

Scholar Advising Update

NAFSA Region II Conference 2008

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Travel and Admission

Ten-print process implemented for NIV applicants

- o DOS now requires “ten print” fingerprint scans for all nonimmigrant visa applicants. (73 FR 49091, 8/20/08)

DHS implements pre-screening of Visa Waiver travelers

- o Electronic System for Travel Authorization (ESTA)
 - o “Went live” 8/1/08, ESTA authorization becomes mandatory 1/12/09
 - o Online system collects biographical and travel information from VWP travelers and “pre-approves” travel to U.S.
 - o ESTA authorization valid for up to two years
 - o Electronic record accessible by CBP at POE (not a document carried by traveler)
 - o Determines “whether alien is eligible to travel to the U.S. and whether there exists any law enforcement or security risk in permitting” travel under VWP
 - o Legally admissibility to U.S. not determined by ESTA, still determined at POE
 - o If denied ESTA authorization may apply for a visitor visa
 - o DHS may later charge VWP applicants an ESTA fee

Travel and Admission, ctd.

DOS moves toward completely electronic visa application

- o DOS final rule (73 Fed. Reg. 62, 23067-23069 (April 29, 2008)) will allow it to offer a completely electronic visa application procedure and replace current forms with Form DS-160 to be completed, signed, submitted electronically
- o Currently DS-156 is filled out on DOS web site, applicant prints application for appointment, bar code contains some data, but DOS retains no data
- o DS-160 will be submitted electronically and data collected in CCD
 - o It's a "smart form," so data entered determine questions to follow
 - o Includes data fields from DS-156, DS-156E, DS-156K, DS-156V, DS-157 and DS-158
 - o DS-160 is being piloted at Nuevo Laredo and Monterrey, Mexico
 - o No time frame from DOS for full implementation at all consulates
 - o Access form at <https://ceac.state.gov/genniv/>
- o DOS is experimenting with off-site biometrics collection in privately contracted facilities similar to USCIS Application Support Centers

INA amended to remove HIV as ground of inadmissibility

- o Until HHS amends 42CFR34.2(b) to remove HIV, though, it remains a ground of inadmissibility HIV-positive person needs waiver of inadmissibility

Travel and Admission, ctd.

USCIS—DOS Petition Information System (PIMS)

- o **Background**
 - o PIMS is a Consolidated Consular Database (CCD) report to provide posts with official, inter-agency, notification of H, L, O, P, Q petition approvals
 - o Results of checks re fraud, criminal background, and immigration history and status (including SEVIS), may also be included
 - o Ends consular posts' reliance on paper USCIS approval notices supplied by visa applicants and enhances fraud detection
 - o Post must confirm petition approval in PIMS before issuing visa based on it
 - o USCIS sends data to DOS Kentucky Consular Center (KCC), entered in PIMS
 - o USCIS service center sends to KCC a duplicate petition and exhibits supplied by petitioner, and PIMS record includes full scanned copy
- o **Getting petition into PIMS**
 - o Petitioner submits a **duplicate original petition**, with attachments/exhibits under separate cover sheet (CSC requests "goldenrod") stating "Duplicate original - Please forward approval to KCC for entry in PIMS" in big, bold type
 - o Not possible to send a petition directly to KCC or verify PIMS record

Travel and Admission, ctd.

USCIS—DOS Petition Information System (PIMS), ctd.

- o **What happens when no PIMS record for a visa applicant**
 - o If no record officer e-mails KCC, which will research USCIS' CLAIMS3 system and confirm approval and make the details available through the CCD
 - o DOS has instructed posts to check PIMS for H, L, O, P, and Q visas *before* interview
 - o DOS says KCC confirmation takes two working days, but may take longer
 - o PIMS cable: "the PIMS Petition Report contains a record of all petitioners recorded by KCC as having approved petitions since 2004"
 - o But apparently only initial (not COS, EOS, amendment) petitions recorded
- o **Advising visa applicants**
 - o Don't need original approval notice at consulate, as required in the past
 - o See http://travel.state.gov/visa/temp/types/types_1271.html#pims
 - o But may need original approval notice at POE
 - o Advise of possible delays in visa approval and/or issuance
 - o Especially if COS, EOS or amended petition approved prior to late March 2008
 - o Especially if petitioner did not file a duplicate original with USCIS

Travel and Admission, ctd.

