



## Immigration Insider

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### News from the Alliance of Business Immigration Lawyers Vol. 5, No. 11A · November 1, 2009

#### Headlines:

- **1. Congress Extends Four Immigration Programs for Three Years** - The non-minister religious worker, "Conrad 30," EB-5 immigrant investor pilot, and E-Verify programs are extended for three years, until September 30, 2012.
- **2. USCIS Ombudsman Recommends Temporary Acceptance of Filed LCAs for Certain H-1B Filings** - The USCIS ombudsman made several recommendations in light of LCA processing delays and errors at DOL, coupled with USCIS's current H-1B petition initial filing requirements.
- **3. USCIS, EOIR Issue Interim Final Rule Implementing Extension of U.S. Immigration Laws to Northern Marianas** - The interim final rule amends the regulations governing, among other things, classifications authorized for employment.
- **4. ABIL Global: New Indian Immigration Regime** - New stipulations will have a significant impact on foreign nationals wanting to visit India on short-term assignments.
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#### Details...

### 1. Congress Extends Four Immigration Programs for Three Years

On October 28, 2009, President Obama signed into law the fiscal year 2010 appropriations bill for the Department of Homeland Security.

The law (Pub. L. No. 111-83) extends four immigration programs: (1) the non-minister religious worker program (section 568 of the law), the "Conrad 30" program for certain foreign doctors (section 568), the EB-5 immigrant investor pilot program (section 548), and the E-Verify program for electronic verification of workers' eligibility (section 547). All four programs are extended for three years, until September 30, 2012.

The new law also includes statutory authority for U.S. Citizenship and Immigration Services to complete processing of permanent residence applications for surviving spouses and other relatives of immigration sponsors who die during the adjudication process (section 568).

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## **2. USCIS Ombudsman Recommends Temporary Acceptance of Filed LCAs for Certain H-1B Filings**

In August and September 2009, the ombudsman for U.S. Citizenship and Immigration Services (USCIS) received complaints concerning H-1B cases with incorrectly denied labor condition applications (LCA/ETA-9035) filed with the U.S. Department of Labor (DOL). The ombudsman said that LCA processing delays and errors at DOL, coupled with USCIS's current H-1B petition initial filing requirements, "are prejudicing employers and individuals who are unable to timely file original or extension H-1B visa petitions." Untimely H-1B petition filings lead to several problems, the ombudsman noted, including: (1) the potential loss of employees' legal status; (2) business operation disruptions due to the loss of continuity in the employment of key employees; and (3) economic loss to employees in the form of lost wages and costs of travel overseas due to loss of status.

Stakeholders have detailed to the ombudsman errors stemming from the new DOL LCA certification process, iCERT, launched on April 15, 2009. For example, the ombudsman noted, DOL is denying LCAs based on false FEIN (Federal Employer Identification Number) mismatches with DOL's database. The ombudsman said that cases involving LCA certification problems represent up to seven percent of total iCERT filings from April 15, 2009, through the beginning of August 2009 (approximately 2,900 denials out of approximately 41,700 LCAs submitted).

The ombudsman noted that despite DOL's jurisdictional ownership of H-1B-related LCA processing problems, these difficulties extend to USCIS through the agency's requirement that petition filings include certified LCAs. "Any costs to USCIS[,] such as issuing RFEs or temporarily lowering production levels, are outweighed by the burden that incorrect denials have on employers and individuals," the ombudsman said. "USCIS currently has the capacity to make what amounts to a minor processing modification to address a temporary situation."

To mitigate the impact of LCA processing difficulties, the ombudsman recommends that USCIS:

(1) reinstate the agency's previous practice of temporarily accepting an H-1B petition (Form I-129) supported by proof of timely filing of an LCA application with DOL, and issue a Request for Evidence (RFE) whereby the H-1B petitioner later provides the certified LCA; and

(2) establish a temporary policy under which the agency would excuse late H-1B filings where the petitioner has documented an LCA submission to DOL that was improperly rejected.

The report is available at

[http://www.dhs.gov/xlibrary/assets/cisomb\\_recommendation\\_43\\_LCAs\\_October\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_recommendation_43_LCAs_October_2009.pdf). USCIS officials have not responded yet to the ombudsman's recommendations.

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### **3. USCIS, EOIR Issue Interim Final Rule Implementing Extension of U.S. Immigration Laws to Northern Marianas**

U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review issued an interim final rule effective November 28, 2009, implementing the extension of U.S. immigration laws to the Commonwealth of the Northern Mariana Islands (CNMI) under the Consolidated Natural Resources Act of 2008 (CNRA). The rule amends the regulations governing, among other things, references to the geographical "United States" and its territories and possessions; classifications authorized for employment; acceptable documents for employment eligibility verification; employment of undocumented workers; and adjustment of status of immediate relatives admitted under the Guam-CNMI Visa Waiver Program. The stated purpose of the rule is "to ensure that the regulations apply to persons and entities arriving in or physically present in the CNMI to the extent authorized by the CNRA."

