CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

MARCH 2007 IMMIGRATION UPDATE

Posted on March 4, 2007 by Cyrus Mehta

Headlines:

1. **Employment Third Preference Category Stagnates** - Little if any forward movement in the employment third preference category is expected in the near future.
2. **DHS Launches Traveler Redress Inquiry Program** - DHS TRIP provides a way for travelers to address situations where they have been incorrectly delayed, denied boarding, or identified for additional screening.
3. **CBP Establishes Traveler Complaint Web Site** **-** CBP has four primary programs to address customer complaints and feedback.
4. **Business Travel to U.S. Down 10 Percent** **-** A report blames the decline primarily on post-9/11 visa hassles.
5. **DHS Proposes to Relax Land, Sea Passport Rules for Children** - The DHS plans to propose significant flexibility on requirements for travel documents for U.S. and Canadian children entering the U.S. via land or sea ports.
6. **USCIS To Reissue RFEs for Religious Workers** **-** Affected petitioners do not have to respond to generic RFEs.
7. **Congressional Research Service Analyzes Unauthorized Foreign Students and the DREAM Act** **-** CRS analyzed legislative proposals that would enable some unauthorized foreign students to become lawful permanent residents (LPRs) through cancellation of removal.
8. **Court Holds That Adjustment Applicants Can Exercise Job Portability in Removal Proceedings** - The Fourth Circuit ruled that applicants with pending adjustment of status applications can exercise job portability while in removal proceedings.
9. **BIA Says Individual Is Child Who Filed for Adjustment After CSPA Effective Date** **-** The respondent retained his status as a child, and

therefore was an immediate relative, because he was under the age of 21 when the visa petition was filed on his behalf.

10. **USCIS Revises Work Authorization Application** - USCIS has revised the Application for Employment Authorization to obtain supplemental evidence from foreign physicians with national interest waivers.
11. **GAO Says US-VISIT Needs Work** **-** The US-VISIT program has not yet implemented a biometric exit capability or a suitable alternative.
12. **Top Officials of Cleaning Service Charged With Immigration Violations** - About 200 undocumented workers in 18 states were swept up in a federal investigation of a cleaning service.

Details...

1. **Employment Third Preference Category Stagnates**

   The Department of State (DOS) notes in the Visa Bulletin for March 2007 that little if any forward movement in the employment third preference category is expected in the near future. Recent discussions with both U.S. Citizenship and Immigration Services (USCIS) and the Department of Labor indicate, the DOS said, that the demand for numbers with pre-August 2002 priority dates is likely to be extremely high in the coming months as both agencies continue to work on their backlogs. This could easily cause a retrogression of the current employment third preference cut-off dates if that demand begins to materialize at USCIS offices during the spring and summer months.
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2. **DHS Launches Traveler Redress Inquiry Program**

   The Department of Homeland Security (DHS) has launched the DHS Traveler Redress Inquiry Program (DHS TRIP), to enable travelers to seek redress and resolve watch list misidentification issues. DHS TRIP provides a way for travelers to address situations where they have been incorrectly delayed, denied boarding, identified for additional screening, or have otherwise experienced difficulties when seeking to enter the U.S. The program also "facilitates redress information sharing" among the DHS's agencies and creates internal performance measures to monitor

progress.
DHS said that DHS TRIP enables travelers to outline their concerns in a single request via a secure Web site. The information received will be shared with appropriate DHS component agencies, such as the Transportation Security Administration and the Department of State.

For more information on DHS TRIP or to use the system, see http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm.

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3. **CBP Establishes Traveler Complaint Web Site**

U.S. Customs and Border Protection (CBP) has launched a Web site for handling traveler complaints. CBP has four primary programs to address customer complaints and feedback: the Comment Card Program, the Customer Service Center, Passenger Service Representatives and a telephone/verbal complaint response system.
An outline of the CBP's response programs and information on how to file a complaint are available at http://www.cbp.gov/xp/cgov/travel/customerservice/handle_complaints.xml.

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4. **Business Travel to U.S. Down 10 Percent**

In the February 26, 2007, issue of *Newsweek* magazine, Fareed Zakaria noted that total international arrivals to the U.S. declined 10 percent between 2000 and 2004. and that business travel to the U.S. has declined by 10 percent in the last two years while other major capitals (London, Singapore, Dubai) are experiencing increases. Further, Mr. Zakaria said, although the U.S. increased foreign student enrollment by 17 percent between 1999 and 2005, during the same period, enrollments have grown by 28 percent in Britain, 42 percent in Australia, 46 percent in Germany, and 81 percent in France. The article blames the depression of the U.S. travel market relative to other nations primarily on post-9/11 visa hassles,

noting that Discover America polled 2,000 randomly selected international travelers this winter and asked them which location is the worst for visa problems and difficulties with immigration officials; the U.S. topped the list.

