

# Immigration *Insights*

Here are the hot topics that our clients and friends will want to know about. Additional U.S. immigration-related information is available at <http://immigration.dinslaw.com/>

## USCIS Deadline for Issuing FY09 H-1B Cap Case Receipts is June 2

By Susan A. Smith

Although receipt notices continue to trickle in for the H-1B petitions chosen in the random-selection lottery conducted by U.S. Citizenship and Immigration Services (CIS), CIS' self-imposed deadline for issuing receipt notices - June 2, 2008 - has just about arrived. Petitioners should receive receipt notices dated no later than June 2<sup>nd</sup>. If a receipt notice is not issued for an employer's H-1B petition, one of two things will occur: (1) CIS will wait-list the petition; or (2) CIS will return the petition accompanied by a rejection notice and the filing fees. CIS has also wait-listed a small number of petitions that will take the place of petitions that are denied, withdrawn or otherwise found ineligible. CIS will notify wait-listed petitioners of the petition's status.

## E-Verify Improvements?

By Susan A. Smith

In an effort to improve the reliability of the E-Verify program, U.S. Citizenship and Immigration Services (CIS) has implemented the first two phases of an overall three-part enhancement that is focused on decreasing the number of authorized U.S. workers who are not initially recognized by the E-Verify system. Some U.S. employees are concerned that E-Verify's significant error rate may cause them to unnecessarily refuse to hire or terminate authorized workers, creating a business disruption and exposure to discrimination claims.

The enhancements to E-Verify include the introduction of naturalization data and real time arrival data from the government's Integrated Border Inspection System (IBIS). Naturalized citizens who have not yet updated their records with the Social Security Administration (SSA) are the largest group that initially faces a SSA tentative "non-confirmation." By including the naturalization data, CIS hopes to reduce the incidence of non-confirmations. Preliminary unofficial reports indicate that the addition of naturalization data is working in many cases.



In addition to the inclusion of naturalization data, the enhancements also include real time IBIS records, that CIS hopes will reduce mismatches for those authorized workers who have recently entered the country legally. The results of this enhancement have not been indicated. CIS also plans to begin sharing timely citizenship status records with the SSA to further prevent tentative non-confirmations.

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Led by two Partners who have long been recognized in the field of immigration law by *The Best Lawyers in America* publication, the Dinsmore & Shohl LLP Immigration Group focuses its practice in the area of business immigration law.

The Immigration Group represents a wide range of publicly-traded companies, multi-national corporations, privately-held businesses, universities, research institutions, arts, entertainment and professional sports organizations, professors, and professionals with respect to both work visa and permanent resident (green card) cases.

In addition, the members of the Immigration Group have significant experience in many other areas that companies and other institutions may need help with in regard to the U.S. immigration system, including but not limited to visa applications at United States Consulates, labor certification proceedings before the U.S. Department of Labor, I-9 (Employment Eligibility Verification) compliance, immigration policy formulation, naturalization, family immigration law, and NAFTA immigration issues.

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## Do I Need an Original I-797 Approval Notice to Apply for a Nonimmigrant Visa at a U.S. Consulate Abroad?

By Susan A. Smith

In the past, U.S. embassies and consulates required the original I-797 CIS Approval Notice as definitive proof of the petition's approval. In late 2007 the Department of State (DOS) implemented an electronic system referred to as PIMS (Petition Information Management Service) which requires U.S. consular officers to verify the integrity of the nonimmigrant petition approval through the PIMS system. According to a DOS November 7, 2007 cable, the "electronic PIMS record...is the primary evidence to be used in determining petition approval." Therefore, the U.S. consular officers no longer require the presentation of an original Form I-797 Approval Notice to establish petition approval. The DOS website at [http://travel.state.gov/visa/temp/types/types\\_1271.html#1](http://travel.state.gov/visa/temp/types/types_1271.html#1) (click on "Other Documentation") confirms that the "Form I-797 is no longer used to verify petition approval, and is no longer necessary for a nonimmigrant visa interview."

