

## September 2008 Immigration Updates

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### Upcoming Changes to the Visa Waiver Program

#### Preregistration Expected to Become Mandatory by January 12, 2009

A major change is taking place with the Visa Waiver Program (VWP). It is expected that by January 12, 2009 everyone using the VWP must have received electronic travel authorization from Customs and Border Protection (CBP).

Indeed, on August 1, 2008, Customs and Border Protection began accepting online applications for the Electronic System for Travel Authorization (ESTA), an automated system that will assist in determining eligibility to travel to the United States under the existing VWP, as well as determining whether such travel poses any law enforcement or security risk. Upon completion of an ESTA application, a VWP traveler will be notified of his or her eligibility to travel to the United States under the VWP. The Department of Homeland Security plans to publish the final rule in the Federal Register in November 2008, with the intention of making the travel authorization mandatory for all VWP travelers intending to enter the United States on or after January 12, 2009. It is recommended that travelers submit their ESTA applications as early as possible and no later than 72 hours prior to the expected travel.

The ESTA program asks applicants to register online in order to provide biographical data and assess Visa Waiver Program eligibility. The information sought is the same as that currently requested on the Form I-94W Arrival/Departure Record an applicant fills out when seeking admission to the United States under the VWP. This data will be evaluated by CBP to determine the eligibility of citizens and eligible nationals of VWP countries to travel to the United States and whether such travel poses a law-enforcement or security risk. This determination will be made by CBP before such persons travel to the U.S. A travel determination made under ESTA will remain, with certain exceptions, valid for two years and may be used for multiple applications for admission.

Please note, ESTA is *not* a new visa category. The ESTA program is a "pre-clearance" program covering those travelers seeking to enter the United States using the Visa Waiver Program *only*. Travelers holding valid travel visas of all types will not be required to register through ESTA. However, once the program becomes mandatory, those travelers who are simply transiting through the United States will be required to register with ESTA, a significant departure from previous U.S. transit practices. If a traveler is only planning to transit through the United States en route to another country, when he or she completes the ESTA application, the traveler will simply need to enter the words "In Transit" and his or her final destination location in the address lines under the heading "Address While In The United States."

The CBP's "Frequently Asked Questions about ESTA" can be found [here](#). We will provide updates as further details become available and when the final rule is released.

#### Applicants for Reentry Permits Must Now Do Biometrics

A Reentry Permit is a special travel document that may be obtained by a Lawful Permanent Resident (LPR) of the United States who intends to remain outside of the U.S. for longer than one year and wishes to take steps to preserve his or her permanent residence status while abroad.

The federal regulations require an LPR to be physically present in the U.S. on the day the Reentry Permit application is filed, but allow the applicant to then leave the U.S. and wait abroad for the Reentry Permit to issue. Until now, filing a Reentry Permit application has been a one-step process. But now U.S. Citizenship and Immigration Services (USCIS) is requiring all applicants who file Reentry Permit applications to appear at a USCIS office for a biometrics appointment. This appointment may take several weeks to obtain, and thus Reentry Permit applicants must now either wait inside the U.S. to get the appointment, or leave and then return to the U.S. for the biometrics appointment. There currently is no means to comply with the biometrics requirement at U.S. Consulates abroad.

#### Department of Labor Comments on the Role of Attorneys in the PERM Process

On August 29, 2008, The U.S. Department of Labor (DOL) issued a comment and clarification on the role that attorneys may play when assisting employers in the Program Electronic Review Management (PERM) Labor Certification process, which is the first phase in most cases where an employer chooses to sponsor a foreign national for permanent residency in the United States. DOL reaffirmed the longstanding policy, which Mintz Levin has always upheld, that employers may consult with their attorneys to confirm that they are complying with the legal requirements of PERM, but it must be the employer and not the attorney who reviews all applications for the job offered as part of the PERM recruitment efforts, and it must be the employer who makes the final determination as to whether the applicant is or is not qualified for the job offered.

#### Transition Formalized from Two-Finger Scanning to Ten-Finger Scanning

On August 20, 2008, the Department of State updated the Federal Register with a final rule codifying the general requirement that all nonimmigrant visa applicants, with few exceptions, are now required to submit fingerprint scans of all ten fingers for purposes of verifying and confirming identity, conducting background checks, and ensuring that an applicant has not received a visa or entered into the United States under a different name. In practice this has already been occurring, but this recent announcement formalizes the practice.

