Siskind's Immigration Bulletin – November 24, 2008

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10. FAQ on E-Verify Regulation for Federal Contractors

Note: Legislative Update (Will Return in the Next Issue of the Bulletin)

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1. Openers

Dear Readers:

For the second week in a row, the Department of Homeland Security dropped a major final regulation on us. Last week, we got the new rule mandating the use of E-Verify for all federal contractors. This week we received the long-awaited R-1 religious worker regulation (with a few changes as well to the religious worker green card category). We've summarized both rules and include them in this issue.

The Federal contractor E-Verify policy was first unveiled in August 2007 as part of President Bush's "tough love" initiative introduced. Once the immigration reform efforts of 2007 failed to pass in Congress, the White House unveiled a series of enforcement measures designed to crack down on employers hiring illegal immigrants. The White House was basically sending a message to the employer community that their failure to get adequately engaged and push back against anti-immigrants was a big reason for the failure. And only after employers really felt the pain of inaction would they finally be stirred to action.

The new rule will require a large portion of federal contractors to sign up for E-Verify and millions of workers will now be run through the new electronic verification system. If the Social Security No-Match rule is finally released by the court, the E-Verify and no-match rules could be a one-two punch that could seriously impact immigration enforcement.

The R-1 rule comes in the wake of several years of criticism from various circles that the religious worker program is rife with fraud. Many would dispute whether the facts actually bear this out. Nevertheless, USCIS has issued a regulation that they began working on a few years back. The rule adds several new layers of complexity to the R-1 cases. First, all cases must now be pre-approved by USCIS and direct filing at consulates is barred. Second, all petitioning employers are subject to inspection before the R-1 may be approved. Third, employers must now supply a special letter from the IRS verifying their tax exempt status. Fourth, employers must now supply a lot more information about their economic and employment situation as part of the R-1 petition. All of these requirements and several other new ones are explained in this week's article.

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This week is Thanksgiving and we wish all of our readers a happy holiday. It is, after all, the immigration holiday in America where we celebrate that we are in such a welcoming and abundant country.

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Finally, as always, we welcome your feedback. If you are interested in becoming a Siskind Susser client, please call our office at 901-682-6455 and request a consultation. We are a national immigration law firm and work on a broad range of immigration matters.

Kind regards,

Greg Siskind

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2. The ABC's of Immigration: R-1 Religious Visas

Religious workers seeking to temporarily enter the US to pursue work in their field are likely to enter using the R nonimmigrant visa.

On November 21, 2008, USCIS released a final rule that made substantial changes to the R-1 religious worker program. The rule was mandated by Congress when it extended the special immigrant religious worker categories for non-ministers that expired on October 1, 2008. The new rule is designed to address various concerns regarding fraud and also to clarify various issues that have arisen over the years with the R-1 program.

Who qualifies for an R visa?

To qualify for an R visa, the applicant must be

- A minister,
- A person working in a professional capacity in a religious occupation or vocation, or
- A person who works for a religious organization or an affiliate in a religious occupation who has been a member of the religious group for at least the two years immediately preceding the application.

The applicant must be a member of the religious denomination for at least two years immediately preceding the time of application for admission and be coming to work at least part time.

What is a "Religious Denomination"?

A religious denomination is defined as a religious group that have some form of ecclesiastical government, a common belief or statement of faith, some form of worship, a set of religious guidelines, religious services and ceremonies, established

places for worship, religious congregations or comparable evidence of a bona fide religious organization.

USCIS has noted that a denomination does not mean that there must be a governing hierarchy. Rather, the focus is on "the commonality of the faith and internal organization of the denomination. An individual church that shares a common creed with other churches, but which does not share a common organizational structure or governing hierarchy can still satisfy the "ecclesiastical government" requirement by submitting a description of its own internal governing or organizational structure.

What are examples of "Religious Occupations"?

A religious occupation is an activity relating to "traditional religious functions." The work must be recognized as a religious occupation within the denomination and the duties must be primarily related to, and must clearly involve inculcating or carrying out the religious creed and beliefs of the denomination.

Note that USCIS no longer includes a list of example occupations in its regulations. But over the years, USCIS has approved R-1 religious occupation petitions for liturgical workers, religious instructors, religious counselors, cantors, workers in religious hospitals or religious health care facilities, missionaries, religious translators and religious broadcasters.

Maintenance workers, janitors and clerical employees do not qualify. And positions primarily administrative in nature also do not qualify. Positions that are strictly related to fundraising do not qualify for R-1 status, though USCIS has acknowledged that selling literature may not bar someone if they have other religious functions in their position. And religious study or training for religious work does not constitute a religious occupation (though a religious worker may pursue study or training incident to status).

The 2008 R-1 rule requires religious organizations to submit evidence identifying religious occupations that are specific to that denomination and that he alien's proposed duties meet the religious occupation's requirements.

What is a "Religious Vocation"?

A religious vocation is defined under the 2008 R-1 rule as "a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life." Examples include nuns, monks, religious brothers and sisters.

What is a "Minister"?

The 2008 R-1 rule adds a new definition of "minister". Under the rule, a minister is "an individual authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and to perform other duties as usually performed by authorized members of the clergy of that denomination." Lay preachers are not included in this definition.

How do I apply for an R visa?

Until release of the November 2008 rule, an applicant outside the US could apply for a visa directly at a US consulate without prior USCIS approval. The new rule now requires all R-1 applicants, whether applying for a change of status in the US or for consular processing abroad, to get an I-129 and R visa supplement approved by USCIS.

As of November 2008, all R-1 and immigrant religious worker petitions are filed at the USCIS California Service Center. Premium processing was not available as of November 2008 and in the 2008 rule USCIS indicated it was not likely to change this any time soon.

What attestations must an employer make regarding the petition?

Under the 2008 rule, Employers must now complete, sign and date an attestation and submit it along with the petition attesting to the following:

1. The employer is a bona fide non-profit religious organization or religious organization affiliated with a religious denomination and is exempt from taxation;
2. The worker has been a member of the denomination for at least two years and that the alien is otherwise qualified for the position offered;
3. The number of members of the prospective employer's organization;
4. The number of employees working at the location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of the employees, their titles and a brief description of their duties;
5. The number of individuals holding religious worker status (both special immigrant and nonimmigrant) within the preceding five years;
6. The number of individuals the organization filed for religious worker status (both special immigrant and nonimmigrant) within the preceding five years;
7. The title of the position offered to the alien and a detailed description of the alien's proposed daily duties;
8. The complete package of salaried or non-salaried compensation being offered; and
9. That an alien seeking nonimmigrant religious worker status will be employed for at least 20 hours per week (the rule also imposed a 35 hour per week requirement for immigrant petitions);
10. The specific location or locations of the proposed employment; and
11. That the alien will not be engaged in secular employment.

What additional documentation must be submitted regarding the qualifications of the petitioning organization?

