

Siskind's Immigration Bulletin – October 2, 2009

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Siskind Susser serves immigration clients throughout the world from its offices in the US and its affiliate offices across the world. To schedule a telephone or in-person consultation with the firm, go to <http://www.visalaw.com/intake.html>.

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1. Openers

Dear Readers:

Our summer hiatus from the newsletter has ended and we're happy to be back on our regular schedule.

And just in time. Congressional immigration leaders are busily drafting the next major immigration bill. Immigration enforcement is getting busier. And as the economy slowly recovers, companies are again dealing with immigration questions that they had put aside in the recent past.

In firm news, Lynn Susser was interviewed for the Memphis Daily News regarding Siskind Susser's 15<sup>th</sup> anniversary - <http://www.memphisdailynews.com/editorial/Article.aspx?id=44966> . I'm speaking next week on investor immigration at the International Bar Association's annual meeting in Spain and recently presented on the subject of physician immigration at the annual Healthcare Staffing Summit in Washington.

Finally, the DV-2011 green card lottery is about to get underway. We'll be sending out information in our next newsletter on how to enter yourself in the program.

Regards,

Greg Siskind

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2. The ABC's of Immigration, Employer Compliance Series – Electronic I-9s

For the past few years, employers have been eligible to file and store Forms I-9 electronically. As the national crackdown on employers of illegal immigration grows more intense and a number of vendors are now offering electronic I-9 products, employers are starting to weigh the benefits of ditching paper I-9s and going digital. This article first discusses the laws surrounding filing and then reviews why companies would want to make the switch.

**Can a Form I-9 be completed electronically?**

In October 2004, President George W. Bush signed Public Law 108-390 which for the first time authorized employers to retain Employment Eligibility Verification Forms (Forms I-9) in an electronic format. In April 2005, the law took effect and employers began to manage their Forms I-9 electronically. ICE issued rules setting standards for using electronic I-9s in June 2006 (8 CFR §274a.2) and the agency is actively encouraging employers to store their Forms I-9 electronically.

**Why would companies want to switch to electronic I-9 systems?**

There are numerous reasons why companies would prefer electronic I-9s over paper-based systems.

- Most of the major vendors use web-based systems. That means employers do not have to install software and only need Internet access and a web browser.
- Employees are not able to complete the Form I-9 unless the data is properly entered. Many vendors offer systems that guide workers and human resource officials through proper completion of the forms.
- Some of the systems are “intelligent” and ensure that based on answers provided in Section 1 of the Form I-9 only appropriate documents show up in Section 2.
- Some systems allow for certain sections of the form that are the same from applicant to applicant to be pre-filled to save time.
- The better electronic I-9 systems include help features that make it easier for human resource officials and employees to answer questions on the Form I-9.
- Employers with employees at multiple sites can more easily monitor I-9 compliance at remote locations.
- Re-verification is automated and employers are less likely to incur liability due to an inadvertent failure to update an employee’s I-9. Many systems send email reminders.
- Employers can integrate the system with E-Verify or other electronic employment verification systems in order to minimize the chances that unauthorized workers end up employed.
- Using an electronic I-9 system reduces the risk of identity theft from the robbery of paper I-9 records (a problem that has been occurring with more frequency of late). By law, electronic I-9s must have built in security systems to protect the privacy of employees and the integrity of the data.
- Using an electronic I-9 system can make it easier to respond to ICE audits. In addition to the audit trails required by regulation, some of the systems archive communications relating to the I-9.
- Electronic I-9 systems can integrate with payroll and employee database systems.
- Data from the electronic Form I-9 can be automatically uploaded in to E-Verify, the government’s electronic employment verification system. Several electronic I-9 vendors are federally approved E-Verify Designated Agents thus allowing for them to automate the entry of an employer’s data in E-Verify.
- An electronic I-9 system allows for the automation of the purging of Forms I-9 for employees no longer with the employer and for whom Forms I-9 must no longer be retained.
- Some of the systems contain instructions in multiple languages for employees that have difficulty understanding English.
- Employers can potentially achieve cost savings by storing Forms I-9 electronically rather than using conventional filing and storage of paper copies or converting paper forms to microfilm or microfiche.
- Electronically retained I-9s are more easily searchable and, hence, often a time saver for HR personnel. The better systems produce a variety of reports that make it easier to monitor I-9 compliance.
- Some of the systems also track visa and I-94 expiration dates.

### **Are there downsides to using an electronic I-9 system?**

There are some potential problems with using a digital system. They include the following:

- There are no 100 percent secure electronic systems (though the law requires electronic I-9 vendors and their employer customers to implement security measures).
- The electronic systems do not totally stop identity theft since a person can present doctored identification and employment authorization paperwork making it appear that the employee is another person (though employers can undertake additional background checking to reduce the likelihood of problems).
- The cost of a paper I-9 form is free (aside from indirect costs like storage, training, etc.). Electronic systems typically charge a flat monthly fee or a per employee fee (though the per employee costs are usually no more than a few dollars with any of the major vendors).
- Most I-9s are Internet dependent. When the Internet is not available, the I-9 form may not be able to be completed (though an employer may be able to use a paper I-9 in such a case).
- If an electronic I-9 vendor goes out of business, the employer could be in a bind if precautions are not in place to make it easy to retrieve the employee's data (such as having back ups on the employers own computer system).

