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US IMMIGRATION & NATIONALITY LAW

MAY 2007 IMMIGRATION UPDATE

Posted on April 27, 2007 by Cyrus Mehta

Headlines:

1. **USCIS Completes FY 2008 H-1B Selections, Changes Procedures** - USCIS has completed the random selection process to determine which FY 2008 H-1B petitions would be accepted for processing, and outlined new procedures.
2. **DHS Issues Final Rule on Petitioning Requirements for O and P Nonimmigrants** - DHS issued a final rule to permit petitioners to file O and P nonimmigrant petitions up to one year before the petitioner's need for the worker's services.
3. **DHS Revamping Electronic Verification System** - DHS is updating its electronic records system to consolidate information from different systems of records notices and add new sources of data.
4. **"Other Worker" Visa Category Becomes Unavailable; Some Categories Move Forward Significantly** - The "other worker" category became unavailable beginning in May and will remain so for the remainder of fiscal year 2007.
5. **USCIS Issues Final Rule Removing Standardized Request for Evidence Timeframe** - The final rule maintains the current 12-week standard as a ceiling on the response time to be provided, and sets a maximum of 30 days to respond to a Notice of Intent to Deny.
6. **Seventh Circuit Finds Labor Dep't, Not DHS, Decides Job Requirements** **-** The determination of what kind of training is required to classify someone as a "skilled" worker is made by the DOL, not the DHS.
7. **Court Finds Jurisdiction to Review Adjustment Application Before Renewal in Removal Proceedings** **-** Ninth Circuit precedent supported the finding that the court had jurisdiction to review the USCIS's denial of adjustment of status.

8. **USCIS Proposes Revisions for Religious Worker Visa Classifications**- USCIS is proposing a variety of changes.
9. **Children in Immigrant Families Generally Fluent in English** **-** A new report finds that children in newcomer families have strong ties to their adopted country.

Details...

1. USCIS Completes FY 2008 H-1B Selections, Changes Procedures

U.S. Citizenship and Immigration Services (USCIS) announced on April 12, 2007, that it completed the computer-generated random selection process to determine which H-1B petitions subject to the congressionally mandated H-1B cap for fiscal year (FY) 2008 would be accepted for processing. Among other things, petitioners who received receipt notices dated before April 12, 2007, cannot assume that their H-1B petitions have been accepted for processing, USCIS said.

As a result of the high volume of petitions subject to the computer-generated random selection process, USCIS did not conduct data entry of all cap-subject filings. Rather, it developed new procedures that "enabled the agency to efficiently process cap-subject petitions." As required, FY 2008 cap-subject H-1B petitions were stamped to reflect the time and date of actual receipt. USCIS assigned a unique numerical identification number to the 123,480 properly filed H-1B petitions received on April 2 and 3 and, on April 12, conducted the computer-generated random selection process to determine which petitions would be accepted for processing. USCIS did not issue receipt notices for all the petitions received on April 2 and 3. It did, however, conduct data entry and generate (and in some cases issue) receipt notices for a portion of cap-subject petitions before conducting the random selection process. The issuance of receipt notices before conducting the random selection process had "no impact whatsoever" on whether a petition was randomly selected for processing, USCIS said.

Acknowledging that the process "caused some confusion," USCIS noted the following:

- Some cap-subject petitions were data-entered on April 2 and 3. Fees were deposited in connection with these petitions and receipt notices (Form

I-797) were issued. USCIS cannot invalidate these receipt notices because the fees have been deposited. As noted above, petitioners who received receipt notices dated before April 12, 2007, cannot assume that their H-1B petitions have been accepted for processing. For cases that fall into this group, those that were not randomly chosen will be returned to petitioners and the filing fee will be refunded. Those that were accepted for processing will be processed under the original receipt notice.

