POARCH THOMPSON LAW

IMMIGRATION & ADOPTION

Beyond the Border:
Barriers to Lawful Immigration

SHRM Roanoke
February 25, 2019

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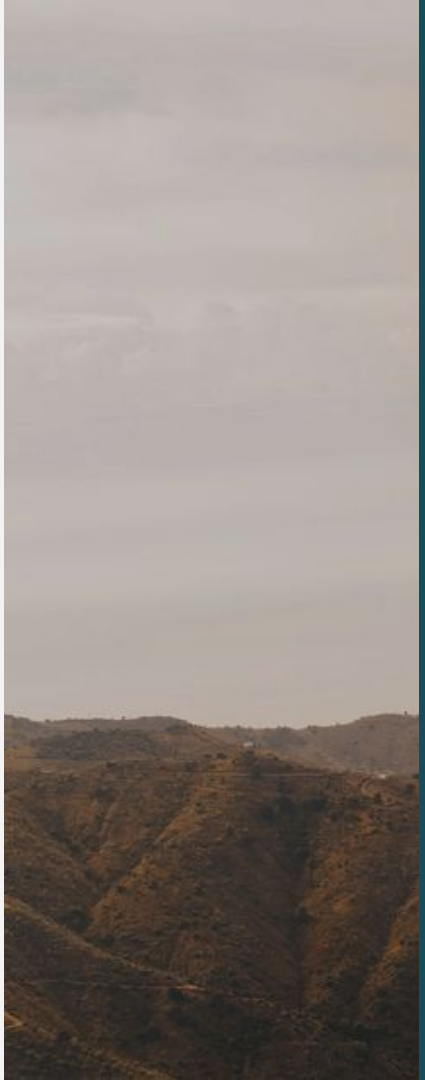
Section One:

Social Security No Match Letters



What are employers receiving?

Employers are receiving “no-match” letters from the Social Security Administration indicating when an employee’s social security number doesn’t match the agency’s records.

History of No-Match Letters

- Old practice: started in 1973 (DECOR letters); 1993-2005 (EDCOR letters)
- Under Bush Administration, no-match could constitute “constructive knowledge”
- Litigation ensued over final rule / regulation; suspended in 2006
- Obama administration rescinded rule entirely
- Resumed under Trump administration (announced in 2018)
- March 2019: 570,000 no-match letters sent to employers (electronic W2s)
- October 2019: issued no-match letters for second group (paper W2s)
- Prior policy: required more than 10 no-match employees to get a letter
- Current policy: even 1 no-match employee will result in no match letter

Advisal from the U.S. Department of Justice, Civil Rights Division, Office of the Special Counsel of Immigration-Related Employment Discrimination (OSC) issued the ONLY guidance provided to address "no-matches" from the U.S. Government.

See https://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/Employers.pdf

What do employers need to know?

- Matching matters: proper credit to employee record
- Matching matters: to avoid fines
  - Employers required by law to provide accurate W2 information.
  - Incorrect W2, then disregarding no-match letter = possible IRS fine.
  - ICE Audit of I-9 Compliance: ICE will ask for no-match in determining employer's knowledge.

What do employers need to know?

- Other side of liability / risk is discrimination:
  - DO NOT assume no-match = no immigration status or work authority.
  - DO treat all employees the same without regard to citizenship / immigration status
  - DO NOT terminate / change work assignment / assign unpaid leave / other adverse or punitive action solely on basis of no-match.
  - DO NOT re-verify the employee's employment eligibility by having them complete a new Form I-9 solely based on no-match.
  - DO NOT require the employee to produce specific documents (from I-9 list) to address the no-match (shouldn't do that EVER).
  - DO NOT require the employee to provide a written report of SSA verification (cannot always be obtained).

What should an employer DO after receiving no-match?

(Part One)

- Follow the same procedures for all employees regardless of citizenship status or national origin.
- Check the reported no-match information against personnel record.
- If typographical error, correct it through the SSA's Business Services Online (BSO) portal.
- Keep no-match letter separate from employee file (with I-9s, which should be kept separate from employee's normal personnel file).
- Inform the employee of the no-match notice in writing and ask the employee to confirm his/her name/SSN reflected in your personnel records.
- If employer records incorrect, then update BSO portal.
- If employer records correct, notify employee in writing that they need to resolve the issue by contacting the SSA to correct and/or update records.