### **What requirements must electronic I-9 systems meet?**

The 2006 rules set standards for completing forms electronically and also for the scanning and storage of existing I-9 forms. Since the change in the law a number of software products have come on to the market allowing for the electronic filing of I-9s and there are advantages to using such a system including improving accuracy in completing forms and setting up automated systems to prompt employers to re-verify I-9s for employees with temporary work authorization.

DHS regulations require I-9s generated electronically to meet the following standards:

- The forms must be legible when seen on a computer screen, microfiche, microfilm or when printed on paper.
- The name, content and order of data must not be altered from the paper version of the form.
- There are reasonable controls to ensure the accuracy and reliability of the electronic generation or storage system.
- There are reasonable controls designed to prevent and detect the unauthorized or accidental creation, deletion or deterioration of stored Forms I-9.
- The software must have an indexing system allowing for searches by any field.
- There must be the ability to reproduce legible hardcopies.
- The software must not be subject to any agreement that would limit or restrict access to and use of the electronic generation system by a government agency on the premises of the employer, recruiter or referrer for a fee (including personnel, hardware, software, files, indexes and software documentation).
- Compression or formatting technologies may be used as long as the standards defined above are met.
- There is a system to be able to identify anyone who has created, accessed, viewed, updated, or corrected an electronic Form I-9 and also to see what action was taken.

Employers that know or should reasonably have known that an action or lack of action will result in loss of electronic Form I-9 records can be held liable under IRCA.

Employers may use more than one kind of electronic I-9 system as long as each system meets the standards noted above.

Employers using an electronic I-9 system must also make available upon request descriptions of the electronic generation and storage system, the indexing system and the business process that create, modify and maintain the retained Forms I-9 and establish the authenticity and integrity of the forms, such as audit trails. The I-9 software vendor should, of course, provide such documentation to the employer, though this is not a requirement in the regulations.

There are special audit requirements for electronically stored I-9s and a discussion of those requirements is set out below in the section of this chapter discussing the regulation of government inspections.

### **How is an electronic Form I-9 “signed” by an employee and employer?**

DHS regulations require that electronic I-9s can be “signed” electronically through a system where the person providing the information will acknowledge that he or she has read the attestation.

The signature must be affixed to the document at the time the attestation is provided. The form must also be printed out and provided to the person providing the signature at the time the document is signed. This applies to the employee as well as the employer, recruiter, or referrer for a fee.

### **What are the Form I-9 recordkeeping requirements for electronic I-9s?**

Employers must keep I-9 Forms for all current employees though the forms of certain terminated employees can be destroyed. In the case of an audit from a government agency, the forms must be produced for inspection. The forms may be retained in either paper or electronic format as well as in microfilm or microfiche format.

### **What privacy protections are accorded workers when they complete Form I-9 electronically?**

Employers with electronic I-9 systems are required to implement a records security program that ensures that only authorized personnel have access to electronic records, that such records are backed up, that employees are trained to minimize the risk of records being altered, and that whenever a record is created, accessed, viewed, updated, or corrected, a secure and permanent record is created establishing who accessed the record.

### **How does an employer who uses an electronic I-9 system respond to an ICE audit?**

Original I-9 forms must normally be provided for inspection to ICE examiners. If an employer retains Forms I-9 in an electronic format, the employer must retrieve and reproduce the specific forms requested by the inspecting officer as well as the associated audit trails showing who accessed the computer system as well as the actions performed on the system in a specified period of time. The inspecting officer must also be provided with the necessary hardware and software as well as access to personnel and documentation in order to locate, retrieve, read, and reproduce the requested Form I-9 documentation and associated audit trails, reports, and other related data.

Finally, an inspecting officer is permitted to request an electronic summary of all of the immigration fields on an electronically stored Form I-9.

### **Can a company using an electronic I-9 system batch load data to E-Verify?**

Yes. DHS has a real-time batch method that requires a company develop an interface between its personal system or electronic Form I-9 system and the E-Verify database. Employers interested in more information on this including design specifications, should call ICE at 800-741-5023.

### **Can employers convert existing I-9s in to an electronic format?**

Yes. Many employers are scanning and indexing their current I-9 Forms and storing them electronically using electronic I-9 software.

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### 3. Ask Visalaw.com

If you have a question on immigration matters, write [Ask-visalaw@visalaw.com](mailto:Ask-visalaw@visalaw.com). We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

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Q- I was in the U.S. as an L-1B nonimmigrant with an I-94 valid until May of 2008. My company filed an extension of status, which was denied in August of 2008. I did not leave the U.S. until December of 2008, about 120 days after the denial. I have a B-1/B-2 visitor visa in my passport. Can I still travel to the U.S. using the B visa?

