

PUBLICATION

Immigration Update: August 2016 Visa Bulletin; Increased Fines for I-9 and Other Immigration Violations; USCIS Returns Unselected Fiscal Year 2017 H-1B Cap-Subject Petitions; and More

August 09, 2016

Tracking newsworthy developments in the ever-changing world of business immigration and its impact on employers and employees.

This month: August 2016 Visa Bulletin; Increased Fines for I-9 and Other Immigration Violations; USCIS Returns Unselected Fiscal Year 2017 H-1B Cap-Subject Petitions; Long Wait Times at U.S. Consulates in India; Is Your Work Site Ready for a Site Visit?; Continued High RFE Rates; Employment Authorization Document Adjudication Delays.

August 2016 Visa Bulletin: Retrogression in Certain Employment-Based Categories

The Department of State (DOS) has issued its August 2016 Visa Bulletin which reflects retrogression in Employment-Based First Preference (Priority Workers such as Multinational Managers) and Employment-Based Second Preference (Members of the Professions Holding Advanced Degrees) visa applications and continued high demand in Employment-Based Third Preference visa applications (Skilled Workers, Professionals and Other Workers).

Employment-Based First (EB-1) Preference Category cutoff date for India and China

Historically, the EB-1 Category was current for all nationals. However, as announced in the July 2016 Bulletin, the August 2016 Bulletin imposes a cutoff date of January 1, 2010, for both India and China. For all other countries, the EB-1 category remains current and for India and China this category is expected to be current again on October 1, 2016 (the first month of fiscal year 2017).

Employment-Based Second (EB-2) Preference Category cutoff date for all nationals

Previously, the EB-2 Category was current for all nationals except for India and China. Due to high demand for the EB-2 category from all nationals, the August 2016 Bulletin imposes a cutoff date for all applicants. This category is projected to be current again starting October 1, 2016.

Continued high demand for Employment-Based Third (EB-3) Preference Category

In the EB-3 category, chargeability for worldwide, El Salvador, Guatemala, Honduras and Mexico advanced two weeks from March 1, 2016 to March 15, 2016. The cutoff date for India advanced from October 22, 2004 to November 8, 2004, and the cutoff date for the Philippines advanced by from February 15, 2009 to May 15, 2009.

Increased Fines for I-9 and Other Immigration Violations Effective August 1, 2016

The U.S. Departments of Homeland Security (DHS), Justice (DOJ) and Labor (DOL) announced increased civil fines against employers who commit immigration-related offenses, such as Form I-9 and E-Verify violations, H-1B visa program violations, unfair immigration employment practices and unlawfully employing foreign

nationals. These increased penalties will be applicable only to penalties assessed after August 1, 2016, but will apply to violations that occurred after November 2, 2015.

The penalty increases are substantial because the federal agencies are adjusting fines for inflation from the dates of initial enactment. For instance, penalties for violating the Form I-9 identity and employment eligibility verification provisions almost doubled from a range of \$110 – \$1,100 to \$216 – \$2,156. The penalty for H-1B visa program violations, including misrepresentations on the labor condition application or requirements that the employee pay certain fees will increase to up to \$1,782 per violation. More serious conduct, including willful failures pertaining to wages or working conditions, willful representations on the labor condition application or discrimination against an employee will result in a penalty of up to \$7,251 per violation. The penalty for displacing a U.S. worker during a period beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with other willful violations or willful misrepresentations increased from \$35,000 to up to \$50,758 per violation.

Finally, the penalties for knowingly hiring, recruiting, referring or retaining an unauthorized worker increased per unauthorized alien to \$539 to \$4,313 for the first offense, \$4,313 to \$10,781 for the second offense and \$6,469 to \$21,563 for subsequent offenses.

USCIS Returns Unselected Fiscal Year 2017 H-1B Cap-Subject Petitions

Employers with FY 2017 H-1B cap cases not chosen for processing should have received their returned petition packages with fee checks by July 8. The agency continues to process receipted non-premium H-1B cap petitions and premium cases that received requests for evidence. Employers who submitted an H-1B cap-subject petition between April 1 and April 7, 2016, and have not received a receipt notice or a returned petition by July 22, 2016, may contact USCIS for assistance.

Increased Wait Times at U.S. Consular Posts in India

U.S. Consular Posts in India are currently experiencing extraordinary wait times for nonimmigrant visa (NIV) interview appointments. In July 2016, the current wait times for all non-immigrant visa categories (other than Visitor and Student/Exchange Visitors) are 112 days in Chennai, 116 days in Hyderabad, 104 days in Kolkata, 71 days in Mumbai and 111 days in New Delhi. The wait times are expected to continue and possibly worsen throughout the summer months. Indian clients in the U.S. should defer any unnecessary travel to India or, where travel is essential, be prepared for long delays in the scheduling of visa interviews. Business emergencies only take second priority when requesting an expedited appointment. Applicants who are renewing their visa may be able to avoid the lengthy processing times if they qualify for the Interview Waiver Program (IWP). If Indian nationals will be traveling to other countries, they may also consider processing as third country Nationals (TCN) at consular posts outside of India.