Aside from the attestation, the employer must submit with the I-129 and fee,

- a currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization

- documentation of the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;
- organizational literature, such as books, articiles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization; and
- a religious denomination certification (the organization must complete, sign and date a statement certifying that the petitioning organization is affiliated with the religious denomination)

What additional documentation must be submitted regarding the qualifications of a minister?

For ministers, the following documentation must be submitted:

1. a copy of the certificate of ordination or similar document reflecting acceptance of the alien's qualifications as a minster in the religious denomination;
2. documentation that the worker has completed any course of prescribed theological education at an accredited or normally recognized institution including transcripts, curriculum, and documentation that establishes that the theological education is accredited, or
3. For denominations that don't require a prescribed theological education, evidence of

    a. The denomination's ordination requirements;
    b. The duties allowed to be performed by virtue of ordination;
    c. The denomination's level of ordination, if any; and
    d. The alien's completion of the denomination's requirements for ordination

What documentation must be submitted regarding compensation?

The petitioner must explain how it intends to compensate the R-1 worker, including specific monetary and in-king compensation or whether the worker will be self-supporting (if the work is for temporary, uncompensated missionary work that is part of a broader international program of missionary work sponsored by the denomination). If compensation is being paid, evidence may include

- Past evidence of compensation for similar positions;
- Budgets showing monies set aside for salaries, leases, etc.;
- Verifiable documentation that room and board will be provided; or
- Other evidence acceptable to USCIS

Plus, IRS documentation such as W-2s or certified tax returns must be submitted if available.

How does an organization show it is a qualifying religious organization?

An organization petitioning for an R-1 religious workers must show that it is a "bona fide non-profit religious organization in the United States" or a "bona fide organization which is affiliated with the religious denomination."

To qualify, an organization must be tax exempt under Section 501(c)(3) of the Internal Revenue Code. And to demonstrate this, under the 2008 rule, an employer must provide USCIS with a copy of a valid determination letter from the IRS confirming such exemption. To qualify based on an affiliation, the organization must show it is "closely associated" with a religious denomination that is tax exempt under Section 501(c)(3).

In the 2008 regulation, USCIS has expressly barred 501(d) religious organizations from applying for R-1 status even though an organization is tax-exempt under that section of the IRC.

The 2008 rule added a requirement that an R-1 sponsor must file a determination letter from the Internal Revenue Service (IRS) of the tax-exempt status of the petitioning religious organization under the Internal Revenue Code (IRC) 501(c)(3). The organization need not get a new determination for each petition and determination letters do not expire. If an organization changes addresses from the address on the letter, the same determination letter may be used as long as an explanation is provided in the petition.

The sponsoring organization also needs to submit a letter on behalf of the R-1 visa holder. This letter should outline the applicant's two-year minimum membership, including where that membership occurred, in or out of the US. It should also include a statement that the foreign-based religious group and the US based religious group for which the applicant will work belong to the same denomination. It must state the name and location of the organization in the US for which the applicant will work. Finally, it should outline the applicant's qualifications and salary.

What is the new inspection requirement under the R-1 rule?

USCIS has been conducting on site inspections of R-1 change of status petitions for some time, but now all R-1 sponsors will need to have an on site inspection even if the religious worker is applying for consular processing. Technically, the rule says that USCIS can verify the evidence being submitted by a petitioning organization "through any appropriate means" but the USCIS has made it clear that on site inspections are the means that will be used for this purpose.

At an inspection, USCIS may tour the facilities, interview organization officials and review organization records relating to the organization's compliance with immigration laws and regulations.

Is there a minimum salary an R-1 religious worker must be paid?

There is no prevailing wage requirement like H-1B cases, but the 2008 R-1 rule has added a requirement that an R-1 nonimmigrant must be compensated either by salaried or non-salaried compensation and the petitioner must provide verifiable evidence of such compensation. If there is no compensation, the petitioner must prove that the non-compensated worker is participating in a traditionally non-

compensated missionary program within the denomination which is part of a broader "international program of missionary work" sponsored by the denomination. Plus, the petitioner must provide evidence of how the aliens will be supported while participating in the program. This is stricter than the old rule which generally allowed uncompensated, self-supporting nonimmigrants to see R-1 visas.

To qualify for R-1 status based on temporary, uncompensated missionary work, the petitioner must show it is a missionary program in which: (1) foreign workers, whether compensated or uncompensated, have previously participated in R-1 status; (2) missionary workers are traditionally uncompensated; (3) the organization provides formal training for missionaries; and (4) participation in such missionary work is an established element of religious development in that denomination. A petitioner may submit evidence in the form of books, articles, brochures or similar documents that describe the missionary program, the religious duties associated with the missionary work and proof that the alien has been accepted in to the program and describing the alien's responsibilities. Plus, the organization must demonstrate that the alien has the means to support himself or herself or has otherwise provided for the alien's support.

Note that it may still be possible to seek a B-1 visitor status classification if this test cannot be met.

Petitioners must show proof of past compensation or support for nonimmigrants when apply for an extension.

How long can I have R status?

The maximum stay in R-1 status is 5 years. A person can obtain R-1 status again after remaining outside the US for one year before making another application.

Under the 2008 R-1 rule, R-1s can be initially admitted for a period up to 30 months (down from the prior 36 month limit) and an extension of up to 30 months may be issued by USCIS. If a person's employment in the US is seasonal or intermittent or for an aggregate of six months or less per year, the five year limit does not apply. It also doesn't apply to people who reside abroad and regularly commute to the US to engage in part-time employment. To demonstrate this, an applicant needs to show arrival and departure records, tax returns and employment records outside the US.

Can I have more than one employer if I am an R-1?

Yes. But each qualifying employer must submit a separate petition with all of the required documentation.

What visa status do the spouse and children of an R-1 nonimmigrant receive?

Spouses and children of R-1 nonimmigrants and classified as R-2. They are not permitted to work unless they have their own work visas. R-2 status is granted for the same period of time and subject to the same time limits as the R-1 regardless of the time the spouse and children may have spent in the US in R-2 status.

Are there any differences between the special immigrant religious worker category for green card applicants and R-1 non-immigrant visas?

The most important difference between the two religious worker categories is that the R-1 visa is temporary and the special immigrant religious worker visa is permanent. An applicant for a green card as a special immigrant religious worker must have been working for the religious group for at least two years prior to making the application. This work may be done either in or out of the US. In most cases where the work is done in the US, the person has been in the US on an R-1 visa. Another difference between the two is the forms involved. A special immigrant religious worker applies using Form I-360 in place of the I-129 and R supplement. Also, under the 2008 rule, special immigrant religious workers must work at least 36 hours per week while R-1 visa holders can work 20 hours per week.

Generally speaking, the evidence that should accompany the special immigrant religious worker petition and the role of the beneficiary within the religious organization are the same as for the R-1 applicant.

Are R-1 visas "dual intent"?

The 2008 rule for the first time addresses the impact a green card petition has on R-1 status. The new rule states that R classification may not be denied solely because a labor certification or preference petition, including a Form I-360, has been filed by or on behalf of the alien.

