

SEPTEMBER 2007

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

Headlines:

- **1. DHS Issues Final Rule on Employer 'No-Match' Obligations; Judge Issues Temporary Restraining Order Until October 1** - The amended regulation describes the legal obligations of employers relating to the unlawful hiring or continued employment of unauthorized workers.
- **2. Temporary WHTI Travel Accommodation Ends September 30, 2007** - Effective October 1, 2007, U.S. citizens traveling to Canada, Mexico, the Caribbean, or Bermuda will no longer be able to depart from and re-enter the United States with a government issued photo identification and DOS official proof of application for a passport. They must present a U.S. passport or other WHTI compliant documentation.
- **3. USCIS Proposes Replacement of Green Cards Without Expiration Dates** - USCIS proposes to require nearly 750,000 lawful permanent residents carrying green cards without an expiration date to replace their current cards.
- **4. CBP Launches Online Application for Cross-Border Travel Program** - Cross-border travelers wishing to apply for Nexus now are able to do so through a new, online application system.
- **5. California CBP Provides Tips for Mexican Students Entering the U.S.** - F-1 students attending grade school, high school, or college and residing in Mexicali, Mexico, should follow these steps in advance of entry into the U.S.
- **6. USCIS Issues Service Center and Lockbox Receipting Update** - USCIS has released information on completed data entry and receipt notices for certain applications and petitions.
- **7. DV-2009 Lottery Registration Period to Begin in October** - The DV-2009 Lottery online entry period begins on October 3, 2007, and ends on December 2, 2007.
- **8. El Salvador TPS Extended** - The 60-day re-registration period began August 21, 2007, and will remain in effect until October 22, 2007.
- **9. NCSL Releases Report on 2007 Enacted State Immigration Legislation** - This online report provides a quantitative overview of introduced legislation and summarizes enacted laws relating to immigrants and refugees by state.
- **10. Report on Web Basic Pilot Released** - Overall, most employers using the Web Basic Pilot found it to be an effective, reliable tool.

- **11. Klasko News** – Upcoming speaking engagements, recent publications, and more.
- **12. Government Agency Links**

1. DHS Issues Final Rule on Employer 'No-Match' Obligations; Judge Issues Temporary Restraining Order Until October 1

U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), issued a final rule that amends the regulations relating to the unlawful hiring or continued employment of unauthorized workers. It was to be effective September 14, 2007, but a federal judge in a U.S. district court in California issued an order in a suit brought by the AFL-CIO, ACLU, and NILC temporarily restraining DHS from implementing this regulation pending a hearing on October 1, 2007.

The final rule, if and when it becomes effective, modifies the current regulation's definition of "knowing" to add three additional situations where the employer's failure to take reasonable steps in response to any one of these situations could lead to a finding that an employer had constructive knowledge of the fact that an employee was an "unauthorized alien." The additional situations are: (1) an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee; (2) written notice known as a "no match" letter from the Social Security Administration (SSA) that the combination of name and social security number (SSN) submitted for an employee does not match SSA records; and (3) written notice from DHS that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person or that there is no agency record that the document was assigned to anyone.

The final rule describes the steps which DHS considers reasonable that an employer may take after receiving a "no match" letter from the SSA or a notice of discrepancy from DHS which would provide the employer with a "safe harbor" ensuring that DHS will not use such a written notice as any part of an allegation that the employer had constructive knowledge that the employee referred to in the notice was not authorized to work in the United States.

DHS said it "will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien in a situation described in any of the regulation's examples."

Safe harbor procedures. The "safe harbor" procedures that employers may follow to avoid a finding of constructive knowledge include attempting to resolve the no-match and, if it cannot be resolved within a certain period of time, verifying again the employee's identity and employment authorization through a specified process. Safe harbor is unavailable where the employee requests visa or labor certification sponsorship and is unauthorized to work. Additionally, if the employer knows or has enough inconsistent information to suggest an employee's ineligibility, the safe harbor provisions will not protect that employer. On the other hand, the safe-harbor steps should be completed before taking any action against the employee to avoid national origin discrimination or wrongful termination claims.

The regulation describes more specifically the "reasonable" steps that an employer might take after receiving a no-match letter. Such steps include, for example, checking its records promptly after receiving a no-match letter to determine whether the discrepancy resulted from a typographical, transcription, or similar clerical error

in the employer's records, or in its communication to the SSA or DHS. If there is such an error, DHS expects the employer to correct its records, inform the relevant agencies, verify that the name and number, as corrected, match agency records, and make a record of the manner, date, and time of the verification. ICE/DHS will consider a reasonable employer to have acted promptly if the employer takes such steps within 30 days of receipt of the no-match letter. The regulation also describes a new I-9 employment verification procedure that the employer may follow within an additional three days if the discrepancy is not resolved within 90 days of receipt of the no-match letter.

