



## Immigration Legal Update

### IN THIS ISSUE...

- [E-Verify Federal Contractor Rule Implementation Delayed until February 20, 2009](#)
- [Changes to Documents Accepted for Form I-9](#)
- [US-VISIT Applies to Green Card Holders Beginning January 18, 2009](#)
- [No April Fools! Don't Let Your Employees be Victims of the H-1B Cap](#)
- [Visa Bulletin for February 2009](#)

### **E-Verify Federal Contractor Rule Implementation Delayed Until February 20, 2009**

According to the new rule issued pursuant to an Executive Order, as of January 15, 2009, many federal contractors and subcontractors would have been required to use the E-Verify system, [www.uscis.gov/e-verify](http://www.uscis.gov/e-verify), administered by the Department of Homeland Security, as a means of verifying that their employees are eligible to work in the United States. In late December 2008, the U.S. Chamber of Commerce challenged the legality of the new rule. The Chamber's lawsuit challenges the government's use of an Executive Order coupled with federal procurement law to make E-Verify mandatory for federal contractors and subcontractors. The Chamber also challenged expanding E-Verify to require reconfirming the employment authorization of existing workers. Joining the Chamber as co-plaintiffs in the lawsuit are the Associated Builders and Contractors, the Society for Human Resources Management, the American Council on International Personnel, and the HR Policy Association. Due to the lawsuit, the implementation of the rule has been suspended until February 20, 2009.

As a matter of background, under the final rule, employers are required to enroll in E-Verify if and when, after January 15, 2009, they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract. The same clause will also be required in subcontracts over \$3,000 for services or construction.

The final rule also requires the insertion of the E-Verify clause within existing prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000), except for:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services; and
- Contracts where all work is performed outside the United States.

In the past, employment verification through E-Verify was limited to new hires only; under the new final rule, qualified federal contractors and subcontractors are required to use E-Verify for both new hires and existing employees who work on a federal contract.

When a contractor is awarded a federal contract containing the E-Verify clause, the contractor and any covered subcontractors on the project must enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. These contractors or subcontractors must also initiate verifications for existing employees who will be working on the contract and who use the system to verify newly hired employees within 90 calendar days of enrollment. After the 90-day phase-in period, federal contractor and subcontractor employers are required to conduct E-Verify verification of all newly hired employees within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of newly hired employees before their start date if the employees have accepted the job offer and filled

out the Form I-9 (prescreening of job applicants is not allowed). Importantly, federal contractor employers must continue to use E-Verify for the life of the contract for all new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

The USCIS has issued releases discussing the new final rule and its requirements, available at the USCIS' website at [http://www.uscis.gov/files/article/FAR\\_13Nov08.pdf](http://www.uscis.gov/files/article/FAR_13Nov08.pdf) (new rule announcement) and [http://www.uscis.gov/files/article/FAR\\_FAQ\\_13nov08.pdf](http://www.uscis.gov/files/article/FAR_FAQ_13nov08.pdf) (Frequently Asked Questions).

### **Changes to Acceptable Documents for Form I-9**

On December 12, 2008, the U.S. Citizenship and Immigration Services (USCIS) submitted an interim final rule to the Federal Register that revises the list of acceptable documents for the Form I-9, Employment Eligibility Verification, process. Employers will be required to use the revised form for all new hires and to reverify any employee with expiring employment authorization beginning 45 days after publication in the Federal Register. The current edition of the Form I-9, dated 6/05/2007, will no longer be valid for use 45 days after publication of the rule in the Federal Register. The revised Form I-9 will be available on the USCIS' home page (at <http://www.uscis.gov/i-9> ) 45 days after publication in the Federal Register. The Handbook for Employers, Instructions for Completing the Form I-9 (M-274) is being updated to reflect these changes and will be published on the USCIS' website in the near future.

Under the interim final rule, employers will no longer be able to accept expired documents to verify employment authorization on the Form I-9. (Under current regulations, the U.S. passport and all List B documents are acceptable for the Form I-9, even if they have expired.) The change was implemented to ensure the reliability of identity and employment authorization documents and to prevent any fraudulent use of expired documents which, according to the Department of Homeland Security (DHS), are often prone to such fraudulent use. This will further honor the time limits placed by government authorities on their documents and increase the likelihood that up-to-date documents will contain the most recent security features that make them less vulnerable to counterfeiting and fraud.

In addition, new acceptable documents have been added for the citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI). The existing Compacts of Free Association between the U.S. and the FSM and the RMI allow most citizens of the FSM and RMI to be admitted to the U.S. as nonimmigrants, including the privilege of residing and working in the U.S. These citizens are not required to obtain an Employment Authorization Document (Form I-766), and may use valid FSM or RMI passports with evidence of their admission under the Compacts to satisfy Form I-9 requirements. To conform the Form I-9 with the requirements of the Compacts, a new List A provision is being included.

Another revision pertains to the temporary I-551 stamp in an unexpired foreign passport, which is listed in List A of acceptable documents for Form I-9. The DHS issues temporary I-551 stamps to legal permanent residents (LPRs) on either unexpired foreign passports or Forms I-94 (Arrival-Departure Record) to serve as temporary documentation of legal permanent resident status while they wait for the actual Form I-551 ("green card"). The new rule modifies the reference in List A to a temporary I-551 stamp on an unexpired foreign passport to include a preprinted temporary I-551 notation on machine-readable immigrant visas, which the Department of State has been issuing for several years.