What should an employer DO after receiving no-match?

(Part Two)

- Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
- Calendar periodic check-ins regarding employee's efforts to address and resolve the no-match.
- Review any document the employee chooses (from I-9 list or not) to offer showing resolution of the no-match.
- Amend I-9 if necessary to correct information. Attach copy of SSA no-match.
- Submit any employer or employee corrections to the SSA (if not already done).

- **If during the course of following up, there are indications of fraud or the employee appears to indicate he or she may not be authorized to work in the U.S., employers should contact legal counsel for additional guidance**.

What about no-match and ICE Enforcement?

SSA clearly specified that the no-match letters are educational only. The letters are intended to alert employers of a no-match and to provide instruction on how to improve accuracy of wage reporting.

- To share information with ICE requires Memorandum of Understanding (MOU) between SSA and Immigration & Customs Enforcement (ICE)
- Information included on the W-2, including the no-match letter data, is Federal Tax Information under IRS Code 6103 & SSA is prohibited from sharing this information with other agencies. See *Judicial Watch v. SSA,* 701 F.3d 379 (D.C. Cir. 2012)(information subject to confidentiality under tax laws).
- **Exception:** the Department of Homeland Security (DHS) can request information from the SSA for the purposes of identifying and locating aliens in the United States, and enforcing laws. See 5 U.S.C. § 552a(b)(7)
- No-match information is not being shared at this time intra-agency (DHS / SSA) to generate enfrocement leads or develop I-9 audit targets.

What can Employers expect in 2020?

- Expect ICE to remain interested in how employers respond to no-match letters and whether there may be other indicators of knowing-hire violations.
- Possible collaboration between ICE and SSA.
- Absolutely have process in place to receive 2020 SSA no-match letters.

What if employee brings back new identity documents / new name / new social?

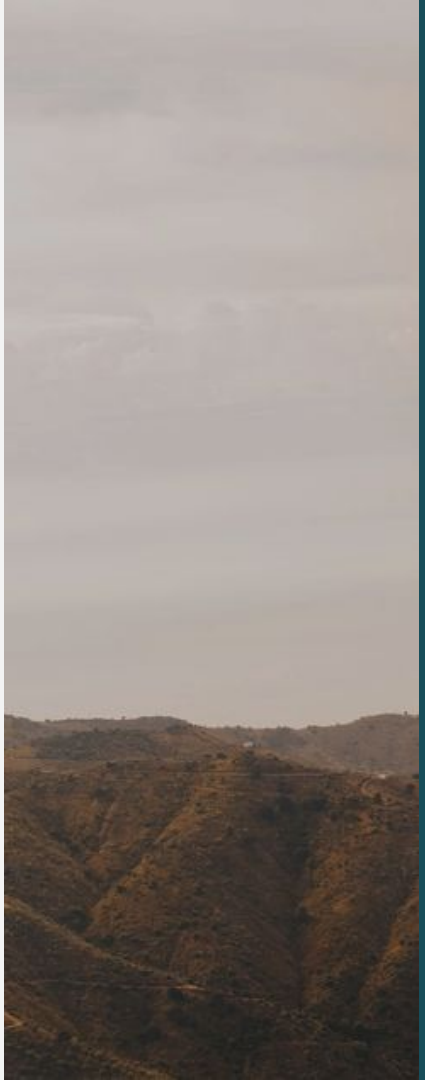
- Follow M-274 for new name amendment of I-9: "You may encounter situations other than a legal change of name where an employee informs you (or you have reason to believe) that their identity is different from that previously used to complete the Form I-9. For example, an employee may have been working under a false identity, has subsequently obtained work authorization in their true identity, and wishes to regularize their employment records. In that case you should complete a new Form I-9. Write the original hire date in Section 2 and attach the new Form I-9 to the previously completed Form I-9 and include a written explanation. In cases where an employee has worked for you using a false identity but is currently authorized to work, the Form I-9 rules do not require termination of employment."
- Honesty policy / consistent treatment of dishonesty.

What is a reasonable period of time to allow worker to fix SSA record?