A- Overstaying your authorized period of stay results in the automatic revocation of your visa under 222(g). So your L-1B visa became invalid when you failed to leave the U.S. after your extension of status was denied. Your B visa remains valid, since it is not the visa you were using when you overstayed. Also, since you did not overstay more than 180 days, you do not have a bar of inadmissibility. However, when you

use the B visa to enter the U.S., the CBP officer who is inspecting you will have to make a determination as to whether you are someone who is likely to leave the U.S. upon the expiration of your I-94. Having previously overstayed a visit to the U.S. could be a reason for the CBP officer to deny you entry into the U.S. on the B visa.

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Q- My mother was a U.S. citizen. She filed a petition for my married sister in November of 2001. My mother passed away in March of 2009. Is the petition still valid? Can I provide an Affidavit of Support so that my sister's case remains valid?

A- An I-130 petition automatically becomes revoked upon the death of the petitioner (except in some instances where the petitioner was the spouse of the beneficiary). So the I-130 is no longer valid. However, Under the Family Sponsor Immigration Act, DHS has the authority to reinstate an I-130 petition for humanitarian reasons and where there is a substitute sponsor. A substitute sponsor can be a spouse; parent; mother-in-law; father-in-law; sibling; child who is 18 or older; son-in-law; daughter-in-law; sister-in-law; brother-in-law; grandparent; grandchild who is 18 or older; or legal guardian of the beneficiary. Some criteria in determining whether there are humanitarian reasons to reinstate the I-130 are 1) disruption of family unity; 2) hardship to U.S. citizens or Permanent Residents; 3) a beneficiary who is elderly or in poor health; 4) a beneficiary who has had a lengthy residence in the U.S.; 5) a beneficiary who has no home country to go to; 6) undue delays caused by DHS or DOS in processing the petition and visa; and 7) a beneficiary who has strong family ties to the U.S.

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Q- I am a Conditional Permanent Resident. My conditional residence expired in September. I have applied already to have the condition removed. Can I still work while waiting for my application to be adjudicated? Do I have to apply a separate work authorization card while waiting?

A- When you filed the application to remove the condition from your residence, you received a Receipt Notice. That Receipt Notice should have a statement on it that it can be used as proof of your status, including your ability to travel and work authorization, for one year from the date it was issued. So you can work while waiting for your application to be adjudicated, and you do not need a separate work authorization. You just need to present that letter to your employer as proof of your authorization to work. If USCIS takes longer than a year to adjudicate your application, you can make an Infopass appointment with your local USCIS office, up to 30 days prior to the expiration of the year, and they will put a stamp in your passport which you can use as evidence of your status and work authorization.

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Q- I am currently working on an H-1B visa, but I had to go through a lottery to get it. When it is time to renew my H-1B visa, will I have to go through a lottery again?

A- No. There is a limit to the number of new H-1B visas that can be issued each year, 65,000 plus an additional 20,000 for applicants who have a U.S. masters degree or higher. However, if you have been in H-1B status within the last six years, your H-1B application will not be considered as a new H-1B and will not be subject to

the cap. So you will not have to go through a lottery when you apply to extend your H-1B status.

This year USCIS received less than 65,000 new H-1B applications, so there was no lottery. Currently there are between 15,000 and 20,000 available new H-1B visas. So if someone has held off on filing an H-1B petition because of a fear of not being chosen in the lottery, they may still be eligible to file for a new H-1B visa.

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#### 4. Border and Enforcement News

Citing the latest figures from the US Border Patrol's Tucson Sector, The number of deaths of undocumented immigrants in the Arizona desert increased by 20 percent during the 2009 fiscal year, despite extreme vigilance and the efforts of humanitarian organizations, *The Latin American Herald Tribune Reports*. Since Oct. 1, 2008 until Aug. 31 this year, 191 undocumented immigrants have died, compared to last year, when during the same period, 159 deaths were recorded.

"I'm sure that once all the deaths in September are added up, we will easily show more than 200 fatalities," said Rev. Robin Hoover, founder and director of Compassionate Borders, a group that every week puts water in the desert for undocumented immigrants. "In the past few years an average of 180 undocumented immigrants have died each year in the Arizona desert. Again this year we see the percentage of deaths on the rise," said Hoover, who last Sunday led a ceremony in Tucson in remembrance of the victims.

Border Patrol spokesman Jorge Gomez says that the majority of these deaths are caused by human traffickers. "These people don't care about the lives of immigrants, they just see them as business and don't hesitate to leave them to their fate in the desert," Gomez said. He added that traffickers continue to trick illegals by telling them they will only have to walk a few hours through the desert, when they really end up walking for days. "No one can carry enough water to survive so many days in the desert," Gomez said.

The Tucson Sector, which includes 90 percent of the border between Arizona and the Mexican state of Sonora, is currently guarded by 3,300 Border Patrol agents. This region annually reports more than 40 percent of all undocumented-immigrant arrests along the entire Mexican border, as well as most of the deaths.

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The number of people crossing both the northern and southern borders of the US has seen a sharp decrease over the past few months, coinciding with the enforcement of the June 1 passport requirement, *USA Today* reports. According to estimates by US Customs and Border Patrol, the combined travel among the two borders has decreased by 13% since the rule was enacted.