USCIS—DOS Petition Information System (PIMS), ctd.

- o **Assessing a PIMS delay**
 - o Visa applicant may not be directly informed that a delay is related to PIMS
 - o Officer often says application is undergoing further "administrative processing," i.e., when security check ("Condor," "Donkey," "Mantis," etc.) is pending
 - o May be helpful to advise H, L, O, P, and Q visa applicants to ask at the visa interview whether the approval has been verified in PIMS
 - o Will not speed visa issuance, but it may help identify the reason for the delay
- o **What if petitioner forgot to include duplicate petition**
 - o Do nothing
 - o As stated above, DOS has a process to follow when no PIMS record
 - o Disregard USCIS notice to file I-824 (common from CSC)
 - o Filing of an I-824 will not get petition to KCC for scanning into PIMS
 - o Even if it did work, it would not occur in time to assist a visa applicant
- o **See NAFSA advisory on scholar advising network**
http://www.nafsa.org/knowledge_community_network.sec/international_student_3/international_scholar/isca2

Exchange Visitor Program

Final Rule, Recertification and SEVIS fees

SEVIS fee increase (effective 10/27/08)

| <u>Fee Item</u> | <u>Old Fee</u> | <u>New Fee</u> |
|---|----------------|----------------|
| I-901 F and M students | \$100 | \$200 |
| <i>I-901 Most exchange visitors</i> | <i>\$100</i> | <i>\$180</i> |
| I-901 Au Pair, Camp, Summer Work/Travel | \$35 | \$35 |
| I-901 Government-sponsored EVs | \$0 | \$0 |
| F/M Initial school certification | \$230 | \$1,700 |
| Initial certification site visit or visit for adding a campus, etc. | \$350 | \$655 |
| Recertification of SEVP certified schools | \$0 | \$0 |

See the rule at: http://www.ice.gov/doclib/sevis/pdf/fee_rule_text.pdf

Exchange Visitor Program, ctd.

DOS issues chart for determining EVs subject to 12 and 24 mo. bars

- o See "DOS Guidance on J Professors and Researchers" on NAFSA web site under "Regulatory Information"
- o In a May 24, 2007, letter DOS takes the position that the 24-month bar also applies to J-2 dependents of J-1 Professors or Research Scholars, despite NAFSA's arguments to the contrary (*yes, this is crazy!*)

DOS rule revises bases for sanctions, terminations, and revocations

- o Retains many provisions, but modifies reasons for imposing sanctions
 - o Adds two new reasons for sanctions, for "sponsor operating program in such a way as to: "undermine foreign policy objectives of the U.S." or "compromise national security interests of the U.S."
 - o Eliminates requirement that violations be "willful" or "negligent" since "any violation or pattern of violations would, arguably, be willful or negligent"
 - o "Paper review" by panel of three Review Officers rather than trial-type hearing
 - o Program termination for failure to file an annual management audit, if required
 - o *Sec. Rice mentioned these in her annual F/J/M cable to consulates*

Exchange Visitor Program, ctd.

Final Rule on J Student Interns (73 Fed. Reg. 35066 (June 20, 2008))

- o Amends regulations to create a new "Student Intern" subcategory under the College and University Student category
 - o For students currently enrolled and pursuing degree at postsecondary academic institution outside U.S.
 - o May participate in a student internship program for up to 12 months for each degree/major
- o Programs that have College and University Student category will not have to apply for a new Student Intern designation but will *automatically* be authorized once SEVIS functional (a new option - *Student Intern* - in the Exchange Visitor Category drop-down menu at item 17 in SEVIS RTI)

New 12-month Intern Work and Travel Pilot Program for Irish Post-secondary students and recent graduates

- o See http://www.nafsa.org/_/Document/_/dos_announces_new_j-1.pdf

New 18-month Intern program for Korean Students and recent graduates, the WEST (Work, English Study, Travel) Program, expected to launch in 2009

- o See http://www.nafsa.org/_/Document/_/the_west_work_english.pdf

Exchange Visitor Program, ctd.