The Saudi chapter of the Young Arab Leaders passed up a business forum held in New York last year, the *Newsweek* article reports, because they "refused to go through what has become an extremely demeaning process for visa applications," a conference organizer said. Attendees at the conference, the pro-business Arab and American Action Forum, were pulled out of line at John F. Kennedy International Airport and made to stand for two to five hours, the article states, while security officials questioned them about whether they had used weapons and what they thought of the war in Iraq. "We seem to have lost the ability to think rationally about security," said homeland security expert Stephen Flynn.

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5. **DHS Proposes to Relax Land, Sea Passport Rules for Children**

As part of the forthcoming notice of proposed rulemaking on the Western Hemisphere Travel Initiative (WHTI), the Department of Homeland Security (DHS) plans to propose significant flexibility on requirements for travel documents for U.S. and Canadian children entering the U.S. via land or sea ports. The proposal would allow U.S. and Canadian citizen children 15 and under, with parental consent, to cross the border at land and sea ports with a certified copy of their birth certificate as an alternative to a passport or other WHTI-compliant identity document. Also, U.S. and Canadian citizen children, ages 16 through 18, traveling with public or private school groups, religious groups, social or cultural organizations or teams associated with youth athletics organizations would be able to enter at land or sea ports under adult supervision with a certified copy of their birth certificate.

The initial phase of WHTI travel document requirements went into effect in January, requiring all air travelers regardless of age to present a passport for entry into the U.S. The DHS proposal does not affect the requirements for air travel.

The Department of State plans to issue final regulations soon that will allow the Department to issue U.S. citizens a lower-cost alternative to a passport, the Passport Card. The DHS said that a proposed rule addressing land and sea travel will be published at a later date and will include additional details on requirements for travelers entering the U.S. through land and sea border crossing. The DHS plans to continue to issue WHTI-compliant border crossing documents for frequent border crossers under its trusted traveler programs.

The DHS's announcement is posted at http://www.dhs.gov/xnews/releases/pr_1172167923684.shtm.

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6. **USCIS To Reissue RFEs for Religious Workers**

U.S. Citizenship and Immigration Services (USCIS) has found recently that some requests for evidence (RFEs) were issued to petitioners for special immigrant religious workers that did not take into account the supporting evidence that was included with the petitions. These generic RFEs requested evidence with respect to every eligibility criteria regardless of the evidence submitted initially by the petitioners. On January 29, 2007, USCIS discontinued the use of generic RFEs and, in an announcement on February 16, 2007, the agency said that affected petitioners do not have to respond to these generic RFEs. Affected petitioners may respond if they choose, however, by pointing out the evidence already submitted and submitting any other missing evidence. "Petitions will not be denied for abandonment for failure to respond to these generic RFEs," USCIS said. USCIS said that after reviewing each of these petitions, the agency will send a case-specific RFE, if needed, to affected petitioners to request specific additional supporting evidence required for adjudication. After USCIS receives the petitioner's response to the case-specific RFE within the timeframe specified, it will make a decision on the case.

The announcement is posted at http://www.uscis.gov/files/pressrelease/ReligiousWkrsRFE021607PN.pdf.

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7. **Congressional Research Service Analyzes Unauthorized Foreign Students and the DREAM Act**

The Congressional Research Service (CRS) issued a report on January 30, 2007, that analyzes legislative proposals under the DREAM Act that would enable some unauthorized foreign students to become lawful permanent residents (LPRs) through cancellation of removal. Two similar DREAM Act bills were introduced in the 109th Congress: S. 2075 and H.R. 5131. Those bills would have enabled eligible unauthorized students to adjust to LPR status through a two-stage process. The CRS notes that H.R. 5131 was not passed but S. 2075 was incorporated into the Comprehensive Immigration Reform Act of 2006 (S. 2611), which passed the Senate in May 2006. The CRS said that the 110th Congress may consider DREAM Act legislation either as a free-standing bill or as part of a larger immigration reform measure.
The report, "Unauthorized Alien Students: Issues and 'Dream Act' Legislation," was issued January 30, 2007, and is available at http://www.opencrs.com/rpts/RL33863_20070130.pdf.

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8. **Court Holds That Adjustment Applicants Can Exercise Job Portability in Removal Proceedings**

On February 22, 2007, in *Perez-Vargas v. Gonzales*, the U.S. Court of Appeals for the Fourth Circuit ruled that applicants with pending adjustment of status applications can exercise job portability while in removal proceedings.
Section 204(j) of the Immigration and Nationality Act allows those with adjustment of status applications pending for more than 180 days to continue with the permanent resident status process despite changing jobs or employers, provided the new job is in an occupational classification that is the same as, or similar to, the one sponsored by the original employer. In *Perez-Vargas*, the Fourth Circuit disagreed with the

Board of Immigration Appeals' conclusion that an immigration judge lacked jurisdiction to make such a portability determination under section 204(j). The court agreed with the petitioner that the BIA misapprehended the question by distinguishing jurisdiction to adjudicate an application for adjustment of status from jurisdiction to make a section 204(j) determination. Among other things, the court reasoned that the BIA's interpretation would effectively negate the beneficial impact of section 204(j) with respect to noncitizens in removal proceedings, an interpretation that runs contrary to the plain language of the statute.