However, many of the U.S. consulates and embassies have not updated their websites to reflect this change, nor have they notified the contractors who answer visa application inquiries and schedule visa appointments and visa interviews. Because of this, applying for a nonimmigrant visa without an original I-797 Approval Notice may be worrisome to some visa applicants. We have received no reports of visa refusal for lack of an original I-797 Approval Notice, but visa applicants who have doubts may wish to carry the original approval notice to their consular visa appointments until all U.S. consulates update their stated requirements.

## Expedited Screening and Processing of Low-risk, Frequent International Travelers

By Susan A. Smith

U.S. Customs and Border Protection (CBP) will kick off its Global Entry Pilot program on June 6 at J.F.K. International Airport (New York), George Bush Intercontinental Airport (Houston), and Washington Dulles Airport. The Global Entry Pilot program is designed to expedite the screening and processing of low-risk, frequent international travelers entering the United States. Global Entry travelers will bypass the passport control line and be directed to the Global Entry kiosk where they will scan their passport or U.S. permanent resident card, provide biometric data (fingerprints and photo) and answer a few questions electronically. Once the process is complete, the kiosk will provide a transaction receipt, which the traveler

will present to a CBP officer when leaving the inspection area.

## DOS Regulation on Form DS-160 Electronic Nonimmigrant Visa Applications

By Susan A. Smith

The Department of State (DOS) has changed its regulations to enable the submission of fully electronic nonimmigrant visa applications – DOS Form DS-160. The DS-160 visa application program currently operates on a pilot basis at two U.S. consulates in Mexico: Nuevo Laredo; and Monterrey. Unlike the current DS-156 (Nonimmigrant Visa Application) which applicants complete on-line on a DOS's website, print, and then present in hardcopy form to the U.S. consulate, the DS-160 captures all data in a U.S. government database via the Internet. The information submitted for the DS-160 application, combined with a biometrics appointment and a personal interview at a U.S. consulate, will determine an applicant's eligibility for a nonimmigrant visa. The U.S. government has not announced when it will roll out the DS-160 program at other U.S. consulates, but visa applicants should be aware that the electronic DS-160 may be coming soon to a U.S. consulate near by.

If you are planning to apply for a visa at the U.S. consulates in Nuevo Laredo or Monterrey, Mexico, you can access the electronic DS-160 form at [Nonimmigrant Visa - Instructions Page](#). The form can be completed electronically by the applicant, by his or her attorney, or by another third party, but the applicant must actually click the "submit" button to formally file the DS-160.

## H-1B "Cap Gap" Employment: I-9 Re-Verification and F-1 Student Concerns

By Susan A. Smith

The Department of Homeland Security (DHS) recently changed its regulations to authorize an automatic extension of employment authorization for F-1 students whose employment authorization document (based upon Optional Practical Training (OPT)) expires prior to October 1, 2008. For an F-1 student with OPT to qualify, the H-1B petition filed on the student's behalf must have requested a change of status. This "automatic extension" effectively bridges the "cap gap" between the expiration of the student's OPT employment authorization document and October 1, 2008 – the first day that a FY09 H-1B petition may be effective.

Because the regulation provides for *automatic* extension of employment authorization, the question then becomes how to

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conduct Form I-9 re-verification upon expiration of the original employment authorization (EAD) period. The Department of Homeland Security (DHS) has recently offered some guidance in the form of a Q&A. According to DHS, the Designated School Official (DSO) for the F-1 student will issue a "cap gap" Form I-20,<sup>1</sup> which will show on page 3 of the I-20 that the student's employment authorization has been extended and the effective dates for such extension. This "cap gap" I-20 will contain the following endorsement: "F-1 status and employment authorization for this student have been automatically extended to [applicable date]. The student is authorized to remain in the United States and continue employment with an expired employment authorization document...."

The employer should request the following documents for I-9 verification purposes: (1) the "cap gap" I-20 with the appropriate endorsement; (2) the expired Form I-766 EAD card; and (3) the CIS Form I-797 Receipt Notice for the H-1B petition filing. According to DHS this combination of documents "satisfies the Form I-9 document presentation requirements until September 30, or on the date of rejection, denial, or revocation of the petition." If CIS has not issued an H-1B petition receipt notice, the cap gap Form I-20 and the expired EAD card alone satisfy I-9 requirements until the expiration date on the Form I-20. The employer must re-verify upon reaching the I-20 expiration date.