DOS has created Student/Exchange Visitor Visa Center

- o Schools and EV sponsors may e-mail fmjvisas@state.gov to inquire about status of F, M and J visa applications
- o Applicant should use the Public Inquiries number 202-663-1225
- o Include date of inquiry, nature of inquiry (e.g. delay, communication problem), and

Post Information

Consular Office Involved:
Have you contacted the consulate directly?
When:
How (e.g. Phone, mail, fax, e-mail):
Name of person you contacted (if known):
Attach correspondence, if any:

Foreign National's Information

Full Name (as on passport):
Nationality:
Place of Birth:
Date of Birth:
Current Visa Status in U.S. if any:
Type of Visa:
NIV Appointment number:

DSO/RO Contact Information

Name:
Institution:
Phone:
E-mail:

See http://www.nafsa.org/regulatory_information.sec/state_department_student_exchange

H-1Bs

“Cap-gap relief”—does it apply to beneficiary of university H-1B petitions?

OPT unemployment—check OPT unemployment before filing H-1B petition?

Effective 10/1/08, you must be a “registered user” to submit LCAs

January 2009 DOL integrates ETA-9035 and ETA-9089 systems

- o Expect LCA processing time to go from “instant” to 7 days

DOL proposes to move prevailing wage determinations

- o DOL proposed rule would shift responsibility for H-1B, H-1B1, E-3 and permanent labor certification prevailing wage determination responsibility from SWAs to DOL’s National Processing Centers in Chicago and Atlanta
- o Employers would file pwd request directly with national processing center
- o DOL indicates process will eventually be “performed electronically between the NPC and the employer” but “initially [will] be a manual paper process”
- o Apparently employers would still be able to utilize other wage information, such as the OES and ACWIA databases, for LCAs
- o This is just a proposed rule and not yet in effect

H-1Bs, ctd.

Neufeld Memo (May 30, 2008) clarifies AC21 issues:

o **Extensions beyond 6 years in cases of lengthy adjudication**

AC21 sec. 106(A), 12/05/06 Aytes memo, 12/27/05 Aytes memo, 5/12/05 Yates memo, 4/23/03 Yates memo

- Eligibility: 365+ days have passed since filing of ETA-9089 or I-140
 - **NOTE: Need not be pending, can be approved, H-1B employer doesn’t have to be LPR employer**
- Extensions granted in one-year increments until ETA-9089 or I-140 is denied or ETA-9089 expires (before I-140 filed) or is revoked
- May file extension petition 6 months prior to expiration, and FN—if not eligible at filing—must become eligible (meet 365 day req.) before requested extension start date
- May request remainder of 6-year period year plus 7th
 - o But total of 3 years with one I-129
- 240 days work authorization while extension petition pending
- H-4s granted extension based on principal’s

H-1Bs, ctd.

Neufeld Memo, ctd.

- **Extensions beyond 6 years for FNs unable to obtain immigrant visa due to visa bulletin**

AC21 sec. 104(C), 12/05/06 Aytes memo, 12/27/05 Aytes memo, 5/12/05 Yates memo, 4/23/03 Yates memo

- Although statute does not specify this, USCIS says I-140 must be *approved* for FN to be eligible
- Extensions may be granted in three-year increments
- No cumulative limit (despite unfortunate "one-time" language)
- 240 days work authorization while extension petition pending
- H-4s granted extension based on principal's

- **H-1Bs employer by cap-exempt employer are not counted against cap when working concurrently for cap-subject employer**

- So, a private company can file an H-1B petition for a researcher at your institution even after H-1B cap has been exhausted
 - If employment at your institution terminates, future petitions cap-subject

H-1Bs, ctd.