The new rule also eliminates Form I-688 (Temporary Resident Card), and Forms I-688A and I-688B (Employment Authorization Cards) from the list of acceptable documents under List A. The DHS no longer issues such cards and has determined that any such documents that were previously issued have expired. The USCIS now issues Form I-766 (Employment Authorization Document) to those who formerly received Forms I-688, I-688A or I-688B, and the Form I-766 remains on List A.

The new rule also adds references to Form I-94A (Arrival-Departure Record), which is nearly identical to the Form I-94 except that all fields are computer generated rather than being annotated by hand. The rule also revises the reference to Social Security Number Card to now read "Social Security Account Number Card," which remains an acceptable List C document. The rule also revises the restriction on the acceptability of Social Security Account Number Cards to exclude any card that specifies on the face that the issuance of the card does not authorize employment in the United States. As such restrictive language actually printed on the card has changed through the years, the current rule makes sure that the language was revised to mimic the language in the pertinent statute.

### **US-VISIT Applies to Green Card Holders Beginning January 18, 2009**

The DHS established the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT) in 2003 to verify the identities and travel documents of aliens. Aliens subject to US-VISIT may be required to provide fingerscans, photographs, or other biometric identifiers upon arrival in the United States. Currently, aliens arriving at a United States port of entry with a nonimmigrant visa, or those traveling without a visa as part of the Visa Waiver Program, are subject to US-VISIT requirements with certain limited exceptions. Under the DHS' new rule, which becomes effective January 18, 2009, nearly all foreign nationals will be subject to

US-VISIT, including lawful permanent residents (green card holders).

**No April Fools! Don't Let Your Employees be Victims of the H-1B Cap**

April 1, 2009, is fast approaching. It is the first day the USCIS will receive H-1B petitions on behalf of foreign nationals who need H-1B status with a start date of October 1, 2009, which would include individuals who have never had H-1B status before and, most commonly, students in J-1 or F-1 status.

The federal government's 2010 fiscal year commences on October 1, 2009, and H-1B petitions may be filed with the USCIS no earlier than six months prior to the requested start date; therefore, H-1B petitions may be received by the USCIS on April 1, 2009, requesting a start date of October 1, 2009.

Last year, the annual cap of 58,200 available H-1B numbers was reached within the first several days the USCIS began accepting H-1B petitions. As the USCIS once again received more H-1B petitions than available numbers, the USCIS utilized a "lottery" system to determine which of the petitions would be accepted under the cap; therefore, even if a petition was received on the very first day of filing, there was no guarantee that the petition would be accepted for processing. Further, the additional 20,000 available H-1B numbers for those who possess a master's degree or higher from a U.S. educational institution were once again used in record time. Accordingly, even if a student has Optional Practical Training (OPT) and a valid Employment Authorization Document (EAD) until May 2010, an employer must file an H-1B petition on the student's behalf for an April 1, 2009, receipt date. If an employer waits too long to file an H-1B petition on behalf of a student who has an EAD valid until May 31, 2010, and is caught outside of the 2009 H-1B cap, the employer will then have to wait until April 1, 2010, to file an H-1B petition seeking an October 1, 2010 start date. While filing early for H-1B status may result in the loss of a student's OPT time under an EAD, the employer can try to avoid a situation where the employee may have to leave the U.S. for some period of time.

Last year, some relief was provided to F-1 students in certain situations. The DHS issued a rule extending the period of OPT from 12 to 29 months for qualified F-1 nonimmigrant students. The extension is available to F-1 students with degrees in the sciences, technology, engineering, or mathematics (STEM degrees) who are employed by businesses enrolled in the government's E-Verify program. Further, the work authorization of F-1 students with practical training periods that expire before the allowed H-1B start date of October 1, 2009, is automatically extended until September 30, 2009, if their H-1B petition is selected in the lottery.

**Visa Bulletin for February 2009**

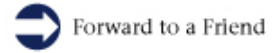
The Immigration and Nationality Act sets an annual minimum for both family-based and employment-based immigrant visas ("green cards") prescribed by categories and per-country limits. A prospective immigrant can apply to become a permanent resident only when a visa number is available in his/her respective category. The monthly Visa Bulletin, published by the U.S. Department of State, provides a monthly update on the availability of visa numbers listing the cutoff priority. Only applicants who have a priority date earlier than the cutoff date may be allotted a number.

The complete Visa Bulletin is available at the Department of State's website at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4417.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4417.html). Below is an excerpt from the February 2009 Visa Bulletin pertaining to the employment-based categories.

	<b>All Chargeability Areas Except Those Listed</b>	<b>CHINA-mainland born</b>	<b>INDIA</b>	<b>MEXICO</b>	<b>PHILIPPINES</b>
<b>Employment-Based</b>					
1st	C	C	C	C	C
2nd	C	01JAN05	01JAN04	C	C
3rd	01MAY05	01OCT02	15OCT01	01APR03	01MAY05
Other Workers	15MAR03	01OCT02	15OCT01	15OCT01	15MAR03
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

"C" - current "U" - unavailable

For more information, please contact  
Megan Naughton at 860-275-8263 ( [mnaughton@rc.com](mailto:mnaughton@rc.com) ),  
Joshua Mirer at 860-275-8344 ( [jmirer@rc.com](mailto:jmirer@rc.com) ),  
or Natasha Sharubina at 860-275-8396 ( [nsharubina@rc.com](mailto:nsharubina@rc.com) ).



© 2009 Robinson & Cole LLP

All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission.

This email was sent to: [archive@rc.com](mailto:archive@rc.com)

This email was sent by: Robinson & Cole LLP  
280 Trumbull Street Hartford, CT 06103 Attn: Client Relations



We respect your right to privacy [view our policy](#)

[Manage Subscriptions](#) | [Update Profile](#) | [One-Click Unsubscribe](#)