The new rule, part of the Western Hemisphere Travel Initiative, was introduced as an effort to make borders secure after 9/11. The rules affect US citizens entering by land or sea, who once could get across by simply declaring themselves citizens. The

change also affects citizens of Canada and Bermuda, who previously did not have to show passports.

The passport rule went into effect in airports in 2007. The rules for Mexicans has remained unchanged; they have needed special border crossing cards or passports plus visas, well before the Western Hemisphere Travel Initiative first went active.

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In an effort to improve relations and trust with members of its city's growing Hispanic community, New Orleans Superintendent Warren Riley announced last month that his officers will not ask crime victims or witnesses about their documentation status. "We will not, under any circumstances, focus on deportation," Riley said.

According to New Orleans' *The Times Picayune*, the announcement is the latest in a series of steps taken by the city to bolster the relationship with its Hispanic residents. Earlier this year, NOPD named officer Janssen Valencia as its liaison to the Hispanic community. Valencia said in an interview that the NOPD would not question crime witnesses or victims about their immigration status. But Riley's statement made the policy official.

"We want them to know that – unless you are the violator or the perpetrator – there is no threat of deportation or arrest, as it relates to the New Orleans Police Department," Riley said.

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Last week, President Obama nominated Alan Bersin to be the new commissioner of US Customs and Border Protection, the nation's largest law enforcement agency, *The Los Angeles Times* reports. Bersin, a veteran of federal patrol enforcement, has served since April as assistant secretary for international affairs at the Department of Homeland Security. If approved by the Senate, Bersin will oversee about 57,000 employees who police the nation's borders.

Bersin will continue to advise Homeland Security Secretary Janet Napolitano on issues related to Mexico and the border, although he will relinquish the title of special representative, officials said. "Under Alan's leadership over the past several months, we have forged new international and domestic partnerships along our borders to strengthen security," Napolitano said in a statement. "I look forward to continuing to work with Alan in his new position."

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## 5. News From the Courts

Earlier this month, the US government filed an 18-count indictment against a New Jersey IT services firm for allegedly using fraudulent visas. *Computer World* reports that the government is seeking \$4.9 million against the NJ-based Vision Systems Group Inc., who is accused of paying its H-1B workers in multiple states based on low prevailing wages in Iowa through the creation of shell businesses in that state.

Prosecutors for the case argue that Vision Systems told its H-1B hires that green cards could be obtained more quickly from ICE offices located outside New Jersey. The indictment charges that the methods used by Vision Systems "have substantially deprived US citizens of employment."

Vision Systems and its executives are fighting the charges in US District Court in Iowa. Mark Weinhardt, attorney representing the company, contends that "workers were paid at or above the prevailing wage rates of the places they were working."

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The full 4th U.S. Circuit Court of Appeals will not review the asylum case of a woman whose father has said he will bring her back to Senegal, circumcise her and marry her off to a much older man, Baltimore's *The Daily Record* reports. Francoise A. Gomis, whose asylum petition was denied by three-judge panel in July, will not get a rehearing.

Gomis, who came here on a work visa that expired in April 2003, filed an asylum petition in 2005. She testified that she did so after learning that her 15-year-old sister had been forcibly circumcised, suffering blood loss and infection, and that when their brother complained to the police, he was told to go home.

Judge Paul V. Niemeyer, who penned the majority opinion in July, also wrote Monday's opinion. He called female circumcision "abhorrent" but said the court must defer to the Board of Immigration Appeals, which found that Gomis failed to prove it was "more likely than not" she would be circumcised.

Judge Roger L. Gregory, the vehement but sole dissenter in July, requested the rehearing and objected to its denial as contrary to settled law. "There is...one basis for asylum that is clearly established in both this Circuit and the other federal courts: protection from female genital mutilation," Gregory wrote last week. "Gomis's family made it clear that were she to return to Senegal, there is no chance that she could escape circumcision at their hands," he added. "Neither invocation of sympathy nor innovation in the law of asylum was necessary to grant Ms. Gomis's petition; it merely required the application of our precedent - simple justice."

According to her 2005 asylum petition and testimony, she had fled Senegal because her family wanted her to undergo circumcision and get married to a man in his 60s. Gomis presented the Immigration Court with what Gregory called 'a mountain of evidence' that she would be circumcised if she returned to Senegal, including a letter from her father saying that she had embarrassed the family and that he would use 'all means' to get her back and circumcise her.

Gomis' family has said she will be circumcised and, in her small ethnic group, almost all women are circumcised, many right before marriage, he noted. "To deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice," Gregory wrote. "If we choose to ignore the blatant evidence before us of her specific situation by shielding our eyes with general statistics, then we will be sending her to a torturous future of which I shudder to imagine."

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6. News Bytes

*The Wall Street Journal* reports that the number of foreign-born residents of the US has declined for the first time since 1970. According to the Census Bureau's annual American Community Survey, which first recorded the decrease, attributes this to the decline in construction jobs, which has lured fewer immigrants from their home countries.