- Some cap-subject H-1B petitions were data-entered on April 4 and receipt notices were generated but never issued to petitioners. USCIS did not deposit any of the fees submitted with these filings and these receipt notices have been voided. For cases that fall into this group, those that were not chosen will be returned to petitioners with the filing fees and those that were accepted for processing will be issued official receipt notices dated on or after April 12, 2007.
- Finally, a small number of cap-subject H-1B petitions, filed under premium processing, were also data-entered on April 4. In accordance with USCIS procedure, e-mail notification acknowledging receipt of these petitions was issued to petitioners. Official receipt notices were generated but never issued, and USCIS did not deposit any of the fees submitted with these filings. Thus, all generated receipt notices have been voided. For cases that fall into this group, those that were not chosen will be returned to petitioners with the filing fees and those that were accepted for processing will be sent a second e-mail confirmation of receipt and will be issued new receipt notices dated on or after April 12, 2007.

USCIS said it will return all petitions not randomly selected for processing, with the fee(s), to the petitioner or authorized representative. Final notification of those petitions is expected to occur in May.

USCIS continues to accept new FY 2008 cap-exempt H-1B petitions filed on behalf of aliens with U.S.-earned master's or higher degrees. USCIS plans to make a future announcement regarding the "final receipt date" for these petitions.

USCIS also announced that the 15-day premium processing period for petitions subject to the FY 2008 cap began after the computer-generated random lottery selected the petitions for processing. USCIS said that the large number of H-1B filings on April 2 and April 3 required placing conditions on the availability of

the premium processing service. The agency's ability to provide premium processing service to these petitions was affected by the fact that the cap was reached and exceeded the first day employers could file H-1B petitions.

In the meanwhile, the H-1B Master's degree cap of 20,000 visas is about to be reached. The USCIS website, www.uscis.gov, reports that 19,172 petitions have been received as of April 25, 2007.

Corporate clients may contact their members of Congress directly (by personalized letters, phone calls, or personal meetings) to let them know how the H-1B cap and employment-based (EB) backlog problems are hurting them. A model letter that client companies can personalize is located at: http://capwiz.com/aila2/issues/alert/?alertid=9589591. Also, the American Immigration Lawyers Association is collecting examples of how the inability to hire H-1B workers and the delays in getting EB green cards are adversely affecting companies, hospitals, and other entities. Examples (with or without attribution) may be e-mailed to H1Bhorror@aila.org . A sign-on letter template is available at http://www.capwiz.com/aila2/attachments/81H17006_sign_on_letter_text.doc .

USCIS's announcement about the new H-1B procedures is available at http://www.uscis.gov/files/pressrelease/H1Bfy08CapUpdate041907.pdf . The agency's announcement about the premium processing period is available at http://www.uscis.gov/files/pressrelease/H1Bfy08PremProc040907.pdf .

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2. DHS Issues Final Rule on Petitioning Requirements for O and P Nonimmigrants

The Department of Homeland Security (DHS) issued a final rule effective May 16, 2007, to permit petitioners to file O and P nonimmigrant petitions up to one year before the petitioner's need for the worker's services. The rule is intended to enable petitioners who are aware of their need for the services of an O or P nonimmigrant well in advance of a scheduled event, competition, or performance to file their petitions under normal processing procedures. "This way, petitioners will be better assured that they will receive a decision on their petitions in a timeframe that will allow them to secure the services of the O or P nonimmigrant when such services are needed," the DHS said.

Current regulations governing both O and P nonimmigrants preclude the petitioner from filing a Form I-129 (Petition for Nonimmigrant Worker) more than six months before the actual need for the alien's services. The DHS noted that the timing of filings by petitioners, combined with current U.S. Citizenship and Immigration Services (USCIS) processing times, often result in USCIS completing the adjudication of such petitions at the same time as, or even later than, the date of the petitioner's need for the worker. This created a hardship for petitioners seeking to employ a worker based on a scheduled performance, competition, or event, and who already may have booked a venue and sold advance tickets. If the petition is not approved by the time of the petitioner's need for the worker's services, the petitioner may be required to cancel a scheduled event or performance, lose funds advanced for booking a venue, and be liable for the costs associated with ticket refunds as well as other costs. If petitioners were able to file Forms I-129 for O or P nonimmigrant status more than six months in advance of the need for the worker's services, the DHS reasoned, USCIS could ensure that the adjudication is completed in advance of the date of the scheduled event, competition, or performance. Moreover, a large percentage of O and P petitioners seeking performers or athletes often must plan for and schedule competitions, events, or performances more than one year in advance.