- No federal statutes or regulations that define a “reasonable period of time” re: resolution of a no-match.
- A “reasonable period of time” depends on the totality of the circumstances.
- In the E-Verify context SSA will put tentative non-confirmation into continuance for up to 120 days (implying that 120 days is reasonable).

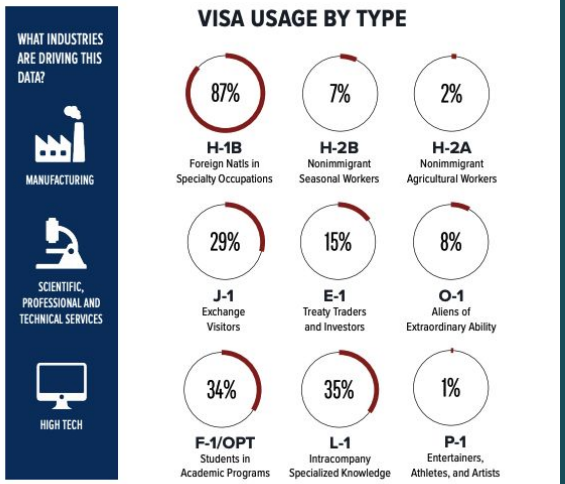
Section Two:

Visa Changes



USCIS fees are changing:

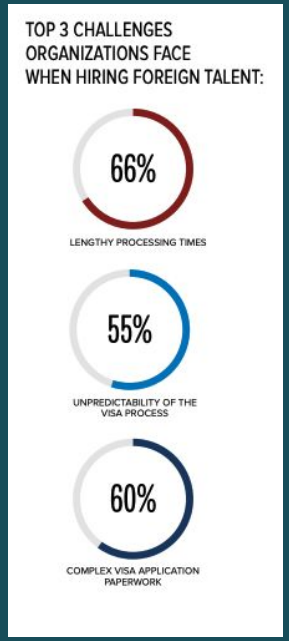
52% OF ORGANIZATIONS HAVE SPONSORED AN EMPLOYMENT-BASED VISA FOR AT LEAST ONE WORKER IN THE PAST 5 YEARS.



I-129	**Petition for a Nonimmigrant worker** 1. I-129**H-1** (H-1B and H-1B1); see Proposed I-129H-1 Petition (Form) and Proposed 129H-1 Petition (Instructions) 2. I-129**O** (O-1) 3. I-129**E&TN** (E and NAFTA TN) 4. I-129**MISC** (H-3, P, Q, or R) 5. I-129**L** (L-1) Currently, there is a single fee of $460 for Form I-129, which contains a variety of supplements used for the different petition-based categories. Under the proposal, USCIS will create separate forms for different category groupings, and charge different fees for the new form types. See Proposal supplemental information, for all proposed revised forms and instructions.	$460	1. **$560** 2. **$715** 3. **$705** 4. **$705** 5. **$815**	1. 22% 2. 55% 3. 53% 4. 53% 5. 77%

I-140	**Immigrant Petition for Alien Worker**	$700	**$ 545**	-22%

USCIS fees are changing:



I-485	**Application to Register Permanent Residence or Adjust Status** Although the base I-485 application fee will be lowered, it will no longer include the fee for Form I-765 (employment) and Form I-131 (advance parole). Adjustment applicants who wish to file for those benefits must submit separate payments with those ancillary applications. And so, whereas currently an adjustment applicant pays $1,140 for adjustment, employment, and advance parole, under the proposal the same applicant would pay almost double: $1,120 for adjustment, $545 for employment, and $ 585 for advance parole, resulting in fees of $2,250, a 97% net hike of $1,110.	$1,140	**$ 1,120**	-2%

I-539	**Application to Extend/Change Nonimmigrant Status**	$370	**$ 400**	8%
I-765	**Application for Employment Authorization**	$410	**$ 490**	20%

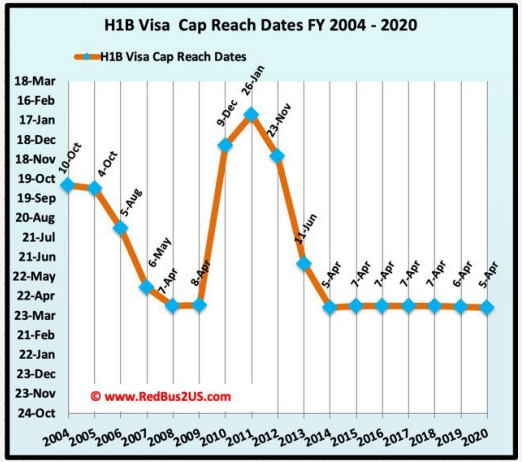
Other Visa Processing Changes:

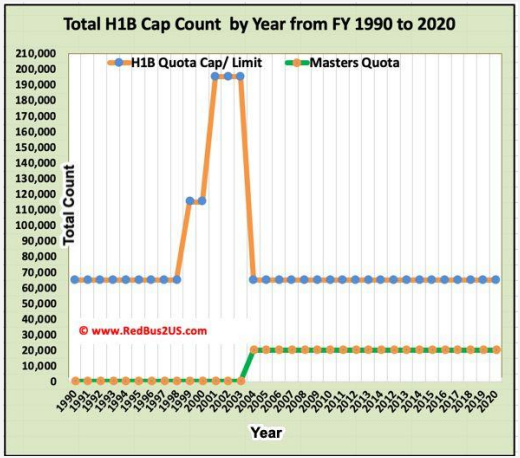
USCIS also proposes:

- Incorporate the biometric services cost into the underlying immigration benefit request fee instead of charging a flat $85 biometric services fee.
- Change the premium processing timeframe from 15 calendar days to 15 business days.
- Consistently apply the $4,000 9-11 Response and Biometric Entry-Exit Fee (Sec. 411(b) Air Transportation Safety and System Stabilization Act, 49 USC Ch. 401 notes) to all petitioners filing a new or extension H-1B petition who employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees in the aggregate are in H-1B, L-1A or L-1B nonimmigrant status, except for petitioners filing an amended petition without an extension of stay request.

What else to expect in 2020 regarding visa processing?

H1B processing changes.





What else to expect in 2020 regarding visa processing?

- Continued Requests for Evidence (RFEs) in H, L and all employment categories.
- Increased denials and, resulting federal court litigation.

"Those companies that engage the agency through litigation were treated with kid gloves compared to other companies" and saw lower rates of denial after lawsuit filed.

--Jonathan Wasden

USCIS H-1B Data (FY 2015-FY2019)			
Fiscal Year	Approved	RFE Issued	Approval after RFE
2019 (Q1-Q3)	83.9%	39.6%	62.7%
2018 (Q1-Q3)	83.9%	39.3%	62%
2017 (Q1-Q3)	93%	20.5%	74.3%
2018	84.5%	38%	62.3%
2017	92.6%	21.4%	73.6%
2016	93.9%	20.8%	78.9%
2015	95.7%	22.3%	83.2%

Source: USCIS, Form I-129 Quarterly Reports (FY15-FY19).

USCIS L-1 Data (FY 2015-FY2019)			
Fiscal Year	Approved	RFE Issued	Approval after RFE
2019 (Q1-Q3)	72%	53.7%	50.7%
2018 (Q1-Q3)	78.4%	44.2%	52.6%
2017 (Q1-Q3)	81.7%	35.1%	50.7%
2018	77.8%	45.6%	52.9%
2017	80.8%	36.2%	49.4%
2016	85%	32.1%	55.6%
2015	83.7%	34.3%	53.5%

Source: USCIS, Form I-129 Quarterly Reports (FY15-FY19).

USCIS TN Data (FY 2015-FY2019)			
Fiscal Year	Approved	RFE Issued	Approval after RFE
2019 (Q1-Q3)	89.5%	24.9%	59.2%
2018 (Q1-Q3)	88.6%	28.7%	62.1%
2017 (Q1-Q3)	92.2%	22%	66.6%
2018	88.2%	28.2%	59.9%
2017	91.6%	22%	64.7%
2016	90.7%	23.6%	64.2%
2015	95.1%	17.3%	74.8%

Source: USCIS, Form I-129 Quarterly Reports (FY15-FY19).

What to expect in 2020 regarding ICE enforcement?