For more on this case, including an analysis of its likely effects in the Ninth Circuit and other jurisdictions, see Mehta, "Fourth Circuit Holds That Adjustment Applicants Can Exercise Job 'Portability' in Removal Proceedings," available online at http://cyrusmehta.com/perseus/news.aspx?SubIdx=ocyrus200722323040.

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9. **BIA Says Individual Is Child Who Filed for Adjustment After CSPA Effective Date**

The Board of Immigration Appeals (BIA) sustained the appeal and remanded the case of a person whose visa petition was approved before the August 6, 2002, effective date of the Child Status Protection Act (CSPA) but who filed an adjustment of status application after that date. The BIA said the respondent retained his status as a child, and therefore was an immediate relative, because he was under the age of 21 when the visa petition was filed on his behalf.
Among other things, the BIA found no indication that Congress intended to exclude from coverage of the CSPA those whose visa petitions were approved before its effective date but who waited until after that date to file an adjustment application. The BIA noted that the CSPA was created to remedy the problem of minor children of U.S. citizens losing their immediate relative status and being "demoted" to the family first preference category as a result of the backlog in adjudicating visa petitions and applications for adjustment of status.

The full text of the case is posted at

http://www.usdoj.gov/eoir/vll/intdec/vol24/3551.pdf. *See also* BIA RULES THAT CHILD STATUS PROTECTION ACT RETROACTIVELY APPLIES TO CHILDREN OF US CITIZENS at www.cyrusmehta.com

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10. **USCIS Revises Work Authorization Application**

U.S. Citizenship and Immigration Services (USCIS) has revised the Application for Employment Authorization (Form I-765) to obtain supplemental evidence from foreign physicians with national interest waivers (NIWs). The revised form also reduces the number of reasons for filing.
USCIS said that the new form requires more evidence from NIW physician applicants to ensure that they are not using a pending adjustment of status application solely as a means for employment other than for medical service in designated shortage areas. Previous versions of the I-765 will no longer be accepted but I-765s that were received as of February 21, 2007, will be accepted and processed.

USCIS noted that the revision was necessitated by a recent decision by the U.S. Court of Appeals for the Ninth Circuit (San Francisco), *Schneider v. Chertoff*, holding that certain NIW physician regulations intending to ensure compliance with the Nursing Relief Act and the Immigration and Nationality Act were *ultra vires* (beyond power or authority). USCIS said it believes that providing necessary and reliable medical care to medically underserved areas remains an important mission of the Nursing Relief Act and that it is imperative to secure this commitment from NIW physicians.

The revised I-765 removes two options as reasons for filing: (1) replacement of an employment authorization document (EAD) that was never received, and (2) replacement of an EAD that was issued with incorrect information because of a USCIS administrative error. Those who wish to file an I-765 for those reasons should contact the USCIS office that processed their previously filed I-765 (the USCIS letter accompanying the EAD contains the address of that office). Applicants may also call the National Service Center (800-375-5283) to ask about an EAD that was never received or was received with incorrect information.

The announcement is posted at http://www.uscis.gov/files-/pressrelease/I-765.pdf and the revised form is posted at http://www.uscis.gov/files/form/I-765.pdf.

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11. **GAO Says US-VISIT Needs Work**

The U.S. Government Accountability Office (GAO) said in a recent report that the Department of Homeland Security's US-VISIT program has not yet implemented a biometric exit capability or a suitable alternative. Among other things, the GAO said that the DHS has continued to pursue US-VISIT without fleshing out the program's operational and technological context. The DHS also has launched other major security programs without defining the relationship between US-VISIT and those programs. Without effective management controls, the GAO said, there is a risk that US-VISIT "will not produce the right solution, and be managed the right way." The report makes numerous recommendations to address the DHS's management challenges with respect to US-VISIT.
The GAO report is available at http://www.gao.gov/cgi-bin-/getrpt?GAO-07-499T.

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12. **Top Officials of Cleaning Service Charged With Immigration Violations**

On February 22, 2007, undocumented workers in 18 states were swept up in a U.S. Immigration and Customs Enforcement and Internal Revenue Service investigation of Rosenbaum-Cunningham International, Inc. (RCI), a cleaning service. RCI co-owners were charged with various fraud, immigration, and tax charges in a 23-count indictment. The estimated 200 janitors were nabbed at 63 locations, including the House of Blues, Hard Rock CafÃ©, ESPN Zone, Planet Hollywood, and others.
Cyrus D. Mehta, who appeared on the 10 p.m. Fox 5 news on February 15, 2007, stated that the ICE raids were not a solution to fix a broken

immigration system. Such a broken system does not allow essential workers to obtain green cards, and for employers to thus hire them legally.

ICE's announcement is posted at http://www.ice.gov/pi/news/newsreleases/articles/070222gr-andrapids.htm.

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