Can R-1 denials be appealed?

Yes. The 2008 R-1 rule provides a right to appeal a denial of an R-1 petition. This now makes the R-1 similar to H, L, O, P and Q visas.

Can R-1 approvals be revoked?

Yes. The 2008 R-1 rule provides for USCIS to be able to revoke an R-1 petition.

What are an employer's obligations if the R-1 is working less than 20 hours per week or has been terminated from employment before the expiration of the authorized R-1 stay?

The employer must notify DHS within 14 days.

What alternatives are available if the R-1 is not an option?

There are a number of other nonimmigrant categories that may be fit if the R-1 is out. They include the L-1 intracompany transfer category, the H-1B specialty occupation and J-1 trainee status. Unpaid workers may qualify for B-1 status. And

F-1 students may be able to engage in some employment activities such as on campus work and curricular training off campus.

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3. Ask Visalaw.com

If you have a question on immigration matters, write *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'm a US citizen and I applied for a green card for my sisters, both over 21, 5 years ago. Now that my mom is a US citizen and going to apply for my sisters again, is the time that they already waited counts toward their new application?

A - Unfortunately, the answer to the question is no. Time spent waiting based on one family relationship won't count for a visa petition based on another.

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Q - I have a pending I-485 case, originally filed at the USCIS Texas Service Center. There were two recent changes in the status of the case. First, about two weeks ago the status changed to "transferred from TSC to NBC". Last week it changed again to "pending at the office to which it was transferred". In the meantime I need to renew my adjustment of status-based employment authorization document. I would like to send a paper-based application (I do not want to e-file), but I-765 instructions do not clearly indicate where to file in my particular situation. Could you advise me about appropriate mailing address?

A - File based on where the I-765 instructions say to file rather than where the I-485 is currently sitting.

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Q - My uncle (a green card holder) has already petitioned for his unmarried son (age: 25). But at the time of visa process his son will not be unmarried anymore. What will happen then?

A - The petition will be voided if your cousin marries before your uncle becomes a citizen. If your uncle can get citizenship first, the application will survive and then your cousin can marry and still process under the same petition. His category would change and the wait would be longer in all likelihood, but he would not have to start over.

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Q - My parents are US citizen residing in the states. They (as US citizens) had applied for my immigration on unmarried basis mistakenly, while I was married in 1998 & had a year old son in 2001. Since NVC has approved my case on unmarried

basis last year in April, I do not know how to proceed in this matter, where my father unintentionally/mistakenly filed my immigration application on unmarried basis. Any suggestions?

A - Unfortunately if you were married when your father filed the I-130 for you, and he marked the petition for an unmarried son of a US citizen (1st preference), then the petition was not approvable when filed. This means that it is a void petition. There is nothing you can do to save the petition. Your father must file a new I-130 for you, and he will not be able to retain he priority date from the previous petition. You should also consider informing the NVC and USCIS of the error, so that it does not seem like you and your father purposely attempted to mislead USCIS or the NVC.

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Q - I am a UK citizen who received a penalty notice disorder last year for drunk & disorderly conduct for which I paid a small fine. I have booked a holiday for America this winter but recently heard if you have ever been arrested you have to apply for a visa with the US Embassy. I contacted the US Embassy who stated I couldn't get an appointment until after my holiday is booked and that it could take up to two more months to get the visa after that. Do I have to apply for a visa? Also would this show up on a police certificate if I applied for one?
A - For travel after January 12, 2009, you will be required to apply for advance authorization to travel to the US as a visitor on the Visa Waiver Program. This new, advanced authorization is known as ESTA. Contained in the application is a question asking whether you have ever been arrested or convicted of a crime of moral turpitude. To determine if a crime is one of moral turpitude, a variety of factors must be considered. These include the criminal statute defining the crime and the facts of the particular event leading to the conviction. For example, some crimes of assault are crimes of moral turpitude, but determining whether a specific arrest and/or conviction for assault will involve moral turpitude will depend on which level of assault was committed (simple assault, ABH, GBH). It is irrelevant that the person may have only been issued a citation and/or paid a fine.
In your case, you have stated that you were convicted of drunk and disorderly conduct, and paid a fine. Although it is unlikely, there is a possibility that the crime could be one of moral turpitude depending on the specific facts of the incident. You should have a consultation with an immigration lawyer to determine if this is, in fact, the case or not.
Assuming that a conviction for drunk and disorderly conduct is not a crime of moral turpitude, you should be able to tick "no" to the question contained in the application. You should carry your documentation with you when you travel to the US in the event you are questioned.
You can find information on ESTA at http://www.cbp.gov/xp/cgov/travel/id_visa/esta/. You may obtain a police certificate in the UK by visiting http://www.acpo.police.uk/certificates.asp.

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4. Border and Enforcement News

Last week, the Department of Homeland Security and Immigration Customs Enforcement launched a new program aimed at identifying undocumented immigrants held in county and city jails, *Congress Daily* reports. The program will

allow local law enforcement agencies to automatically compare the fingerprints of their prisoners against FBI criminal databases and DHS immigration databases. When law enforcement officials run a check on fingerprints against the FBI's Integrated Automated Fingerprint Identification System, a check will automatically be done against DHS' own Automated Biometric Identification System.

ICE plans on having the program operation first with county jails and then with city jails. An ICE spokesperson said that the program will "be measured and careful in our rollout, but we're going to do it as aggressively as possible" and said that full implementation will take three and a half years. The operation will also require substantially more funding from Congress to cover additional costs, such as increased detention capacity and transport services. ICE estimates the total cost could be $3 billion a year, which is more than half of the current total annual budget of the entire agency.

While immigration advocates agree that undocumented immigrants who have committed serious crimes should be deported, many fear that the program would not allow some noncitizens to be given proper legal protections. "Our concern is making sure that people have access to counsel or are advised of their rights," said Kerri Talbot, associate director of advocacy for the American Immigration Lawyers Association. "Sometimes people are pressured into signing away their rights by basically stipulating that they are removable from the United States," she said.

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One of the heaviest-traversed section of US-Mexico border has seen the number of border crossings of undocumented immigrants dip significantly in the past year. *The Arizona Daily Star* reports that the 262-mile Tucson sector has seen substantial decreases in this fiscal year in apprehensions, border deaths, and pounds of marijuana seized—three key indicators of establishing the intensity of border activity.

"It's a sign that we're on the right path," said sector Chief Robert Gilbert. "We had success in '08 and I think our numbers prove that out, but we are long ways from saying we are where we want to be with border control." Despite many immigration experts attributing the decrease in border crossings to the economic slowdown in the US, Gilbert believes it has only played a minor role in the decreases. "The service industry, where the majority of the people that are trying to come illegally work, has not suffered a downturn," Gilbert said.

The Tucson Sector accounts for 13% of the US-Mexico border. In fiscal year 2008, the sector accounted for 50% of marijuana seized, 45% of apprehensions, and 43% of border deaths. Each has seen a slight decrease from fiscal year 2007.