According to DHS, an employer who follows the "safe harbor" procedures laid out in the Final Rule avoids only the risk of being found to have constructive knowledge that an employee is not authorized to work in the United States based on receipt of a no-match letter. DHS is not precluded from finding that an employer had constructive knowledge from other sources or that an employer had actual knowledge that an employee was an unauthorized alien. Also, an employer with actual knowledge that one of its employees is an unauthorized alien cannot avoid liability by following the safe harbor procedures described in the Final Rule. Indeed, even if the employer takes the steps set forth in the Final Rule and the discrepancies in the no-match letter are resolved, that in and of itself, according to DHS, does not demonstrate that the employee is authorized to work in the United States. In the face of this Final Rule and the additional burden it imposes, we strongly recommend that employers re-examine very closely the procedures they have in place to ensure I-9 compliance and to avoid the unlawful hiring or continued employment of unauthorized aliens.

Enforcement. A DHS FAQ states, "ICE has determined that worksite enforcement investigations relating to critical infrastructure protection are among the most important. Additionally, ICE has found that simple penalties are not an effective deterrent. Therefore, ICE is looking at ways to bring significant criminal charges against businesses engaging in routine hiring of illegal aliens."

The full text of the final rule is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16066.htm>. A DHS FAQ is available at http://faq.ice.gov/cgi-bin/ice_faq.cfg/php/enduser/std_alp.php?p_sid=6IbfqOIi (scroll down for questions and links to answers). Information from the SSA on the no-match process for employers is available at <http://www.ssa.gov/employer/noMatchNotices.htm>.

2. Temporary WHTI Travel Accommodation Ends September 30, 2007

The temporary Western Hemisphere Travel Initiative (WHTI) accommodation allowing U.S. citizens to travel by air within the Western Hemisphere using a Department of State (DOS) official proof of passport application receipt will end at midnight on September 30, 2007.

Effective October 1, 2007, U.S. citizens traveling by air to Canada, Mexico, the Caribbean, and Bermuda must present a passport or other WHTI-compliant documentation to enter or depart from the United States. It is always strongly recommended that U.S. citizens verify the specific documentary requirements for their destination country.

In the case of U.S. citizens who departed the country under this travel accommodation prior to October 1 with a Department of State official proof of passport application receipt and government-issued identification, they will be readmitted with these same documents if returning to the United States after September 30.

3. USCIS Proposes Replacement of Green Cards Without Expiration Dates

U.S. Citizenship and Immigration Services (USCIS) has proposed to require nearly 750,000 lawful permanent residents carrying green cards without an expiration date to replace their current cards. The proposed rule would require lawful permanent residents to apply for a new Permanent Resident Card (Form I-551) during a 120-day filing period. USCIS said the change would allow the agency to issue more secure permanent resident cards, update cardholder information, conduct background checks, and electronically store applicants' fingerprint and photographic information.

In August 1989, the former Immigration and Naturalization Service began issuing new cards with a 10-year expiration date and required residents to apply periodically for a new card. Between 1979 and 1989, however, the cards were issued without expiration dates. These latter cards are the subject of the proposed rule.

Under the proposed rule, affected lawful permanent residents would file an Application to Replace Lawful Permanent Residence Card (Form I-90). The I-90 requires applicants to provide current biographic and biometric (photographs and fingerprint) information.

In addition to proposing a 120-day filing period, the rule also would remove all references in the regulations to outdated I-90 application procedures and correct the title and edition date of the Form I-90. Finally, under the rule, USCIS would be able to terminate permanent resident cards without an expiration date via notice in the Federal Register.

The full text of the proposed rule, which will remain available for public comment until September 21, 2007, is posted at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16311.htm>. Information is also available in an accompanying announcement (<http://www.uscis.gov/files/pressrelease/I551Replacement.pdf>), fact sheet (<http://www.uscis.gov/files/pressrelease/I551ReplacementFS082207.pdf>), and Q & A (<http://www.uscis.gov/files/pressrelease/I551ReplacementQA082207.pdf>).

4. CBP Launches Online Application for Cross-Border Travel Program

Cross-border travelers wishing to apply for membership in the Nexus program now are able to do so through a new, online application system. Nexus is a frequent traveler program between the United States and Canada managed by U.S. Customs and Border Protection (CBP). First implemented in 2000, the Nexus program has grown to include 15 lanes at 11 locations along the U.S.-Canada border, at marine reporting locations border-wide, and at five Canadian airports. Applicants voluntarily undergo a background check, in-person interview, and fingerprinting, and pay a \$50 five-year membership fee. Under the new system, individuals may submit an online application and pay the membership fee.