Review

- **7th year H-1B extensions provided by AC21 available to those outside U.S.**

- Available regardless of whether foreign national in U.S. or abroad, so not so much an "extension of stay" as an additional period of H-1B authorization
- **Example:** June 15, 2008, you're visited by a faculty member from China who has been H-1B for 5 years and wants to start LPR process. You file LC on August 15, 2008). June 15, 2009, her H-1B status expires, and she has to leave U.S. But on August 15, 2009 she's eligible for 7th year "extension." You can file it 6 months, early and after taking summer off she's back to work August 15, 2009.
 - NOTE: If LC is approved and I-140 filed, in her last 60 days of H-1B, you can premium process I-140 and she's eligible for 3-year extension due to visa backlog
- See 12/5/06 Aytes memo

- **H-1B eligibility may be recaptured for periods outside of U.S.**

- See 12/5/06 Aytes memo

- **One-year H-1B for jobs requiring license if employee has no license**

- 3/21/08 Neufeld memo: USCIS continues one-year H-1B approval in "catch-22 situations" -- employee needs license but can't get license until H-1B approved

H-1Bs, ctd.

Review, ctd.

- **Some non-profits affiliated with higher ed. institutions cap-exempt**
 - USCIS has been rather liberal in considering (written) affiliations
 - AAO decision regarding related/affiliated institution (8/8/06) exempts from cap public school system's teachers in alternative certificate program
- **Withdraw LCA and H-1B petition if employment is terminated early**
 - *Notify USCIS*: "petitioner shall send a letter explaining the change(s) to the director who approved the petition" **8CFR214.2(h)(1)(I)(A)**
 - Withdraw LCA, too **20CFR655.750(b)(2)**
 - DOL Administrative Review Board found that employer owed about \$75,000 "back wages" because it had not notified USCIS
Amtel Group of Florida v. Yongmahapakorn, 04-087 (ARB 9/29/06)
 - Create process for learning of terminations and withdrawing/canceling LCAs and H-1B petitions
 - Collaborate with other offices to establish notices and procedures

Other Nonimmigrant Classifications

DHS final rule increases period of stay for TNs to 3 years

- TNs now granted admission to U.S. for up to 3 years and granted extensions of up to 3 years, with no maximum period of stay (but USCIS may question intent at some point)
- See 73 Fed. Reg. 61332 (10/16/08) and announcement/FAQ at www.uscis.gov "Press Room"

DOL final rule on E-3 labor conditions application (Australians in specialty occupation)

- See 73 Fed. Reg. 19943-19950 (4/11/08)—prior to April 11, 2008 no guidance

Review

- **Questions about whether premium processing is available for a classification?**
 - Go to Form I-907 at www.uscis.gov and click on "How do I Use the Premium Processing Service"
 - YES: E-1, E-2, H-1B, O-1, O-2P-1, P-2, P-3, TN-1, TN-2 (and some I-140s)
 - NO: E-3, H-1B1
- **Which classifications qualify for 240 days continuing work authorization when extension petition is timely filed?**
 - See 8 CFR 274a.12(b)(20)
 - Common in higher ed.: H-1 (including H-1B and H-1B1), O-1, O-2, TN
 - Note, no E-3
 - Others: A-3, E-1, E-2, G-5, H-2A, H-2B, H-3, I, J-1 (don't rely on this!), L-1, P-1, P-2, P-3, R-1

Permanent Residence

USCIS resumes limited I-140 premium processing

- o Beneficiary currently in H-1B status
- o Sixth year of H-1B will expire within 60 days
- o Ineligible for extension of H-1B under AC21 § 106(a) [lengthy adjudication]
- o Eligible **only** for extension of H-1B under AC21 § 104(c) [immigrant visa backlog]
- o Only for certain I-140s
 - o EB-1 outstanding professor/researcher and extraordinary ability
 - o EB-2, except NIW
 - o EB-3
- o See June 11, 2008 announcement/fact sheet at "Press Room" www.uscis.gov