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While the numbers of arrests of undocumented immigrants has decreased among the US-Mexico border, new ICE figures reveal that a number of US cities have posted record high numbers of arrests for immigrants with criminal backgrounds. *The Daily News* of Boston reports that that city saw the largest ever number of immigrant violator arrests with 162 arrests. Also reporting record-breaking numbers were Houston, Tex.; Newark, NJ; and Washington DC.

ICE insists that the rise in immigrant arrests in urban areas is the result of the agency's Operation Community Shield, a program introduced in 2005, which targets violent transnational street gangs, many members of whom are foreigners with criminal histories and are here illegally. Nationwide, the operation has netted a total of 11,106 undocumented immigrants that are members of street gangs.

While both immigrant advocates and those who favor harsher restrictions on immigration have praised ICE's program as a good way to get rid of criminal activities, some immigration advocates worry the raids often target any undocumented immigrants. "Sometimes, they end up getting people who are not criminals," said Laura Medrano, director of the Northeast chapter of LULAC. "ICE has to go after criminals and deport them."

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State labor authorities for Iowa recently levied nearly $10 million in fines against Agriprocessors Inc., a recently-raided meatpacking plant where nearly 400 undocumented immigrants were arrested in a May 2008 raid, *The New York Times* reports. The fines were issued for illegal paycheck deductions the company made for protective jackets and other uniforms that packinghouse workers were required to wear. Iowa inspectors found 96,436 deductions for uniforms from the paychecks of 2,001 workers, which brought fines of $100 per incident. Aggriprocessors was fined an additional $339,700 for illegally deducting over $72,000 from the paychecks of 1,073 workers for "sales tax." The number and amount of fines have caused the plant to file for bankruptcy court protection.

The fines are the latest in a series of punitive actions against the meatpacking plant. Last month, the Iowa Attorney General's office brought criminal charges against Agriprocessors for over 9,300 misdemeanor child labor violations, involving 32 underage workers. According to these charges, the company hired workers as young as 13 and put them to work using saws, knives and other equipment prohibited for young workers.

Also last week, a human resources manager from the Postville, Iowa meatpacking plant pled guilty in federal court to harboring undocumented immigrants and identity theft. Manager Laura Althouse, according to her plea, helped undocumented immigrant employees obtain false resident visa numbers so they could be hired at the plant. Mrs. Althouse is the first Agriprocessors manager to be convicted on the identity theft charge, which was also brought against many of the plant's workers. In plea bargains, over 200 immigrants pled guilty to lesser charges of documented fraud. Most finished serving their sentences of five months in prison earlier this month, and were deported.

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Two managers at a New Bedford, Mass., leather-goods factory raided last year by ICE agents last month pled guilty to charges that they knowingly employed undocumented immigrants, *The Associated Press* reports. 56-year-old Dilia Costa, co-manager of Michael Bianco Inc., pled guilty to charges including harboring

undocumented immigrants. The other manager, 42-year old Gloria Melo pled guilty to charges of knowingly allowing undocumented immigrants to work at their factory.

Neither Costa nor Melo will serve prison time of a federal judge were to approve their tentative plea deals. If approved, the deal would sentence Costa to two years probation, including six months home confinement. Melo would only have to pay a $500 fine. Both are scheduled to be sentenced in January.

The factory for Michael Bianco Inc. was raided by ICE agents in March 2007 and netted 361 detained immigrants who were allegedly present illegally. The raid, like many other ICE raids in recent months, have come under criticism from immigration advocates who argue that the raids have separated families and placed the safety of detainees' children at risk and without proper care.

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Last month, researchers studying security measures of the newly-introduced US border-crossing cards discovered that the cards are subject to security weaknesses, particularly ease of duplication as well as accessing or disabling the cardholder's information. *The Wall Street Journal* reports that the study, conducted by RSA Laboratories at the University of Washington, examined state and federal ID cards issued for the Western Hemisphere Travel Initiative, and are scheduled to be distributed this June.

According to the study, researchers were easily able to clone an existing card, creating a duplicate the card's publicly readable data. The study indicates that reproduction for this card would be easy in part because DHS's travel cards don't call for any anticopying features that are commonly used in other official US documentations and currency. The study indicates, however, that the replication was only based on the card's aesthetics. While the duplicates RSA produced appear identical, they were not created with the original cards' transmission chip or their scannable smartcard strips.

The study also found that the cards' private information—which is stored on a small chip embedded in the card—can be remotely extracted with relatively cheap computer equipment, and that tests conducted showed that the information can be extracted from the card using this equipment from as far as 30 yards away.

RSA's study showed that information vulnerability issues exist not just from obtaining a card's data, but disabling its use. Research on the radio-enabled travel cards, requested by some states in an effort to make identification checks less time-consuming, revealed that malicious transmission frequencies can act as a killswitch for the cards' radio chips, disabling or erasing the data stored on the chips.

RSA Laboratories, a leader in the field of research in computer-security solutions, suggests that DHS take steps to address the card's flaws. "There is a critical infrastructure evolving around RFID (Radio Frequency Identification)," warns RSA researcher Ari Juels. "If we don't build in protections now, it will be much harder to build them in later."

RSA's published results of the study can be found on their website at http://www.rsa.com/rsalabs/staff/bios/ajuels/publications/EPC_RFID/Gen2authentication--22Oct08a.pdf.

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5. News From the Courts

Supreme Court to Hear Identity Theft Case

U.S. v. Flores-Figueroa, 274 Fed. Appx. 501, No. 07-2871 (8th Cir. April 23, 2008) (per curiam), *cert. granted sub nom. Flores-Figueroa v. U.S.*, No. 08-108, 2008 U.S. LEXIS 7827 (U.S. Oct. 20, 2008).

The Supreme Court granted certiorari to determine what federal prosecutors must show to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1). The provision applies when a person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The Court will clarify the meaning of the word "knowingly," and determine if federal prosecutors must show that the defendant "knew" that the means of identification he or she used belonged to another person.

The defendant in the case used a fraudulent alien registration number and a fraudulent Social Security number. The defendant argued that he did not know that the numbers belonged to another person and that the government must prove that defendant knew the means of identification belonged to another person because "knowingly" in 18 U.S.C. § 1028A(a)(1) modifies not only "transfers, possesses, or uses," but also the phrase "of another person." The Eighth Circuit disagreed with the defendant, holding that the word "knowingly" modifies only "transfers, possesses, or uses." Therefore, the government need not prove that Flores knew that the means of identification belonged to another person.

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6. News Bytes

The New York Times reports that a 2004 government counterterrorism program meant to disrupt potential terrorist plots before that year's presidential election focused on over 2,000 immigrants from predominantly Muslim countries, with almost all of them found to have done nothing wrong. The program implemented by the Department of Homeland Security, and detailed in newly disclosed government data, identified nearly 2,500 immigrants as "priority leads" due to their potential to be security threats. At the time, DHS announced several hndred arrests, mostly of visitors whose visas had expired, but the newly-public records show that the scope of the operation reached much further. Over 2,500 immigrants were interrogated by federal agents, and over 500 arrests were made, though almost entirely every arrest related to immigration status.

