor Visa, is also available. For more information on the EB-5 option, contact Ron Klasko at [rklasko@klaskolaw.com](mailto:rklasko@klaskolaw.com). This site will be updated frequently so please visit us often.

---


### Upcoming Speaking Engagements



Suzanne Seltzer will be a speaker at the American Immigration Lawyers Association 11th Annual New York Chapter Immigration Law Symposium entitled "Immigration Law in an Era of Enforcement: Keeping a New York State of Mind" on Wednesday, December 3, 2008 in New York, NY. Suzanne will chair the Local InterAgency Panel "Dial 311 for New York," which includes representatives from USCIS, Customs and Border Protection, and Immigration and Customs Enforcement. For more information, visit <http://www.aila.org/content/default.aspx?docid=23956> or write Suzanne at [sseltzer@klaskolaw.com](mailto:sseltzer@klaskolaw.com).

---

### Recent Speaking Engagements

 Suzanne Seltzer presented at the NAFSA Region X Conference from November 9-11, 2008 in Brooklyn, New York. Suzanne, a member of the Region X team, served on the conference planning committee in addition to chairing the InterAgency Q&A session with representatives from USCIS, Customs and Border Patrol (CBP), Student and Exchange Visitor Program (SEVP), Social Security Administration, and the Department of Motor Vehicles. For more information on the NAFSA Region X Conference, contact Suzanne at [sseltzer@klaskolaw.com](mailto:sseltzer@klaskolaw.com).

Ron Klasko and Bill Stock spoke at several sessions at the NAFSA Region VIII Conference in Pittsburg, PA from November 5-8, 2008. For a short synopsis of each talk, click on the following link: <http://www.klaskolaw.com/events-calendar.php?action=view&id=116>. Klasko, Rulon, Stock & Seltzer, LLP is proud to be NAFSA's first global advocate law firm partner.



A NAFSA Global Advocate  
Immigration Law Firm

Suzanne Seltzer and Kate Kalmykov were at Columbia University and Fairleigh Dickinson University on November 7 and November 20, respectively, where they spoke with international students about H-1B visas, H-1B alternatives, extending OPT, permanent residence status, and travel issues. For related articles and the PowerPoint presentation used at both talks, click here: <http://www.klaskolaw.com/events-calendar.php?action=view&id=111>.

## **Recent Publications**



Neelam Ihsanullah's latest article "Immigration Legislation in 2008: A Story of Politics, Policy, and Patchwork Solutions" is slated to be published in *The Legal Intelligencer* this month. In this article, Neelam sheds light on Congress' approach to immigration reform in 2008 and provides an overview of the immigration legislation enacted during the year. She also considers how the recent elections and economic downturn may affect Congress's reception of immigration reform bills in the upcoming year. For a copy of the article, contact Neelam at [neelam@klaskolaw.com](mailto:neelam@klaskolaw.com).

---

**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 © 2008 Alliance of Business Immigration Lawyers and Klasko, Rulon, Stock & Seltzer, LLP. All rights reserved.*