USCIS Site Visits for H-1B, L-1 and Religious Worker Petitions

Although U.S. Citizenship and Immigration Services' (USCIS) Administrative Site Visit and Verification Program has been in existence since 2009, employers may be noticing an increase in site visits associated with filings for H-1B, L-1 and Religious Worker Petitions. By filing immigration petitions that require Form I-129 (including H-1B, L-1, R-1 and other nonimmigrant work-authorized classifications), an employer agrees that "any supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews."

USCIS, through its Fraud Detection and National Security directorate (FDNS), may conduct unannounced site visits at the sponsored employee's work location to verify any evidence submitted in support of the petition and compliance with applicable immigration laws and regulations. For religious worker petitions, FDNS conducts site visits on all petitioners before adjudication. FDNS also randomly selects petitioners for site visits after adjudication of religious worker, H-1B and L-1 petitions. These visits are voluntary and typically last less than

an hour, but employers should cooperate and contact their immigration attorney immediately. Counsel is permitted to attend in person and possibly via telephone. If counsel is unable to attend, Employers are advised to provide a detailed description about the visit. In order to prepare for a visit, Employers should have copies of the petition and all supporting materials readily available and have policies and procedures for site visits in place.

Upon arrival, the inspector will likely ask to speak to the company signatory or to the Human Resources Manager. These employees – as well as any reception area staff – should therefore be aware of the possibility of an unannounced visit. During the visit, the inspector may ask to take photographs, ask for pay stubs or W-2s and to interview the beneficiary, supervisors or other personnel to confirm the details of the beneficiary's position as stated in the immigration petition. Red flags for inspectors include: discrepancies in salary on the paystubs and in the petition, disparity between the beneficiary's reported income on Form 1040 and the beneficiary's salary on the petition, "self-employed" status reported by the beneficiary, address of the work location on the petition is not the beneficiary's actual work site, the work site is a virtual or empty office or an absence of any work email or phone number for the beneficiary. In case of a discrepancy between pay stubs and salary listed on the petition, the Employer should be prepared with an explanation.

During the visit, employers should immediately provide any readily available documents and information that the site inspector requests, however, if a request goes beyond the scope of the petition or would require research, the employer may request additional time to respond. If the Employer or beneficiary is unsure of an answer, it is best to offer to follow-up with the inspector instead of providing a guess. Employers should record the credentials of the inspector to ensure any follow-up conversation is directed to the correct agent. Follow-up responses should be provided quickly to ensure the inspector's Compliance Review Report timely completion.

Following the site visit, the inspector will document the site visit observations in a Compliance Review Report that becomes part of the Employer's record. At any time during the visit, the Employer or beneficiary may express unwillingness to participate and the visit will terminate. However, the Compliance Review Report will be based on the data available and will indicate that the visit was terminated. In that case, FDNS may follow-up with the Employer and beneficiary.

Now is the time to make sure your records are in order and your work site is ready for an audit. If you have any questions about the site visit process, please contact one of our immigration professionals.

See the USCIS guidance on its Administrative Site Visit and Verification Program at: <https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program>.

USCIS Ombudsman's Report: Continued High RFE Rates in Employment-Based Petitions; Employment Authorization Document Adjudication Delays

For those noticing an increase in Requests for Evidence (RFEs) issued by USCIS in recent months, you are not alone. The USCIS Ombudsman's 2016 Report to Congress confirms continued high rates of Requests for Evidence (RFE) for H-1B (Specialty Occupation Workers), L-1 (Intracompany Transferee Managers and Executives, and Specialized Knowledge Workers), P-1 (Internationally Recognized Athletes), and O-1 (Individuals with Extraordinary Ability or Achievement) petitions.

FY 2015 RFE rate for H-1B petitions at the California Service Center (CSC) declined ten percent from FY 2014, and is now aligned with the Vermont Service Center (VSC) rate, which also decreased slightly in FY 2015, to 23 percent. The impact of the precedent decision *Simeio*, 26 I&N Dec. 542 (AAO 2015) (holding that petitioners must file an amended or new H-1B petition with the corresponding labor condition application (LCA) if an employee moves to a new work location that is outside the area of employment covered by the previous

LCA) has not yet become apparent, as the agency's guidance on *Simeio* was not issued until late in FY 2015. However, the report notes stakeholders receive RFEs requesting information unrelated to the reason for filing the amendment.

In FY 2015, the CSC's L-1A RFE rates rose to 55 percent, its highest level in 20 years. At the VSC, the rate of L-1A RFE rates dropped from a high of 44.6 percent in FY 2014, to 29 percent in FY 2015. The L-1B RFE rates dropped in FY 2015 at both service centers, to 44 percent at the CSC and 33 percent at the VSC.

The Ombudsman was unclear why L-1A RFE rates differ so considerably between USCIS service centers. It noted that the L-1B rates in FY 2015 were not affected by the USCIS guidance, as the guidance did not become final until August 17, 2015.

The report also expressed concern about a high rate of RFEs of 49 percent at the VSC for O-1 and 65 percent for P-1 petitions, the lengthening processing times for O-1 petitions and the burden on petitioners due to USCIS's requests for consultations from incorrect industry peer groups.

EAD adjudication processing times beyond 90 days continue despite the steps USCIS has taken to address delays. By current regulation, USCIS must adjudicate most EADs within 90 days of receipt, however, data from FY 2015 shows that 22 percent of EAD adjudications take longer than 90 days resulting in adverse consequences for both employers and foreign nationals.