Although the program was publicly known in 2004, it was vague on particular details. At the time of the 2004 operation, ICE said via press release that the program would track leads in an effort to disrupt potential terrorist plots, but emphasized that its

investigations would be conducted "without regard to race, ethnicity, or religion." This contrasts with the records, which show that 79% of the suspects were from Muslim-majority countries.

The 10,000 page document was publicly disclosed after the National Litigation Project at Yale Law School and the American-Arab Anti-Discrimination Committee both sued for the records under the Freedom of Information Act. The results, both groups contend, showed that the government used ethnic profiling to identify terrorism suspects. "This was profiling," said Michael Wishnie, a Yale Law professor who researched the report. "The resources devoted to this were enormous," he said, "but the results clearly were not." Kareem Shora, executive director for the ADC, said the findings were "a slap in the face" because the contradicted officials' claims. "It is very disappointing to see that despite all the reassurances that they were not profiling people, this comes out."

A former ICE project official who spoke to *The New York Times* on the condition of anonymity, said the operation analyzed data pools from the CIA and other agencies, to identify people who might pose particular threats to national security. "I think the intelligence we were getting was bona fide and mineable, and we were doing the best we could to follow it up," the former official said.

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US intelligence agencies have recently loosened security-clearance measures and hiring rules, announcing that employment with these federal agencies are now open to first- and second-generation Americans, a top intelligence official told *The Associated Press* last week. Children of immigrant parents have long been blackballed from receiving higher security clearances because family ties to immigrants have historically been considered a security risk, said national intelligence director Ronald P. Sanders. Sanders says the US agencies' about-face with the rule change came about with the acknowledgement that terrorism and surveillance needs those who can speak foreign languages, understand other cultures, and have associations that can stop terrorism. "Security-clearance rules served as impediment," Mr. Sanders said. "They had their roots in the Cold War, and a lot of their assumptions are no longer valid."

As of this month, dual citizens are actively encouraged to apply, as they can travel more freely between the US and their other nation without raising suspicions. Potentially risky new hires will have their work and associations monitored more closely throughout their employment to uncover potentially troublesome activity. Mr. Sanders is also seeking authority from the Office of Management and Budget to survey existing intelligence employees and applicants to determine their ethnic backgrounds and national ties.

In October, the same month the hire ban was lifted, National Intelligence Director Mike McConnell approved a program to hire outside experts, mostly technological professionals – for temporary projects inside the US intelligence agencies. The Pentagon received similar authority in 2004, but none of the other intelligence agencies have been able to seek temporary hires. Sanders says they would most likely be looking for experts to overhaul intelligence-personnel and financial-information systems.

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In response to widespread criticism from immigration attorneys, the Executive Office of Immigration Review (EOIR) announced last week that it will now reverse the decision to close an immigration court in Reno, Nev., according to *The Associated Press*. While a reversal has been made, the change is only temporary, as agency officials work to both cut costs as well as provide Reno immigrants with an adequate legal venue. "We are working with the Department of Homeland Security to implement video teleconferencing for cases located in Reno, a hearing location within a DHS facility," said EOIR spokeswoman Elaine Komis. "In the interim, EOIR will continue the current practice of detailing immigration judges and staff to Reno to hear cases in person."

The decision to halt proceedings in Reno was announced by EOIR last week, as the agency issued a press release saying that due to "ongoing budgetary limitations" they would no longer provide immigration judges to Reno, and would conduct all hearings in Las Vegas instead. The announcement last week to close the Reno immigration court almost instantly prompted outcry from the region's immigration attorneys, who said that forcing their clients to travel to Las Vegas for deportation relief hearings would be difficult, costly, and time-consuming.

The region's immigration attorneys and immigrant advocacy groups are pleased with the temporary reversal, as well as EOIR's commitment to create a working legal system for Reno-based immigrants. Woody Wright, a Reno lawyer for Nevada Hispanic Services, said that the reversal is "very good news for all people and their families in Northern Nevada. It would have been a major hardship for pretty much everyone involved in the court. Reno-based immigration attorney Jim Kelly is pleased that EOIR and DHS "recognized that this is a very serious matter and are thinking about what needs to be done to ensure people can attend their hearings."

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Federal judges in two separate cases last month awarded major settlements to Hispanic guest workers, and both rulings, *The Christian Science Monitor* reports, could potentially alter the state of immigration employment and exploitation of H-2B visa holders by employers. In October, a San Francisco federal judge ordered back pay to B*raceros*, the original guest workers from Mexico who laid track for American rail companies during World War II. Three days prior to this ruling, an Atlanta judge ruled that 3,000 *Pineros*, Guatemalan laborers who helped plant numerous pine plantations in the Southestern US, had been underpaid and subject to physical risk, and should be compensated for their treatment.

In the Atlanta ruling, Judge Clarence Cooper ruled that the CEO of labor contractor Eller & Sons is personally liable for breaking contracts with workers by paying them lower wages than promised and providing them with inadequate living conditions. The ruling, which could cost Eller & Sons $5 million in back wages, could present a hiring problem for the US forest industry, which has employed nearly 33,000 H-2B visa holders. The Pineros from Guatemala, raised the productivity standard for the industry, planting up to 4,000 trees a day, compared to the 800 averaged by American workers. Despite this, they received about half the pay that an American laborer would, even as recently as the 1990's. "The prevailing sense [among contractors] is that we can't ever go back because foreign labor has raised the production bar so high that American workers are never going to be able to

compete," says Vanessa Casanova, University of Texas anthropology professor and Pineros researcher.

According to *The Washington Post*, The Migration Policy Institute recently published its findings on a study conducted to determine the level of education that immigrants have in the US, and if it is relatable to their current jobs. The study reveals that approximately one in five college-educated immigrants in the US is either unemployed or working in an unskilled service job.

The study argues that college-educated Hispanic and African immigrants fare substantially worse in the US job market than Europeans or Asians. Almost half of newly arrived college-educated Hispanics hold unskilled jobs, as do more than one-third of those who have been in the country for over 10 years. Surprisingly, the legal immigration status of Hispanics did not make a difference in hiring practices and job availabilities, as the authors argue that this employment problem persists even if a Hispanic immigrant is legally cleared to live and work in the US.

The study determined that although African immigrants are more likely to hold high-skilled jobs than a Latin American immigrant with the same qualifications, they have the highest unemployment rates of all foreign-born groups. By contrast, employment patters of well-educated Europeans are virtually indistinguishable from their US-born counterparts, regardless of how long they have currently been working in the US.