USCIS has established a transitional worker program for foreign nationals to live and work in CNMI. For more information, see [http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/cmni\\_qa\\_26oct09.pdf](http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/2009%20Press%20Releases/Oct%202009/cmni_qa_26oct09.pdf).

Written comments should be submitted by November 27, 2009, according to the instructions in the interim rule, which was published in the Federal Register on October 28, 2009, and is available at <http://edocket.access.gpo.gov/2009/pdf/E9-26094.pdf>.

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#### **4. ABIL Global: New Indian Immigration Regime**

Recently, the Indian Ministry of Commerce and Industry (MCI) announced that business visas cannot be granted to foreign nationals to work on projects or specific contracts in India. The formal announcement also requires all foreign nationals on such visas to leave India and return on employment visas. Initially they were required to leave before the end of September 30, 2009, but the Ministry of Home Affairs (MHA) extended the deadline to October 31, 2009. Individuals who are in India on business visas in connection with investments, joint ventures, or buying and selling industrial products can continue to remain in the country. Both government communications also state that in the future, business visas will only be issued for activities specified in their circulars. However, because the circulars were rather ambiguous, the Ministry of Home Affairs published a set of frequently asked questions on October 29, 2009. These provide some clarity but have not resolved all ambiguities.

These new stipulations will have a significant impact on foreign nationals wanting to visit India on short-term assignments. Per the announcement, these individuals will now require an employment visa as opposed to a short-term business visa. Further, the issuance of a business or employment visa will continue to depend upon the discretion of the consular officer. The change in the visa category would definitely have tax and social security ramifications for the foreign nationals and their employers during their stay in India. Additionally, these changes may also generate corporate tax ramifications in rare cases, depending on the nature of the individual's activities in India.

Companies seeking to assign foreign nationals to India on a short-term basis should assess their projects to identify and comply with visa requirements. Companies should also review these short-term projects for compliance with the tax (individual and corporate) structure in India. In the interim, companies seeking to assign foreign nationals should conform to the new regime. It is expected that the outcome of a business or employment visa, which will be based on evidence submitted at the time of application, will be subject to severe scrutiny to determine the caliber of the applicant and the nature of the job in India.

A longer version of this article is available at [http://www.abil.com/global\\_immigration\\_articles.cfm?country\\_id=17](http://www.abil.com/global_immigration_articles.cfm?country_id=17).

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## **New Publications and Items of Interest**

Temporary worker visas. Immigration Works USA has issued a policy brief, "Reduced Access: New Regulations Aimed at Temporary Worker Visas." The report notes that this has been a difficult year for businesses that rely on foreign workers. Both Congress and the new administration imposed restrictions on several widely used visa categories. The Department of Homeland Security made employers the target of a new immigration enforcement strategy likely to result in dramatically increased criminal prosecutions. As the downturn drags on, the report notes, the public is increasingly skeptical that employers need immigrant workers, and additional threats loom on the horizon: legislation pending in the Senate could reduce employers' access to highly skilled workers, and lawmakers in the House of Representatives are working on a bill that could do the same for seasonal workers. The report looks at new developments for H-2A agricultural workers, H-2B seasonal workers, worksite enforcement and I-9 audits, and H-1B and L-1 professionals. An appendix includes a memo on worksite enforcement from U.S. Immigration and Customs Enforcement. The report is available at

[http://www.immigrationworksusa.org/uploaded/file/IW\\_visas\\_policy\\_brief.pdf](http://www.immigrationworksusa.org/uploaded/file/IW_visas_policy_brief.pdf)

USCIS H-1B compliance site visit instructions. This document is intended to assist U.S. Citizenship and Immigration Service site inspectors when conducting a site audit of a business for H-1B compliance. See

<http://www.aila.org/content/fileviewer.aspx?docid=30298&linkid=210517>.

Immigration in the labor market. The Migration Policy Institute (MPI) recently launched its Labor Markets Initiative, a comprehensive, policy-focused review of the role of immigration in the labor market. The initiative will produce detailed policy recommendations on how the United States should rethink its immigration policy in light of what is known about the economic impact of immigration, bearing in mind growing income inequality, concerns about the effect of globalization on U.S. competitiveness, the competition for highly skilled migrants, and demographic and technological change. The initiative is guided by a group of leading experts in labor economics, welfare policy, and immigration. See

<http://www.migrationpolicy.org/lmi/>.