About 38 million foreign-born people lived in the U.S. in 2008, or 100,000 fewer than in the previous year, according to an analysis of Census data by William H. Frey, a demographer at the Brookings Institution. The decline falls within the margin of error, but it still represents a significant turnaround. Between 2000 and 2006, the U.S. foreign-born population increased by about one million people a year; in 2007, the number dropped in half.

The Census Bureau's American Community data survey is available online at: <http://www.census.gov/acs/www/>.

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US Citizenship and Immigration Services, who recently introduced a revised citizenship exam, last month reminded citizen hopefuls that the new exam had become mandatory on October 1. According to *The Press-Enterprise*, the revised exam, which was introduced on a trial basis in 2006, tests broad concepts rather than easy-to-memorize facts that comprised the previous exam.

To better familiarize citizenship applicants with the new exam and the rest of the naturalization process, USCIS is currently holding meetings across the country that will feature free study materials, informational CDs, application forms and a question-and-answer session, said a USCIS spokesperson.

The revised exam appeared last year, with applicants given a choice between the old and new exams, with those submitting an application on or after October 1, 2008 required to take the new exam. All 100 questions and sample answers for the exam are made available ahead of time. Applicants are asked up to 10 of the questions and must answer at least six correctly.

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On September 17, USCIS commemorated Constitution Day and Citizenship Day by naturalizing over 8,400 citizenship candidates at nearly 75 special naturalization ceremonies held throughout the US, a USCIS press release announced.

Constitution Day and Citizenship Day is celebrated on Sept. 17 in remembrance of the signing of the Constitution in 1787. It has been celebrated in some form since 1940, when Congress designated the third Sunday in May as "I Am an American Day." In 1952, President Harry Truman signed a bill formalizing the celebration of Citizenship Day on Sept. 17. In 1956, Congress requested, and President Dwight Eisenhower proclaimed, the week beginning Sept. 17 through Sept. 23 as Constitution Week. Most recently, in 2004, Congress established Sept. 17 as Constitution Day and Citizenship Day.

USCIS' celebration of citizenship is highlighted by various special events, including ceremonies to be held at the Smithsonian's National Museum of American History in Washington, D.C., for 25 candidates; Ellis Island, N.Y., for 100 candidates; Valley Forge National Historical Park in Pennsylvania for 100 candidates; National Constitution Center in Philadelphia for 50 candidates; the William J. Clinton Presidential Library in Little Rock, Ark., for 300 candidates; and Civic Center Park in downtown Denver for 600 candidates.

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*NextGov.com* reports that USCIS unveiled its new interactive website last week, including portals that allow foreigners to track the status of their citizenship applications, keep records up to date, and access forms and other resources.

'The new USCIS site is clean, well-organized and seems to offer improved navigation with intuitive tools and a better system for case reviews,' said Dave Lewan, director of government markets at ForeSee Results, a research firm that partners with the American Customer Satisfaction Index to issue quarterly reports on public opinion about federal Web sites. 'But what's [most] important is the opinion of the actual site users. Now that USCIS has launched this new site, it will be absolutely critical for them to collect, analyze and act on the voice of visitors to make sure the site meets their needs and expectations.'

President Obama announced in June plans to redesign the CIS Web site to simplify the immigration system. 'The idea is very simple here: We're going to leverage cutting-edge technology to reduce the unnecessary paperwork, backlogs and the lack of transparency that's caused so many people so much heartache,' he said.

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U.S. immigration officials are considering another possible round of fee increases and budget cuts next year, prompting concern among immigrant rights groups, *The Los Angeles Times* reports. Alejandro Mayorkas, the new director of the U.S. Citizenship and Immigration Services, said during a visit to Los Angeles last week that "financial challenges" have caused the agency to consider potential fee increases but no decision has been made. The agency is facing a \$118-million revenue shortfall this year in part because applications for citizenship and skilled worker visas are below projections, according to officials.

Immigrant advocates said, however, that any additional fee increase would severely hamper legal immigrants from pursuing citizenship. "Right now the high cost of citizenship is putting the dream of naturalization out of reach of low- and moderate-income legal permanent residents, and any future increase will just make the situation worse," said Rosalind Gold of the National Assn. of Latino Elected and Appointed Officials Educational Fund in Los Angeles.

According to *The Associated Press*, Agency officials have blamed the revenue shortfall on an overall drop in immigration-related applications being filed amid an economic slump. In 2007, the agency increased the cost of applying for citizenship from \$400 to \$675, and applications surged before the higher fees took effect. The number of applications for both naturalization and status adjustments have plummeted since then, according to statistics kept by the agency.

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Earlier this week, President Barack Obama said he's not backing off of his commitment to immigration reform, but edged away from his promise to have a bill he strongly supports in Congress by the end of his first year in office, *Politico.com* reports.

"Now, whether that bill gets introduced on November 15th or December 15th or January 15th, that's not really the issue," Obama said in an interview with Univision. "I mean, it would be easy for us to get a bill introduced. The challenge is getting the bill passed. And there I've been realistic. What I said is that this is going to be a tough fight and that we're going to have to make sure that we are working as hard as we can to do it. I am not backing off one minute from getting this done, but let's face it, I've had a few things to do."