Although employer discrimination could be attributed for some of these job discrepancies, study co-author Michael Fix warns that language skills play a large factor in the unemployment/underemployment facing both Latin American and African Immigrants. According to the study, highly skilled immigrants who speak only limited English are twice as likely to work in an unskilled job as those who are proficient in English. The study says that 44% of Latin American immigrants educated at foreign colleges speak English poorly or not at all, compared with 32% of Europeans and 23% of Asians. Additionally, while African immigrants, at 15% had the lowest percentage of immigrants with inadequate English, they lowest immigrant group surveyed that has their entry sponsored by an employer: 10% for African immigrants compared to 17% of Europeans and 35% of Asians; Latin Americans, at 6%, have the lowest percentage of employer-sponsored visas of these groups.

Fix and co-author Jeanne Batalova suggest that federal and state officials could do more to ease the way for highly-educated immigrants by providing more assistance with English classes, offering loans to offset the cost of preparing for professional certification exams, and working on making a more universal data system to make it easier for immigrants to more easily produce their foreign academic and professional credentials.

The MPI report is available online at:
http://www.migrationpolicy.org/pubs/BrainWasteOct08.pdf.

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The chancellor of the University of Arkansas recently suggested to the state's leaders must do everything it can to encourage more students to seek bachelor's degrees, including the possibility of allowing undocumented immigrants to pay the same tuition rates as in-state residents would. *The Associate Press* reports that UA

Chancellor G. David Gearhart said that the state's education officials should be "frankly forgiving if we can" when it comes to students living illegally in the state.

"I don't think it would be appropriate for me to argue against any qualified student getting a four-year degree at our institution simply because of their parents," Gearhart said in an interview last week. "To me, it's not really the student's fault that they came here and their parents had an issue with immigrant. To me, that's penalizing the student."

Former state Rep. Joyce Elliott, who won her state Senate election race last week, has said that she intends to offer a bill next session to offer in-state tuition rates for undocumented immigrants. "I don't think anyone is against student having the opportunity," Elliot said. "It's just that we're having to try to find a way to work within the laws."

If the legislation is issued, it will create new opportunities for the 150,000 Hispanics currently living in Arkansas. Governor Mike Beebe, who has repeatedly said that "illegal means illegal," has long opposed offing in-state tuition to children of undocumented immigrants. As attorney general, Beene issued a 2005 opinion that said that offering this benefit would violate the Equal Protection Clause in the 14th Amendment.

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The Native-American tribe of the Yakima Nation announced that it intends to create a tribal guest-worker program that would require licenses for foreign workers and nontribal citizens working on their land, *The Seattle Times* reports. The program, the first of its kind introduced by a Native-American tribe, was created in order to help foster a safer and more stable work environment.

Yakama land has many orchards and vineyards that attract a large migrant work force each year. However, tribal leaders have had no way of knowing fully who is entering their Washington-state, 1.2 million-acre reservation, whether they are in the US legally, and how long they intend to stay. Former tribal Councilman Wendel Hannigan, who proposed the initiative, cites concerns about crime on the reservation and a growing number of undocumented workers in the area which prompted him to consider the program. He says he's not trying to hamper the local farming industry but wants to create a legal and stable work force on the reservation. "Hopefully, the community would embrace the effort," Hannigan said in an interview.

The initiative has been met with some criticism from agricultural officials. Mike Gempler of the Washington Growers League isn't convinced that the tribe could obtain authority to handle immigration issues, a responsibility that largely belongs to the federal government. "I think we would need to see what the position of the United States government was before we would be willing to take the next step.

However, some feel that the initiative by the Yakama Nation is the next logical step in regulating migrant inflow. Matthew Fletcher, director of the Indigenous Law and Policy Center at Michigan State University notes that although non-Indians outnumber tribal members on many reservations, there are few other tribes that have the large influx of migrant workers that the Yakamas do. "I don't think it's a big problem yet, but you're seeing a lot of tribes buying resorts in rural areas, and resorts depend on a migrant work force, he said.

Because tribes receive federal benefits and tribal members are US citizens, they are not viewed as sovereign nations when it comes to immigration law, said ICE spokeswoman Lorie Dankers. Dankers said the Yakamas probably would not have the authority to enforce US immigration laws, but declined to elaborate, saying that ICE's attorneys would have to conduct more research.

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7. International Roundup

The BBC reports that immigrant children held in UK detention centers are not getting the medical care they need, a leading medical journal warns. An editorial in the UK's Lancet says the 2,000 children held each year miss out on vaccinations and highlights concerns raised about individual cases. A new Immigration and Citizenship Bill proposed for next year should rule out routine detention of children in the future. The Home Office disputes the claim, saying that all children receive the care they need.

Many of the children are from families who have been refused asylum or have overstayed their visas, while some are asylum seekers or are detained on arrival because they have no identification papers. Families can be taken from their homes with no time to pack even essential medicines and clothes. The Lancet says children there are 'essentially imprisoned with little to do, and provided with inadequate education and health care'. They can often miss out on routine jabs which would protect them against diseases such as measles or meningitis - but then be returned to countries where those diseases are prevalent and are a common cause of death.

The Lancet adds: "These appalling failures in the health care of children in detention centers are the ultimate responsibility of the UK Home Office. They are in marked contrast to the UK government's global health strategy, Health is Global, which emphasizes the government's responsibility to improve the health of people across the world, and in particular people in the UK.

A spokeswoman for the Home Office's UK Border Agency rejected the criticisms. She told the BBC that although she was unable to comment on individual cases: "If a child is in our care and requires medical treatment of any kind we will ensure the child will receive that care. Our centres have been praised by independent monitors and our medical care is as good as on the NHS. There is 24-hour nursing care, doctors on call night and day, and access to social workers and dentists."

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This month, the Taiwanese Yuan approved an amendment that greatly eases the restrictions of immigrant families, *The Taipei Times* reports. The legislation approved by the Executive Yuan, greatly relaxes regulations on residency applications for both parents and children of immigrants.

Under the current regulations on dependents' residency applications, the government only issues Alien Resident Certificates (ARC) to the underage dependents of foreigners if their parents or grandparents hold household registration, residency or

permanent residency status. The current regulation does not allow foreigners' children over the age of 20 or their parents to apply for residency through their family members.

Premier Liu Chao-shiuan said the amendment was proposed to create a 'humanitarian and friendly living environment' for foreigners. The amendment was also part of the Cabinet's effort to attract talent from abroad to work in Taiwan, Liu said, adding that he hoped the bill would clear the legislative floor by the end of the current session.

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Ireland has received a far higher share of immigrants from countries that joined the EU in 2004 than any other EU state, *The Irish Times* reports. Some 5 per cent of the working-age population here originates in those countries, a report by the European Commission has found. This was considerably more than in the UK, the second-largest receiving country in relative terms, where 1.2 per cent of the working-age population came from these 10 countries.

Austria and Luxembourg also had a significant proportion of recent 'EU10' arrivals, albeit much fewer than in the UK and Ireland. Across all other member states, the population share of this newcomer group is very small. That is true even in Sweden, which followed Ireland and the UK by not restricting EU10 migrants from working, but where they account for only 0.1 per cent of all working-age people.