Various reports. New reports from MPI:

"Immigrants and Health Care Reform: What's Really At Stake?"

(<http://www.migrationpolicy.org/pubs/healthcare-Oct09.pdf>)

"Aligning Temporary Immigration Visas With U.S. Labor Market Needs: The Case for Provisional Visas"

([http://www.migrationpolicy.org/pubs/Provisional\\_visas.pdf](http://www.migrationpolicy.org/pubs/Provisional_visas.pdf))

"The Next Generation of E-Verify: Getting Employment Verification Right"

([http://www.migrationpolicy.org/pubs/Verification\\_paper-071709.pdf](http://www.migrationpolicy.org/pubs/Verification_paper-071709.pdf))

"Harnessing the Advantages of Immigration for a 21st Century Economy"

([http://www.migrationpolicy.org/pubs/StandingCommission\\_May09.pdf](http://www.migrationpolicy.org/pubs/StandingCommission_May09.pdf))

"Uneven Progress: The Employment Pathways of Skilled Immigrants in the United States" (<http://www.migrationpolicy.org/pubs/BrainWasteOct08.pdf>)

"Managing Temporary Migration: Lessons From the Philippine Model"

([http://www.migrationinformation.org/datahub/statelaws\\_home.cfm](http://www.migrationinformation.org/datahub/statelaws_home.cfm))

"New Data Guide on Finding, Using the Most Accurate, Recent Immigration Data Resources" (<http://www.migrationpolicy.org/pubs/2008DataGuide.pdf>)

"State Responses to Immigration: A Database of All State Legislation"

([http://www.migrationinformation.org/datahub/statelaws\\_home.cfm](http://www.migrationinformation.org/datahub/statelaws_home.cfm))

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## **Recent News from ABIL Members**

Charles Kuck (bio: <http://www.abil.com/lawyers/lawyers-kuck.cfm>) argues in his recent blog posting, "BALCA - Your PERM Case Is Denied!," that "PERM is a blight on our immigration system. It does not protect American workers in any serious way, it asks employers to jump through more hoops than a show dog, and puts lawyers in the unenviable positions of advising employers on how to navigate a set of non-real world regulations, FAQs, and liaison minutes (when we can actually get answers), using a poorly developed computer filing program so complex that Einstein would have to invent a new Theory of PERM Relativity to explain it to a layman!" See more on this and other topics at <http://www.immigration.net/blog/>. Mr. Kuck also recently blogged on employment-based immigrant visa delays. See <http://ailleadership.blogspot.com/2009/10/get-in-line-what-line-tragic-tale-of.html>.

Sharon Mehlman (bio: <http://www.abil.com/lawyers/lawyers-mehlman.cfm>) spoke on a panel at the Practising Law Institute's conference in New York on October 13, 2009. The panel topic was a USCIS update.

Julie Pearl (bio: <http://www.abil.com/lawyers/lawyers-pearl.cfm>) was quoted in the October 29, 2009, edition of the *Wall Street Journal*. She noted that at

least a third of her clients have cut down on their hiring of H-1B workers as compared to a year ago. "Most companies just aren't hiring as many people in general," Ms. Pearl said.

Cyrus Mehta (bio: <http://www.abil.com/lawyers/lawyers-mehta.cfm>) spoke on Ethics in Immigration Practice at the Practising Law Institute's 2009 PLI Immigration Program in New York City on October 14, 2009. Mr. Mehta also was a discussion leader at the American Immigration Lawyers Association's "Interactive Workshop on Advanced Business Issues," held at AILA's 2009 Fall Conference in Pittsburg, Pennsylvania, on October 2, 2009.

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### **Government Agency Links**

*Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:*

USCIS Service Center processing times online:

<https://egov.uscis.gov/cris/processTimesDisplay.do>

Department of Labor processing times and information on backlogs:

<http://www.foreignlaborcert.doleta.gov/times.cfm>

Department of State Visa Bulletin:

[http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

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*The Alliance of Business Immigration Lawyers (ABIL) is an entity that offers a single point of contact for customer needs, news alerts, staff training and other programs that benefit the client through the collaboration of the 140 member attorneys and their 460 staff. Corporate counsel, human resource professionals, in-house immigration managers and other corporate decision-makers turn to ABIL attorneys for outstanding legal skills and services. ABIL's work also includes advocating for enlightened immigration reform, providing speakers and media sources, presenting conferences, publishing books and articles on cutting-edge immigration topics, and sharing best practices, all with the ultimate goal of offering value-added services to business immigration clients.*

*The Alliance of Business Immigration Lawyers' Web site is:*

<http://www.abil.com/>.

**Disclaimer/Reminder**

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