In addition to employers' I-9 obligations, F-1 students have some concerns regarding the *automatic* extension and the effect of the extension on their status. DHS' SEVP (Student and Exchange Visitor Program) issued recent policy guidance that addresses many of these concerns. We summarize some of the important points from the SEVP guidance:

- (1) If the H-1B petitioner receives a receipt notice, the student's OPT authorization is extended until September 30, 2008. The student should request that the DSO issue a cap gap I-20.
- (2) If the H-1B petition is wait-listed, OPT authorization is extended until July 28, 2008 (allowing CIS eight weeks for receipting or return of wait-listed petitions) and F-1 status is extended until September 27, 2008. The student must send a request for the extension to his or her DSO with proof of wait-listing. The DSO will request a "data fix" from the SEVIS help desk.

- (3) If the H-1B petition is withdrawn or denied, OPT authorization ends 10 days after the petition's withdrawal or denial, and F-1 status ends 60 days after the withdrawal or denial.
- (4) Although the cap gap extension is automatic, the SEVIS database might not automatically be updated to show the extension. Students are responsible for checking with their DSOs to ensure that their record in the SEVIS database has been updated. If the student's SEVIS record has not been properly updated the student should ask the DSO to "perform a data fix."
- (5) For students whose post-completion OPT expired *before* the filing of the H-1B petition on his or her behalf, the cap gap extension starts at the end of the student's F-1 grace period and extends until September 30, 2008. This extension provides an extension of the F-1 grace period but *does not provide work authorization*.

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<sup>1</sup> The student may need to provide the DSO with evidence of a timely filed H-1B petition because the DSO would not typically have access to this information or document.

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## State E-Verify Legislation: A Summary

By Lindsay L. Chichester

Although there is no federal mandate in effect at this time that employers participate in the government's E-Verify program (an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees), a growing number of states require some or all employers to utilize E-Verify. Below, we outline the effective dates and impacts on state E-Verify legislation.

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The following states have passed E-Verify legislation:

State	Effective Date	Which Employers are Impacted
Arizona	January 1, 2008 (as amended on May 1, 2008)	Requires all Arizona employers to participate in E-Verify
Colorado	August 9, 2006	Requires all state contractors to participate in E-Verify
Georgia	July 1, 2007	Requires all public employers and contractors and subcontractors with state and local public employers to participate in E-Verify
Illinois	January 1, 2008	Bans employers from using E-Verify until the SSA and DHS can provide a three-day response in 99% of cases that receive a tentative non-confirmation for employers utilizing the E-Verify system. The law is not in effect at this time because DHS has filed a lawsuit against the state and this litigation is still pending.
Minnesota	January 29, 2008 (by Executive Order)	Requires the state's executive branch and all state contractors to participate in E-Verify
Mississippi	July 1, 2008 and later	Requires participation in E-Verify for all employers in the state, but participation will be phased in based on the size of the employer, as follows: <ul style="list-style-type: none"> <li>• Employers with 250 or more employees must begin participation in E-Verify by July 1, 2008.</li> <li>• Employers with 100 to 249 employees must begin participation in E-Verify by July 1, 2009.</li> <li>• Employers with 30 to 99 employees must begin participation in E-Verify by July 1, 2010.</li> <li>• Employers with 1 to 29 employees must begin participation in E-Verify by July 1, 2011.</li> </ul>
North Carolina	January 1, 2007	Requires all state offices and agencies (including universities) to participate in E-Verify
Oklahoma	November 1, 2007	Requires state and local agencies and contractors with those public agencies to participate in E-Verify
Tennessee	January 1, 2008	Does not require employers to participate in E-Verify, but provides a unique incentive that the current federal regulations do not offer. Employers who verify new hires using E-Verify within 14 days of the commencement of employment are protected from sanctions for hiring unauthorized workers.
Utah	July 1, 2009	Requires public entities to participate in E-Verify or a similar employment verification system and forbids those public entities from entering into contracts with contractors who do not participate in E-Verify or a similar employment verification system.

As more and more states have introduced bills regarding E-Verify, and the debate surrounding the benefits and concerns about E-Verify continues to swirl, this list is sure to grow. Employers should check which states they do business in and take any necessary steps.