"We had an economic crisis that almost saw a financial meltdown," Obama continued. "Health care has taken longer than I would have liked, but it's a big, tough issue. Immigration reform is gonna be tough as well, but I think we can get it done."

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## 7. Washington Watch

The past few weeks have been filled with a number of legislative, regulatory and enforcement developments relating to immigration law. Here's a quick review of some of the more recent noteworthy events that help shape the dialogue of immigration law.

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### **Mel Martinez Bids Farewell, Urges Senate to Pass Immigration Reform**

[A voice of reason in the GOP on immigration departs. He will be missed in this process.](#)

In the mean time, Florida's new Senator, George LeMieux, is certainly not sounding like a fighter for immigration reform. [According to the Orlando Sentinel](#):

*LeMieux appears likely to steer clear of Martinez's controversial attempts to overhaul immigration law, which would include a path to citizenship for the undocumented. 'We need to secure our borders,' LeMieux said. 'After we do that, we can figure what happens to people already here.'*

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### **CBP Confirms EB-5 Visa Holders to be Admitted After September 30th**

The regional center EB-5 program expired on September 30th and despite the fact that the Senate has passed an extension as part of the DHS spending bill, final passage remains stalled. It is likely Congress will pass a continuing resolution extending the program, but just in case, EB-5 advocates are asking questions regarding what happens while we wait.

The American Immigration Lawyers Association asked officials at Customs and Border Protection how they intend to handle these cases:

*Question: Based on the October Visa Bulletin, the Department of State will be issuing EB-5 visas for the full validity period up to close of business on September 30, 2009. Could you confirm that CBP will be admitting these EB-5 visa holders on or after September 30, 2009?*

*Answer: If the visa is valid and the applicant is otherwise admissible, there should not be an issue with CBP admitting as an EB-5.*

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### **Did "You Lie!" Congressman Lie about Immigration Law Background?**

There has been an interesting alliance of antis in both the health care and immigration arenas to scare people in to believing that illegally present immigrants will be eligible for subsidies to secure health insurance under the health care reform proposal being pushed by President Obama. That claim is [patently false](#). But that did not stop one extremist in the Congress, Representative Joe Wilson (R-SC) from screaming "You lie!" when President Obama addressed that myth. This appalling lack of respect has already led the GOP to go in to damage control mode and Wilson [issued an apology](#) within minutes of the President's speech ending. The apology was really one of those non-apology apologies where he didn't apologize for making a false claim, just for the outburst.

Wilson later tried to save face by telling reporters that he was actually an immigration attorney in the past. *The NY Times*:

"I'm for immigration," [Wilson] said, **adding that he had been an immigration lawyer**, although he did not specify exactly what he had done. "But people who come to our country and violated our laws, we should not be providing full services."

It struck me immediately that this would be bizarre if true. Going from representing immigrants to being a member of the virulently anti-immigrant [Immigration Reform Caucus](#) and getting an A- rating from anti-immigrant group [Numbers USA](#) as well as support from the anti-immigrant fundraising group [ALIPAC](#) would show a dramatic transformation in one's views.

I've been practicing immigration law in the South for nearly 20 years and know a lot of my fellow immigration lawyers in this region. I didn't recognize the name Joe Wilson from West Columbia, South Carolina. So I decided to call some of my friends in the Carolina immigration bar - including some from Columbia - and *no one is aware of Congressman Wilson ever handling immigration matters.*

An AILA spokesperson [confirmed](#) that "no one from South Carolina by the name Joe Wilson or Addison Wilson has ever been a member," effectively answering the question of if Rep. Wilson had ever practiced immigration law.

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## Conrad 30 Program Extended through October 31<sup>st</sup>

Did you forget? Despite the fact that the Senate has approved a three year extension in the DHS appropriations bill, the House and Senate have yet to complete negotiations on a compromise bill. The program, which set to expire September 30th, [is now extended](#) until October 31st while House and Senate conferees work out longer term extensions as part of their work on the DHS spending bill.

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### 8. Notes from the Visalaw.com Blogs

#### [Greg Siskind's Blog on ILW.com](#)

- Grassley Letter to Mayorkas Takes USCIS to Task
- DHS Gets Funds to Operate Another Month
- *Nature*: US Visa Nightmares
- Do You Feel Lucky?
- Crystal Williams Chosen as Director of AILA
- MALDEF Head: Don't Block Piecemeal Immigration Reform if Comprehensive Fails
- USCIS Getting Closer to Scrapping HIV Bar?
- Immigration Removal Proceedings Up 110% in Last Five Years
- Marriage Fraud Grandma Sentenced to 44 Months
- Andrew Sullivan: Immigration System at a Breaking Point
- Dobbs Criticized for Promoting Website Hosting Pro-Secession Articles
- USCIS Unveils New Site
- American Immigration Lawyers Association Confirms Joe Wilson was Never Member
- Media Matters Launches Dobbs Boycott
- Antis Descend on Capitol Hill
- Fact Check: Illegally Present Immigrants and Health Care Reform
- October Visa Bulletin Numbers Show Modest Improvements