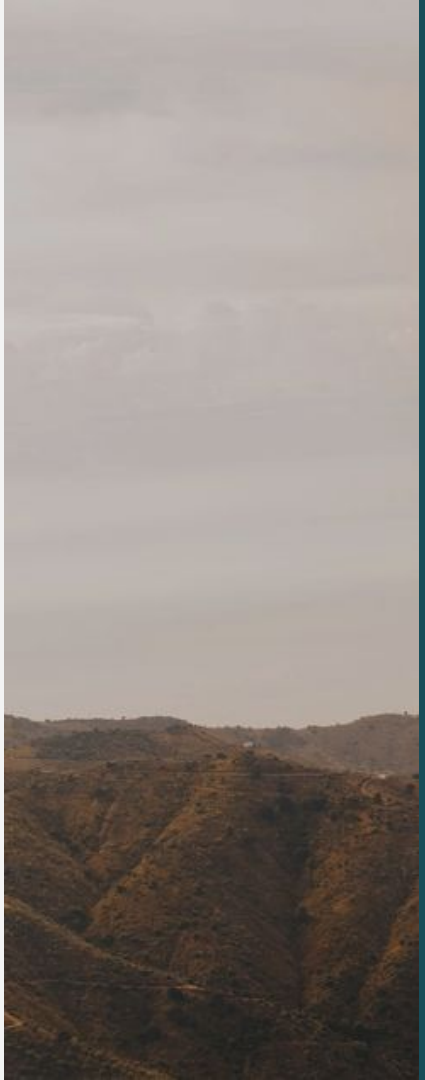
- Planned revision of “specialty occupation” and “employer - employee” definitions (rule TBA)

What else to expect in 2020 regarding visa processing?

- H4 EADs ending (March 2020 announcement expected)
- Removing work authorizations would affect 120,000 spouses, mostly women.
- Public charge grounds

Section Three:

Immigration Enforcement



What to expect in 2020 regarding ICE enforcement?

- Four times the number of workplace investigations through September 2019 compared to close of Obama administration.

DACA Litigation Update

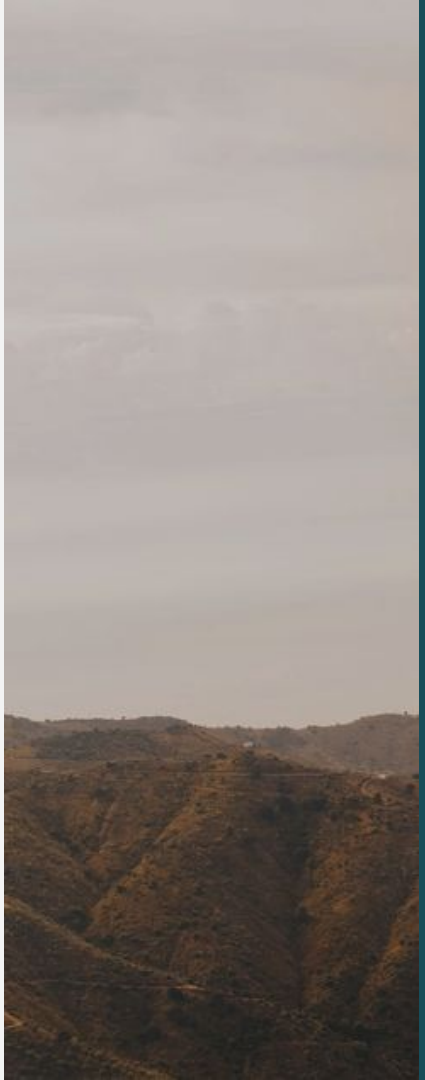
Timeline for the Deferred Action for Childhood Arrivals (DACA) Cases That the U.S. Supreme Court Is Reviewing:

- August 19, 2019: U.S. government's brief filed
- August 26, 2019: Briefs filed by parties that support terminating DACA, including the state of Texas
- September 27, 2019: Briefs by litigants defending DACA due
- October 4, 2019: Amicus briefs in support of DACA due October 28, 2019: U.S. government's reply brief due
- November 12, 2019 (Tue.): Oral argument before the Supreme Court in Washington, DC, scheduled for 10 a.m. Eastern time.

We anticipate that the Court will likely issue its decision close to the end of June 2020, but it could come as early as January 2020 — and the exact timing is difficult to predict.

Section Four:

Questions?



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THANK YOU