Once an applicant is notified that he or she is conditionally approved through the online Nexus account, the applicant schedules an appointment, also through the online account, to complete the interview and fingerprint process and to obtain the membership card. Approved members have access to dedicated commuter lanes, airport kiosks, and telephonic marine reporting that allows expedited processing.

The Nexus card also is acceptable as an alternative to a passport for air travel, a requirement that went into effect January 23, 2007, and has been proposed as an accepted alternative to a passport under new travel document requirements, slated to go into effect for land and sea crossings as early as summer 2008. More than 133,000 travelers from both sides of the border are enrolled in the program, which accounts for more than six percent of border crossings. Travelers may call the CBP Help Desk at 1-800-927-8729 (press 0, then 1 for technical support); or the Canada Border Services Agency Help Desk at 1-888-281-5778 for French calls; or e-mail SGIL-AIDE@cbsa-asfc.gc.ca.

CBP Commissioner W. Ralph Basham said the program "has tremendous benefits for our law enforcement officials as well as travelers, particularly as it has been proposed as an alternative document to a passport under new document requirements, and we want to encourage new members to sign up."

Currently, U.S. and Canadian citizens are not required to present a passport or specific document when seeking to enter or re-enter the U.S. at land and sea crossings. CBP "highly encourages travelers to carry, at minimum, proof of citizenship such as a certified copy of your birth certificate, along with government-issued photo ID, such as a driver's license."

The announcement is at http://www.customs.treas.gov/xp/cgov/newsroom/news_releases/08162007_3.xml. The online application is available at http://www.customs.treas.gov/xp/cgov/travel/trusted_traveler/goes/.

5. California CBP Provides Tips for Mexican Students Entering the U.S.

To facilitate the inspection process at the border, U.S. Customs and Border Protection (CBP) Port Director Billy Whitford of the Calexico, California, ports of entry recently released the following tips for F-1 students attending grade school, high school, or college and residing in Mexicali, Mexico, to follow in advance of entry into the United States:

- Verify that your passport (with an F-1 student visa) is valid. If your passport has expired, you will need to obtain a valid one.
- Verify that your I-20 (Eligibility for Nonimmigrant F-1 Student Status) form is properly endorsed by the designated school official at your school for the new school year.
- Verify that you have an I-94 document with your passport.
- If you recently obtained an F-1 student visa from the U.S. Consulate, present yourself at the pedestrian permit office at either port to process it before classes commence.
- Upon "application for entry," have your entry document(s) and school identification ready to present to the inspecting officer.
- Once a student enters the pedestrian building at the downtown port of entry, a student may apply for entry at the far left pedestrian booth, Monday through Friday.
- If a student is applying for entry through the SENTRI lane, or in a carpool, the above requirements also apply.

Mr. Whitford's tips are available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/08162007_2.xml.

6. USCIS Issues Service Center and Lockbox Receipting Update

U.S. Citizenship and Immigration Services (USCIS) announced that it has experienced a tremendous increase in the number of applications filed, which has resulted in a "front log" of cases awaiting data entry. USCIS will prioritize data entry for specific form types. Delays in data entry and fee receipting will not affect change of status or extension of stay eligibility, assuming all other eligibility requirements are satisfied, USCIS said. The agency also noted that requests for Premium Processing Service will continue to be processed within 15 days.

The actual received date will be honored and recorded on the receipt notice. This date will appear in the "Received Date" box on Form I-797, Notice of Action. The received date on the I-797 is different from the "Notice Date," which also appears on the Notice and identifies the date the receipt notice was generated.

USCIS will provide weekly updates on its Web site. USCIS released information on completed data entry and receipt notices for applications and petitions received on or before the dates listed at <http://www.uscis.gov/files/pressrelease/ReceiptingTimes081707.pdf>. Please note that the receipt dates do not indicate the date the applicant or petitioner will receive the receipt, only the date it is issued. Lag times of 10 or more days until the actual receipt reaches the applicant or counsel are not unusual.

7. DV-2009 Lottery Registration Period to Begin in October

The DV-2009 immigrant visa lottery online entry period begins at noon EDT on October 3, 2007, and ends at noon EDT on December 2, 2007. Additional information and instructions are expected to be posted shortly at http://travel.state.gov/visa/immigrants/types/types_1318.html, which has a link to the previous instructions for reference purposes.

8. El Salvador TPS Extended

The designation of El Salvador for temporary protected status (TPS) has been extended for 18 months to March 9, 2009, from its current expiration date of September 9, 2007. The notice automatically extends the validity of employment authorization documents (EADs) issued under the TPS designation for six months, through March 9, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the March 9, 2009, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

The 60-day re-registration period began August 21, 2007, and will remain in effect until October 22, 2007. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period. Details are available in the August 21, 2007, Federal Register notice at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16092.htm>.