#### [The SSB I-9, E-Verify, & Employer Immigration Compliance Blog](#)

- NC County Consider E-Verify Contractor Mandate
- Nebraska Contractor E-Verify Rule Goes in to Effect
- American Apparel Begins Terminating Employees in Wake of ICE Investigation
- Laurel, Mississippi Sanctions Trial Delayed
- Fremont Nebraska Ordinance to be Tested in Court
- Texas Congressional Candidate Proposes Ban on Muslim Immigration
- RI Employer Compliance Crackdown Leading to Drop in Immigrant Population
- Lima, Ohio Proceeding with E-Verify Policy
- Asian-American Civil Rights Group Petitions SCOTUS to Overturn AZ Compliance Law
- Nebraska to Require E-Verify for Tax Incentives Recipients

#### [Visalaw Healthcare Immigration Blog](#)

- Siskind Susser Lawyers Write Chapters for New AILA Nursing Immigration Handbook
- Judge Clears Way for Atlanta Dialysis Unit to Close
- Officials Agree That Undocumented Immigrants Should Get Flu Vaccine
- Conrad 30 Program Extended Through October 31<sup>st</sup>

- Immigrants Impacted by Struggling Atlanta Hospital
- International Nurse Recruiters Adopt Code of Ethics
- Australians Open US Medical School
- AMA Section Issues Resolutions Relating to Foreign Docs

#### [Visalaw Investor Immigration Blog](#)

- Chinese Hybrid Automaker Hopes to Use EB-5 Program to Attract Investors
- McClatchy Reports on Success of EB-5 Program
- EB-5 Regional Center Program Extended Until End of October
- CBP Confirms EB-5 Visa Holders to Be Admitted after September 30<sup>th</sup>
- UK Family Faces Loss of Business after Visas Not Renewed
- Ohio Regional Center Targets Investors to Fund Research Park
- CNN Reports on Jay Peak EB-5 Program

#### [Visalaw Fashion, Sports, & Entertainment Blog](#)

- Immigrant Soccer League Flourishes in Philadelphia
- Illegally Present Immigrant Squatters Occupy Hockey Team Apartment
- Hockey Coach Ditches Job Offer Due to Immigration Concerns
- Foreign Baseball Players Having Big Impact on Minors
- Fallout Continues over CBP Treatment of Bollywood Star
- Baseball Player, Horse Groomer Face Deportation Over Criminal Charges

#### [Visalaw International Blog](#)

- Spain: Information on PenaNet
- New Zealand: Consultants may be Giving False Hope to Overstayers
- Canada: Sergio Karas co-chairs Ontario Bar Association Seminar
- Canada to Ease Immigration for Some Afghans
- China: US Grads Flocking to China for Job Opportunities

#### [The Immigration Law Firm Management Blog](#)

- Time to Break Out the Champagne?
- Are Lawyers Shackled by Antiquated Ethics Rules?
- Controlling Your Smartphone by Voice
- 2009 Innovaction Awards Announced

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## 9. State Department Visa Bulletin for October 2009

### **A. STATUTORY NUMBERS**

1. This bulletin summarizes the availability of immigrant numbers during **October**. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; the Bureau of Citizenship and Immigration Services in the Department of Homeland Security reports applicants for adjustment of status. Allocations were made, to the extent possible under the numerical limitations, for the demand received by **September 9th** in the chronological order of the reported priority dates. If the demand could not be satisfied within the statutory or regulatory limits, the

category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits.

Only applicants who have a priority date **earlier than** the cut-off date may be allotted a number. Immediately that it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date which has been announced in this bulletin.

2. Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. The dependent area limit is set at 2%, or 7,320.

3. Section 203 of the INA prescribes preference classes for allotment of immigrant visas as follows:

#### **FAMILY-SPONSORED PREFERENCES**

First : Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference.

Second : Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers:

A. Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation.

Third : Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth : Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences.

#### **EMPLOYMENT-BASED PREFERENCES**

First : Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second : Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third : Skilled Workers, Professionals, and Other Workers: 28.6% of the

worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth : Certain Special Immigrants: 7.1% of the worldwide level.

Fifth : Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

4. INA Section 203(e) provides that family-sponsored and employment-based preference visas be issued to eligible immigrants in the order in which a petition in behalf of each has been filed. Section 203(d) provides that spouses and children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The visa prorating provisions of Section 202(e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: CHINA-mainland born, INDIA, MEXICO, and PHILIPPINES.

5. On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (**NOTE:** Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.)

Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	22JUL03	22JUL03	22JUL03	08JUN92	08OCT93
2A	01JUN05	01JUN05	01JUN05	01MAR03	01JUN05
2B	22AUG01	22AUG01	22AUG01	22MAY92	01MAY98
3rd	15JAN01	15JAN01	15JAN01	08JUL91	15OCT91
4th	15APR99	15APR99	15APR99	08OCT95	01DEC86

**\*NOTE:** For **October**, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01MAR03. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01MAR03 and earlier than 01JAN05. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

	All Chargeability Areas	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
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	<b>Except Those Listed</b>				
<b>Employment-Based</b>					
1st	C	C	C	C	C
2 <sup>nd</sup>	C	22MAR05	22JAN05	C	C
3 <sup>rd</sup>	01JUN02	22FEB02	15APR01	01MAY02	01JUN02
Other Workers	01JUN01	01JUN01	01JUN01	01JUN01	01JUN01
4 <sup>th</sup>	C	C	C	C	C
Certain Religious Workers	U	U	U	U	U
5 <sup>th</sup>	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	U	U	U	U	U

The Department of State has available a recorded message with visa availability information which can be heard at: (area code 202) 663-1541. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

Employment Third Preference Other Workers Category: Section 203(e) of the NACARA, as amended by Section 1(e) of Pub. L. 105 - 139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by up to 5,000 annually beginning in the following fiscal year. This reduction is to be made for as long as necessary to offset adjustments under the NACARA program. Since the EW cut-off date reached November 19, 1997 during Fiscal Year 2001, the reduction in the EW annual limit to 5,000 began in Fiscal Year 2002.

**B. DIVERSITY IMMIGRANT (DV) CATEGORY**

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to

5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NACARA program. **This reduction has resulted in the DV-2009 annual limit being reduced to 50,000.** DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For **October**, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off this number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

<b>Region</b>	<b>All DV Chargeability Areas Except Those Listed Separately</b>	
<b>AFRICA</b>	8,300	Except: Egypt: 3,100 Ethiopia 3,900 Nigeria 5,500
<b>ASIA</b>	7,000	
<b>EUROPE</b>	9,100	
<b>NORTH AMERICA ( BAHAMAS )</b>	2	
<b>OCEANIA</b>	375	
<b>SOUTH AMERICA, and the CARIBBEAN</b>	450	

Entitlement to immigrant status in the DV category lasts only through the end of the fiscal (visa) year for which the applicant is selected in the lottery. The year of entitlement for all applicants registered for the DV-2009 program ends as of September 30, 2009. DV visas may not be issued to DV-2009 applicants after that dates. Similarly, spouses and children accompanying or following to join DV-2009 principals are only entitled to derivative DV status until September 30, 2009. DV visa availability through the very end of FY-2009 cannot be taken for granted. Numbers could be exhausted prior to September 30.

### **C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN SEPTEMBER**

For **October**, immigrant numbers in the DV category are available to qualified DV-2009 applicants chargeable to all regions/eligible countries as follows.

When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers **below** the specified allocation cut-off number:

<b>Region</b>	<b>All DV Chargeability Areas Except Those Listed Separately</b>	
<b>AFRICA</b>	14,000	Except: Egypt 6,200 Ethiopia 6,700 Nigeria 8,700
<b>ASIA</b>	7,200	
<b>EUROPE</b>	9,500	
<b>NORTH AMERICA ( BAHAMAS )</b>	2	
<b>OCEANIA</b>	475	
<b>SOUTH AMERICA, and the CARIBBEAN</b>	575	

#### **D. EXPIRATION OF TWO VISA EMPLOYMENT CATEGORIES**

**Employment Fourth Preference Certain Religious Workers:** Pursuant to Section 1 of Public Law 111-9, the non-minister special immigrant program expires by September 30, 2009. No SR-1, SR-2, or SR-3 visas may be issued overseas on or after September 30, 2009. Visas issued prior to this date will only be issued with a validity date of September 30, 2009, and all individuals seeking admission as a non-minister special immigrant must be admitted (repeat, admitted) into the US no later than midnight September 30, 2009.

**Employment Fifth Preference Pilot Categories(I5, R5):** Section 101 of Division J of the Omnibus Appropriations Act 2009, extended this immigrant investor pilot program through September 30, 2009. The I5 and R5 visas may be issued until close of business on September 30, 2009, and may be issued for the full validity period. No I5-1, I5-2, I5-3, R5-1, R5-2 or R5-3 visas may be issued after September 30, 2009.

#### **E. OBTAINING THE MONTHLY VISA BULLETIN**

*The Department of State's Bureau of Consular Affairs offers the monthly "Visa Bulletin" on the INTERNET'S WORLDWIDE WEB. The INTERNET Web address to access the Bulletin is:*

<http://travel.state.gov>

From the home page, select the VISA section which contains the Visa Bulletin.

To be placed on the Department of State's E-mail subscription list for the "Visa Bulletin", please send an E-mail to the following E-mail address:

[listserv@calist.state.gov](mailto:listserv@calist.state.gov)

and in the message body type:

**Subscribe Visa-Bulletin *First name/Last name***  
**(example: *Subscribe Visa-Bulletin Sally Doe*)**

To be removed from the Department of State's E-mail subscription list for the "Visa Bulletin", send an e-mail message to the following E-mail address :

[listserv@calist.state.gov](mailto:listserv@calist.state.gov)

and in the message body type: **Signoff Visa-Bulletin**

The Department of State also has available a recorded message with visa cut-off dates which can be heard at: (area code 202) 663-1541. The recording is normally updated by the middle of each month with information on cut-off dates for the following month.

Readers may submit questions regarding Visa Bulletin related items by E-mail at the following address:

[VISABULLETIN@STATE.GOV](mailto:VISABULLETIN@STATE.GOV)