In addition, as part of the Department of Homeland Security's US-VISIT program, ten-finger scanners are being deployed to all ports of entry to replace the current machines that scan only two fingers of each traveler entering the United States.

#### I-9 Form and Instructions Update

##### New Passport Card

In August 2008, USCIS announced that the new U.S. Passport card was in full production. The passport card is a less expensive alternative to a traditional passport book and is valid at land and sea (but not air) ports of entry for U.S. Citizens traveling to Canada, Mexico, the Caribbean, and Bermuda. This new U.S. Passport card is considered a valid "List A" document for I-9 purposes.

##### Ensure Use of Proper Version of Form I-9

Employers must ensure they are not using outdated I-9 forms. The most recent I-9 form indicates at the bottom of the form that it was revised on June 5, 2007 and it has an expiration date of June 30, 2009 at the top of the form. No prior versions should be used. You may access the most updated instructions and Form I-9 [here](#). Please note that while USCIS updated the I-9 form on June 26, 2008, the update consisted primarily of changes to the form's instructions. Changes to the I-9 instructions include the following:

That the employee is not obliged to provide his or her Social Security number in Section 1 of the Form I-9, unless he or she is employed by an employer who participates in E-Verify.

That employers may sign and retain Form I-9 electronically—this rule is now formalized.

That the Spanish version of Form I-9 may be filled out by employers and employees in Puerto Rico only. Spanish-speaking employers and employees in the 50 states and other U.S. territories may print the Spanish language version of the I-9 for their reference, but may only complete the form in English to meet employment eligibility verification requirements.

### USCIS Begins Issuing Employment Authorization Documents (EAD) with Two-Year Validity in Limited Cases

USCIS began in June 2008 to issue EADs valid for two years in very limited circumstances. Specifically, the new two-year EAD is only available to individuals who have filed Form I-485, "Application to Register Permanent Residence or Adjust Status," and filed for employment authorization under Section 274.a.12(c)(9) of Title 8, Code of Federal Regulations (8 C.F.R.) and are unable to become a lawful permanent resident because an immigrant visa number is not currently available. In practice, USCIS will decide whether to renew an EAD for either a one- or two-year validity period based on the most recent Department of State Visa Bulletin. Applicants who have an available immigrant visa number will continue to be issued EADs that are valid for one-year. USCIS may issue a two-year renewal EAD if the applicant's immigrant visa availability date retrogresses (when actual demand for visa numbers exceeds forecasted supply) after the Form I-485 is filed.

If an individual requests to replace an EAD that has not expired, USCIS will issue a replacement EAD that is valid through the same date as the previously issued EAD. However, if the previous EAD has expired, USCIS will process the request for a renewal EAD and determine the appropriate validity period based on the applicant's priority date and the Department of State Visa Bulletin.

### Laptops and Other Electronic Devices Can Be Seized and Searched by Border Agents

The U.S. Court of Appeals for the Ninth Circuit has held that U.S. border officials do not need "reasonable suspicion" to search information electronically stored on electronic devices carried by international travelers entering the United States. The U.S. Department of Homeland Security insists that searches and seizures of electronic devices at the border are justified by security concerns and in order to stem the flow of child pornography into the United States. The Court of Appeals in its decision determined that searches of international passengers at American airports and ports of entry are considered border searches, and thus are exempt from the application of "reasonable suspicion" and the attendant considerations regarding properly obtained search warrants. Civil libertarians, business leaders, and legal scholars have suggested that these searches constitute a violation of the Fourth Amendment protection against unreasonable searches and seizures. International travelers should be aware that their electronic devices could be confiscated and searched upon entry to the United States, which of course could delay the entry process.

### News Regarding Vaccinations for Permanent Residency Applicants and Those Applicants for Admission to the United States Who have HIV

On July 24, 2008, USCIS issued guidance that additional vaccinations would be required of certain age-group applicants for permanent residency in the United States, including: Rotavirus, Hepatitis A, Meningococcal, Human Papillomavirus, and Zostar. A new form I-693, "Report of Medical Examination and Vaccination Record," issued in June 2008 includes these requirements.

Pursuant to a new law created on July 30, 2008, the Department of Health and Human Services (HHS) is no longer required to designate HIV infection as a "communicable disease of public health significance," which means that HIV may no longer be a bar to admission into the U.S. As of now, HHS has not acted to remove HIV from its list of communicable diseases of public health significance. We will keep you informed.

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*If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or visit [www.mintz.com](http://www.mintz.com).*

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