9. NCSL Releases Report on 2007 Enacted State Immigration Legislation

State legislators have introduced roughly two and a half times more immigration-related bills in 2007 than in 2006, according to the National Conference of State Legislatures (NCSL), which notes that in the continued absence of comprehensive federal reform, states have developed a variety of approaches and solutions of their own. NCSL has released a comprehensive online report that provides an overview of introduced legislation and summarizes enacted laws relating to immigrants and refugees by state. The report includes legislative proposals and laws concerned with immigration enforcement as well as all those in which legal and undocumented immigrants, migrants, and refugees are affected. The report is available at <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm>.

10. Report on Web Basic Pilot Released

Westat of Rockville, Maryland, has released an interim report sent to the Department of Homeland Security in December 2006 on the Web version of the Basic Pilot Program. The 116-page report, "Interim Findings of the Web-Based Basic Pilot Evaluation," notes that on the basis of findings from earlier evaluations, the pilot programs other than the Basic Pilot were terminated. The current Web Basic Pilot program, which is an electronic verification system to verify employee identity and employment authorization, incorporates a number of recommended enhancements.

Among other things, Westat found that the Web Basic Pilot instantly verified the work authorization status of employees more frequently than did the original program. In the Web Basic Pilot, the report notes, 92 percent of cases were initially found to be work-authorized compared to 79 percent in the original Basic Pilot. Westat also found that the accuracy of the U.S. Citizenship and Immigration Services (USCIS) database used for verifications has improved substantially but further improvements are needed. Overall, most employers using the Web Basic Pilot found it to be an effective, reliable tool and reported that the program was not burdensome. The report is available at <http://www.uscis.gov/files/nativedocuments/WestatInterimReport.pdf>.

11. Klasko News

Upcoming Speaking Engagements



H. Ronald Klasko has been invited by the Washington, DC Chapter of the American Immigration Lawyers Association (AILA) to lecture on adjustment of status issues at their dinner meeting on September 19, 2007, in Washington, DC. Additionally, Ron is a speaker at the AILA 2007 Fall CLE Conference which is themed "*Sea of Change in Immigration Law: Keeping your Head Above Water.*" Ron will participate on a panel entitled, "Securing the Lines: Security Clearance Delays and Litigation Update" on September 28, 2007, in Lake Tahoe, NV. The panel will address the delays in security clearances and name checks in adjustment of status and naturalization cases. The group also will discuss federal court remedies for dealing with security clearance and other delays in cases, including filing

mandamus actions. The article "Federal Court Litigation to Remedy Agency Delays" by Ron and Geoff, for the AILA Annual Conference Handbook, also will appear in this conference handbook. Additionally, Ron will be lecturing at Yale University and the University of Texas School of Law, among other programs, in the coming weeks. If you would like more information on any of these talks or to find out how to arrange an on-site program at your organization, e-mail Ron at rklasko@klaskolaw.com.

William A. Stock also will be presenting at the AILA 2007 Fall CLE Conference in Lake Tahoe, NV. Bill will participate in the panel discussion, "Department of Labor: Under Water Again?" that will include the Head of the Foreign Labor Certification Division of the Department of Labor. The talk will center on DOL's new regulations on employers and attorneys in the labor certification process; Bill specifically will address sanctions an employer may face if it fails to administer an immigration policy correctly. For more information on this topic, e-mail Bill at wstock@klaskolaw.com.



Recent Speaking Engagements

Ron Klasko was the lead speaker at the American Immigration Lawyers Association (AILA) Canada Conference in Montreal, Quebec, on September 7, 2007. Ron discussed the hottest topic in immigration law this summer - the fallout from the adjustment of status debacle. Ron's presentation covered work, travel, job change, and timing issues for adjustment of status applicants who, in many cases, will be waiting many years for their adjustment of status applications to be finalized. Ron co-authored an article for this conference, entitled "The Eternal Adjustment Applicant - Frequently Asked Questions" (see **Recent Publications** below). If you would like to request presentation materials, write to Ron at rklasko@klaskolaw.com.

Recent Publications

Ron Klasko and Tammy Fox-Isicoff's recently co-authored article, "The External Adjustment Applicant: Frequently Asked Questions," was published in the AILA Canada CLE Conference Handbook. This article is in question and answer format and addresses common adjustment of status concerns and issues. Write to Ron at rklasko@klaskolaw.com to request your copy.

William A. Stock's recent article, "A Labor Certification Survivor Guide," which addresses the steps for practitioners to get their labor certification practice back on the right track was published in the July/August 2007 edition of AILA's *Immigration Law Today*. E-mail Bill at wstock@klaskolaw.com to request a copy.

12. 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

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