USCIS begins issuing two-year "(c)(9)" EADs for adjustment applicants

- o USCIS guidance says only for applicants facing immigrant visa retrogression and only if I-140 already approved
 - o But applicants report receiving two-year EAD even if I-140 not yet approved

DOL proposed rule to "nationalize" prevailing wage determinations (see H-1B)

Permanent Residence, ctd

DOL Proposes new ETA-9089

- o DOL announced 3/31/08 submission of proposed new Form ETA-9089 Application for Permanent Employment Certification to OMB for review and approval
- o Among other changes, the new form would allow inclusion of primary job requirements and three sets of alternative requirements, including separate sections for education, experience, and training
- o See http://www.nafsa.org/_/Document/_/dol_quartely_stakeholders.pdf

I-765/EAD processing delays

- o In AILA-SCOPS liaison meeting (9/17/08), USCIS told AILA that
 - o "Service centers are sweeping cases at the 60th day mark so that a decision can be made before the 70th day and the card produced before the 90th day"
 - o Customers with cases approaching the 90-day mark should call the National Customer Service line to inquire
 - o "scripts" have been changed so customer service reps. can alert the service centers at the 70-day mark rather than 90-day mark that the application is beyond "normal processing time" and—in theory—expedite
 - o If delayed beyond 90 days e-mail cisombudsman.publicaffairs@dhs.gov

Permanent Residence, ctd

Biometrics for applicants who turn 14

- o USCIS confirmed to AILA that the “fingerprint requirement is not waived” for an AOS applicant who turns 14 while the application is pending, and the applicant will receive a notice to appear for biometrics. “A biometric fee may be required.”

Must be in U.S. to file I-131

- o In a non-precedent decision, AAO upheld denial of a re-entry permit application where the form was filed after the applicant departed the U.S. AAO found that there is no exception for the physical presence requirement at the time of filing. Probably applies to advance parole, too.

USCIS issues memo clarifying certain aspects of INA 245(k)

- o INA 245(k) forgives EB AOS applicant for (1) failing to maintain status, (2) engaging in unauthorized employment, and (3) violating terms of status/admission for “an aggregate period not exceeding 180 days”
- o 7/14/08 Neufeld memo clarifies USCIS interpretation of 254(k)
 - o Applies only to AOS applicants based on EB-1, EB-2, EB-3, EB-4 immigrant petition
 - o Extends to derivative applicants (spouse, unmarried children under 21)
 - o 180-day period begins from last admission to U.S. (**BUT**, entry via adv. parole not new entry)
 - o USCIS takes position that the three kinds of violation are aggregated

Permanent Residence, ctd

Fragomen v. DOL fiasco – lessons for the rest of us

- o Employer, not attorney, should first review applications in labor certification process
- o Employer may then consult attorney about complex DOL rules concerning who is qualified, etc. (see http://www.nafsa.org/_/Document/_/perm_program_guidance.pdf)

Review

- o **DOL rule, effective July 16, 2007, changes permanent labor certification process:**
 - o Establishes **180-day validity period** for approved labor certifications
 - o **Requires employers to pay costs of preparing, filing, and obtaining certification**
 - o Including attorneys’ fees, advertising costs, etc.
 - o Supplementary information and FAQs strictly prohibit the employee from paying these
 - o Only affects labor cert., not immigrant petition or adjustment of status
 - o Also Prohibits substitution, clarifies DOL “no modifications” policy for applications, and establishes **debarment** procedures for employers and attorneys
 - o See rule, summary, and DOL FAQs on NAFSA web site under “Regulatory Information”
 - o If you use outside counsel for LPR and don’t know about the rule, learn about it fast
 - o If you handle LCs and have not yet set up procedures like expiration reminders, do so soon

November Visa Bulletin

| Emp-Based | All Chargeability Areas Except Those Listed | CHINA-mainland born | INDIA | MEXICO | PHILIPPINES |
|---|---|---------------------|---------|---------|-------------|
| 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 Workers | U | U | U | U | U |
| 5th | C | C | C | C | C |
| Targeted Employment Areas/ Regional Centers | C | C | C | C | C |

Wrap-Up

Questions?