The study of the impact of the free movement of workers within the union also revealed that in almost all member states, the number of recent arrivals from non-EU countries exceeded the number of newcomers from other EU member states. The only exceptions were Ireland and Luxembourg.

ireland has been the second most popular destination for Polish citizens, having received 17 per cent of Poland's migrant workers since the country joined the EU in 2004. Some 60 per cent went to the UK, while Germany received 11 per cent.

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8. Notes from the Visalaw.com Blogs

Greg Siskind's Blog on ILW.com

- *60 Minutes* Widower Story now Online
- Immigration Humor: The Original Illegal Aliens
- Reid: Immigration Reform Will be Easy to Deal with in The Next Congress
- 22 Members of Anti-Immigrant Caucus in House Won't be Back in 2009
- Velazquez Takes Leadership Helm of Congressional Hispanic Caucus
- A Thanksgiving Reading
- Student and Exchange Visitor Visas Increasing
- Major New Hollywood Movie Takes on The Immigration Debate
- Zogby Polls for Hate Group
- Obama Names Transition Advisors on Immigration Policy
- Arizona Governor Janet Napolitano to Head Department of Homeland Security
- Condoleeza Rice Urges GOP to Embrace Immigration Reform
- Rove: GOP Not Supporting Comprehensive Immigration Reform is "Suicidal"

- Visa Waiver Program Now Officially Open to Seven New Countries
- Immigration and our Servicemen and Servicewomen
- Pro-Immigration Martinez Struggles for Place in GOP
- Anti-Immigrant Lungren to Compete for Republican House Leadership
- GOP Pollster: If The Party Can't Reverse Hispanic Losses, It Won't Win Again
- E-Verify Contractor Rule Goes Final

The SSB Employer Immigration Compliance Blog

- Diverse Interests Unite in Opposing Oklahoma Sanctions Law
- FAQ on New E-Verify Contractor Rule
- DHS Files Motions to End No-Match Injunction
- Massachusetts Business Owner Pleads Guilty to Immigration Crimes
- Georgia County Considers Employer Sanctions Legislation
- Nebraska Legislator Pushes for E-Verify

Visalaw International Blog

- Canada: Sergio R. Karas Chairs Seminar on Employment and Taxation Laws for Immigration Attorneys
- Bombing Suspect Arrested in Canada
- Malaysia's "Most Wanted" Seeks to Stay in Canada
- Canada: Another PNP Program Under Scrutiny

Visalaw Healthcare Immigration Blog

- The Immigrant Healthcare Dilemma
- DOS Issues Final Healthcare Worker Rule

Visalaw Fashion, Sports, & Entertainment

- Paving the Way for Latino NFL Officials
- Soprano Will Skip US Trip Due to Visa Headaches
- BALCA Denies Labor Certification Holding Singer Position not Full-Time
- Cuban Soccer Players Defect

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9. State Department Visa Bulletin for December 2008

This bulletin summarizes the availability of immigrant numbers during **December**. 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 **December 6th** 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.

2. Section 201 of the Immigration and Nationality Act 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 Charge-ability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	22MAY02	22MAY02	22MAY02	22SEP92	01JUN93
2A	01APR04	01APR04	01APR04	01AUG01	01APR04
2B	15FEB00	15FEB00	15FEB00	01MAY92	15JUN97
3rd	22JUL00	22JUL00	22JUL00	01OCT92	15MAY91
4th	01JAN98	15JUL97	15SEP97	15FEB95	15APR86

***NOTE:** For December, 2A numbers **EXEMPT from per-country limit** are available to applicants from all countries with priority dates **earlier** than 01AUG01. 2A numbers **SUBJECT to per-country limit** are available to applicants chargeable to all countries **EXCEPT MEXICO** with priority dates beginning 01AUG01 and earlier than 01APR04. (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 Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Employment-Based					
1st	C	C	C	C	C
2nd	C	01JUN04	01JUN03	C	C
3rd	01MAY05	01FEB02	01OCT01	01SEP02	01MAY05
Other Workers	15JAN03	15JAN03	15JAN03	15JAN03	15JAN03
4th	C	C	C	C	C
Certain Religious	C	C	C	C	C

Workers					
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

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 **December**, 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 is filler space right herenumber is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	15,100	Except: Egypt: 8,700 Ethiopia 7,900

		Nigeria 6,700
ASIA	6,850	
EUROPE	12,900	
NORTH AMERICA (BAHAMAS)	4	
OCEANIA	440	
SOUTH AMERICA, and the CARIBBEAN	750	

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 date. Similarly, spouses and children accompanying or following to join DV-2008 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 NOVEMBER

For **January,** immigrant numbers in the DV category are available to qualified DV-2008 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:

Region	All DV Chargeability Areas Except Those Listed Separately	
AFRICA	18,300	Except: Egypt 10,800 Ethiopia 10,000 Nigeria 8,400
ASIA	8,300	
EUROPE	15,400	
NORTH AMERICA (BAHAMAS)	4	
OCEANIA	480	
SOUTH AMERICA, and the CARIBBEAN	790	

D. CERTAIN RELIGIOUS WORKERS

The Certain Religious Workers category has been listed as "current" for December in anticipation of the publication of DHS regulations regarding this category. Once those regulations have been published, processing in this category can resume immediately.

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

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

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

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10. FAQ on E-Verify Regulation for Federal Contractors

By Greg Siskind[1]

On November 14, 2008, the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration jointly released a final regulation amending the Federal Acquisition Regulation (FAR) requiring a large number of employers contracting with the federal government to

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begin using the E-Verify electronic employment verification system. Federal agencies will include a section in their agreements with covered employers that specifically calls on the employer to use the E-Verify program in order to comply with the contract.

When does the rule take effect?
January 15, 2009

How does the new rule affect existing contracts?
While all new contracts are covered under the new regulation (assuming the agreement is not exempt under various categories outlined below), only certain existing contracts would be covered. Government agency contracting officers are required to modify existing "indefinite-delivery/indefinite quantity" (ID-IQ) contracts if the remaining period of performance under the contract extends at least six months after January 15, 2009 and if the remaining work under the contract is expected to be "substantial."

What is the basis for the new rule?
On June 6, 2008, President Bush issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System." The order mandates that all federal agencies that enter in to contracts shall require, as a condition of each contract, that the contractor agrees to use an electronic employment eligibility verification system designated by the Department of Homeland Security (DHS) to verify all new employees and all persons assigned by the contractor to perform work within the US on the federal contract. The order also mandates that the Department of Defense, NASA and the General Services Administration amend the FAR to carry out the order. On June 9, 2008, DHS designated E-Verify as the system to be used in carrying out the order. For more information on E-Verify, see the attached FAQ on the subject.
According to the preamble to the new rule, the rule is less intended to be about fighting illegal immigration and more about increasing the stability and dependability of federal contractors. Furthermore, contractors that employ unauthorized workers undermine "overall efficiency and economy" in government contracting.

