

Alerts and Updates

AVAILABILITY OF EB-3 VISAS AND OTHER DEVELOPMENTS IN IMMIGRATION LAW

October 20, 2009

Immigration Update on Visa Availability; Rescindment of No-Match Rule; Nebraska E-Verify; and Guidance When SSNs Are Delayed

Visa Availability

The November [Visa Bulletin](#)—issued by the U.S. Department of State—continues a positive trend started in October, which made visas available for individuals with older priority dates in the Employment-Based Third Preference (EB-3) category following five months of visa unavailability and priority date retrogression. The EB-3 category encompasses those foreign nationals in positions that require at least a bachelor's degree or two or more years of experience.

The November *Visa Bulletin* also indicates continued backlogs for Employment-Based Second Preference (EB-2) applicants from India and China, although visas are available for EB-2 foreign nationals chargeable within the worldwide quota (which includes all other countries, except Mexico and the Philippines). The EB-2 category includes foreign nationals in positions requiring at least a master's degree or higher.

Applicants in all preferences with a priority date that is either listed as "C" (Current) or is a date earlier than those listed below may now take further action regarding the filing of their Adjustment of Status Applications (Form I-485). These actions can include filing the Form I-485 concurrently with the Form I-140 Immigrant Visa Petition, or now filing the I-485 application if an I-140 petition was already filed and is pending. The U.S. Citizenship and Immigration Services is also able to approve the final grant of permanent residence while the priority date is current once the I-485 adjudication is completed.

The [Visa Bulletin](#) is updated monthly and is available on the State Department website.

	All	China	India	Mexico	Philippines
EB-1	C	C	C	C	C
EB-2	C	April 1, 2005	Jan. 22, 2005	C	C

EB-3

June 1, 2002

June 1, 2002

April 22, 2001

June 1, 2002

June 1, 2002

No-Match Regulation Rescinded

The U.S. Department of Homeland Security (DHS) has followed through on its July 8 promise to rescind the 2007 No-Match Rule. As we reported in our [July 13, 2009 Alert](#), the No-Match Rule, which was blocked by court order shortly after issuance, has never taken effect. The rule established procedures that employers could follow if they receive Social Security Administration (SSA) No-Match letters or notices from DHS that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even a year later that an employee's name and Social Security number on a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes.

The withdrawal of the No-Match regulation may be a mixed blessing for employers. While rescission of the regulation eliminates employer liability for mismatches, which would have subjected employers to knowing-hire violations if safe-harbor procedures were not followed, DHS has indicated that it will be stepping up its efforts to enforce existing employer compliance programs, including I-9 audits and increased participation in E-Verify and U.S. Immigration and Customs Enforcement's Mutual Agreement Between Government and Employers (IMAGE).

Nebraska Implements E-Verify

On October 1, 2009, Nebraska became the latest state to implement an E-verify requirement. The Nebraska law orders state agencies and employers that receive state or local contracts or tax incentives to use E-Verify. Nebraska's law mirrors the federal contractor E-Verify requirement, mandating that all contracts awarded by the state after October 1, 2009, contain a provision requiring contractors and subcontractors to use E-Verify for all new hires who will be working in Nebraska.

In addition, employers and participants in certain Nebraska tax programs are required to utilize E-Verify for all new hires and prove their participation in order to receive the incentives. The new law also mandates that public employers within the state—including all agencies, boards and commissions—use E-Verify for all new hires on or after October 1, 2009. While the law does not require private employers to use E-Verify, it creates tax incentives for entities that do use it. More information is available on [Nebraska's Department of Labor website](#).

Back-Pay Award for H-1B Worker Includes Period Without Social Security Number

In *Administrator, Wage and Hour Division v. Itek Consulting, Inc.*, the U.S. Department of Labor's (DOL) Office of Administrative Law Judges (ALJ), found the employer of an H-1B worker to be liable for back wages for periods, including time when the worker did not have a Social Security number (SSN)—holding that the employee's lack of an SSN does not justify the employer's wage obligation.

The ALJ found that the H-1B worker's lack of an SSN did not meet any of the three permitted exceptions to the employer's wage obligation during periods of an employee's nonproductive status: (1) if the worker is nonproductive due to circumstances unrelated to work; (2) if the H-1B worker is made incapable of working; and (3) if the H-1B worker has been properly terminated.

The ALJ decided that the "incapable of work" exception does not include lack of an SSN because the SSA and IRS have procedures in place to address the situation. The ALJ likened the absence of an SSN to the situation of a worker requiring training or a license to perform his job, both of which would be circumstances where the employer's duty to pay the offered wage continues.

Instructions and information on how an employer can report wages before an employee receives an SSN are available on the [Social Security Administration](#) and [Internal Revenue Service](#) websites.

For Further Information

If you have any questions about visa availability, Social Security No-Match letters, E-Verify or employer wage obligations for H-1B workers, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.