Can the requirement to include the E-Verify clause be waived?
Yes. In exceptional circumstances, the head of the contracting activity at an agency may waive the requirement. This authority may not be delegated.

Are any contracts exempt from the new requirement?

Yes. The following types of contracts do not require inclusion of the E-Verify clause:

1. Contracts for commercially available off-the-shelf (COTS) items as well as items that would be classified as COTS items but for minor modifications;

2. Prime contracts that have a value less than $100,000 and subcontracts under those contracts that have a value of less than $3000

3. Contracts waived based on exceptional circumstances by the head of contracting authority at the agency

4. Contracts that are less than 120 days in duration.

5. Contracts for work that will be performed outside the United States (the fifty states, the District of Columbia, Guam, Puerto Rico and the US Virgin Islands)

How much time does a contracting employer have to start running employees' names through the E-Verify system?

There are a few key timelines to watch in complying with the regulation. For employers not yet enrolled as a federal contractor in E-Verify:

1. Employers have thirty calendar days to enroll as a federal contractor in E-Verify after a contract is awarded.

2. Within 90 calendar days of enrollment in E-Verify, the employer must begin verifying employment eligibility for all *new* hires working in the US.

3. For all employees assigned to the contract, the employer must begin verification within 90 calendar days of enrollment in E-Verify or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

For employers already enrolled as a federal contractor in E-Verify when the contract is awarded, the following timelines apply:

1. For employers already enrolled for 90 calendar days or more, the employer must initiate verification of all new hires within three business days after date of hire (except certain universities, state and local government employers and federally recognized Indian tribes).

2. For employers enrolled less than 90 calendar days, within 90 calendar days after enrollment as a federal contractor, the employer shall initiate verification of all new hires .

3. For each employee assigned to the contract, the employer shall begin verification within 90 calendar days after the date of the contract award or within 30 days after assignment to the contract, whichever date is later. Note that the 90 day clock starts on the date the contract is awarded instead of 90 days from the date of enrollment as would be the case for employers enrolled less than 90 days when the contract is awarded

What types of employers only need to verify employees assigned to a federal contract?

1. Institutions of higher education

2. State and local governments

3. Federally recognized Indian tribes

4. Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond

Are any types of employees exempt from being verified even if the contract is subject to the new requirement?

Yes. The rule exempts employees who hold an active security clearance of confidential, secret or top secret. Employees for which background investigations

have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD) – 12, "Policy for a Common Identification Standard for Employees and Contractors," issued on 8/27/2004.

Can an employer verify *all* existing employees as opposed to just employees working on the contract?
Yes. Contractors can choose to verify all employees of the contractor. If this option is exercised, the employer must notify DHS and must initiate verifications for the contractor's entire workforce within 180 day of notice being given to DHS. To notify DHS that the entire workforce will be verified, the employer should update its company profile through the "Maintain Company" page on E-Verify.

Does a company already enrolled in E-Verify need to re-enroll in order to comply with the new rule?
No. However, an employer does need to update its profile on E-Verify's "Maintain Company" page. There is an option for federal contractors where employers and employers will need to take a brief federal contractor tutorial that explains the new policies and features that are unique to contractors. Once the federal contractor option is selected, employers will not be able to verify new employees until it takes the refresher tutorial.

What does a company do once the contract is over?
After the contract is over, the company should update its Maintain Company page to reflect the revised status. After that, existing employees may not be run through E-Verify. If the company chooses to terminate participation in E-Verify, it can select "request termination" in the E-Verify system.

What are COTS contracts?
The new rule does not apply to contracts to supply "commercially available off-the-shelf (COTS) items. This applies to items of supply that are commercial items sold in substantial quantities in the commercial marketplace and offered to the government, without modification, in the same form in which it is sold in the commercial marketplace. The new rule also does not apply to contracts to supply bulk cargo such as agricultural products and petroleum products. Contracts for items that would be COTS items but for minor modifications are also not covered. The preamble to the rule specifically notes that food is an item of supply and most agricultural suppliers will not be affected by the new rule.
Services related to supplying the COTS items that are procured at the same time the COTS items are procured and supplied by the same employer providing the COTS items are also not subject to the rule. The services also must be typical or normal for the COTS provider.

Which employees associated with work on a contract must be verified under the new rule?
Employees hired after November 6, 1986 who are directly performing work in the United States under the contract. An employee is not considered to be directly performing work under the contract if the employee

- normally performs support work, such as indirect or overhead functions, and
- does not perform any substantial duties applicable to the contract

What if the Form I-9 for an existing employee is not the current Form I-9?

Employers may use a previously completed Form I-9 as the basis for initiating E-Verify verification of an assigned employee as long as that Form I-9 complies with the E-Verify documentation requirements and the employee's work authorization has not expired, and as long as the employer has reviewed the Form I-9 with the employee to ensure that the employee's stated basis for work authorization has not changed. If the Form I-9 does not comply with the current E-Verify requirements, or employee's basis for work authorization has expired or changed, the employer should complete a new Form I-9. If the Form I-9 is up to date, but reflects documentation (such as a US passport or green card) that expired after completing the Form I-9, the employer shouldn't use E-Verify's photo screening tool unless USCIS issues further instructions on the subject at some later point.

Are subcontractors also responsible for participating in E-Verify under the new rule?
Yes. Any subcontractor furnishing commercial or noncommercial services or construction under a prime contract or a subcontract covered by the rule must participate in E-Verify. The value of the contract must be more than $3000 and the work to be performed must be in the United States.

How many employers will be affected by the new rule?
The GSA, DOD and NASA believe that 168,324 contractors will be impacted in this fiscal year.

What is the contract language that must be included in contracts of employers covered by the new rule?

EMPLOYMENT ELIGIBILITY VERIFICATION (JAN 2009)

(a) Definitions. As used in this clause—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products. Per 46 CFR 525.1 (c)(2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a

contract that is required to include the clause prescribed at 22.1803. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and

(2) Does not perform any substantial duties applicable to the contract.

Subcontract means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

United States, as defined in 8 U.S.C. 1101(a)(38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

(b) Enrollment and verification requirements. (1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall—

(i) Enroll. Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) Verify all new employees. Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); and

(iii) Verify employees assigned to the contract.

For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of—

(i) All new employees. (A) Enrolled 90 calendar days or more. The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b)(3) of this section); or

(B) Enrolled less than 90 calendar days. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph(b)(3) of this section); or

(ii) Employees assigned to the contract. For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b)(4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Contractor shall follow the applicable verification requirements at (b)(1) or (b)(2) respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) Option to verify employment eligibility of all employees. The Contractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the Contractor, then the Contractor must reenroll in E-Verify.

(c) Web site. Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: http://www.dhs.gov/E-Verify.

(d) Individuals previously verified. The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;

(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD) -12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) Subcontracts. The Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for identification of the parties), in each subcontract that—

(1) Is for— (i) Commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or
(ii) Construction;
(2) Has a value of more than $3,000; and
(3) Includes work performed in the United States.

(End of clause)