Of the 112 comments received on the proposed rule published two years ago, 110 comments supported the proposal to extend the allowable petition filing time from the current six months to one year in advance of the petitioning employer's need for the services of the O or P nonimmigrant. As nearly all comments supported the proposed rule's extension of the O and P nonimmigrant petition filing period, the final rule provides that petitioners of O and P nonimmigrants may file petitions at any time up to a maximum of one year in advance of their need for the worker's services. USCIS is not adopting a proposed requirement that petitions must be filed no sooner than six months before the actual need for the worker's services.

The final rule does not apply the one-year filing timeframe to other nonimmigrant classifications associated with Form I-129. The nature of O and P employment is different from other nonimmigrant visa classifications, the DHS explained. Extending the filing period for other nonimmigrant classifications using Form I-129 "may result in the increased potential for fraud and abuse as well as an increase in case filings where the need for the alien's services has not

fully materialized."

The final rule is available at - http://a257.g.akamaitech.net/7/257/2422/01jan20071800/-edocket.access.gpo.gov/2007/pdf/E7-7134.pdf . Average petition processing times are available at https://egov.immigration.gov/cris/jsps/ptimes.jsp .

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3. DHS Revamping Electronic Verification System

The Department of Homeland Security (DHS) is updating its electronic records system to consolidate information from different systems of records notices and add new sources of data . The update includes Basic Pilot Program information used to determine whether a newly hired employee is authorized to work in the U.S. The notice is available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/-edocket.access.gpo.gov/2007/E7-6611.htm . The DHS is also creating a new Biometric Storage System. See http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.-access.gpo.gov/2007/pdf/07-1643.pdf .

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4. "Other Worker" Visa Category Becomes Unavailable; Some Categories Move Forward Significantly

The Department of State's Visa Bulletin for May 2007 notes that the employment third preference "other worker" category was expected to reach the annual numerical limit by the end of April. As a result, the category became unavailable beginning in May and will remain so for the remainder of fiscal year 2007.

Also, the Department noted that U.S. Citizenship and Immigration Services and the Department of Labor still have a significant number of backlogged cases. As a result, an anticipated increase in demand for visa numbers has not yet materialized and may not for some time. In an effort to maximize number use under the annual numerical limit, the Department said, the Worldwide and Philippines employment third preference cut-off dates have advanced by one

year, to August 1, 2003. Eligible professionals and skilled workers with priority dates earlier than August 1, 2003, may apply for adjustment of status or consular processing in May. Unless there is a significant increase in employment visa demand, the Department noted, it will be necessary to continue this rate of movement during the upcoming months. Such movement may be expanded to include other chargeability areas and preference categories.

One consequence of rapid cut-off date advancement is the inevitable increase in demand for visa numbers as adjustment of status cases are brought to conclusion at USCIS offices. Such increased demand could have a dramatic impact on the cut-off dates, leading to retrogressions. The Department said it would provide as much advance notice as possible should this occur.

The May 2007 Visa Bulletin, which contains the latest information on visa number availability, is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html .

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5. USCIS Issues Final Rule Removing Standardized Request for Evidence Timeframe

U.S. Citizenship and Immigration Services (USCIS) issued a final rule, effective June 18, 2007, to provide flexibility to the agency in setting the time allowed to applicants and petitioners to respond to a Request for Evidence (RFE) or to a Notice of Intent to Deny (NOID). Specifically, the final rule maintains the current 12-week standard as a ceiling on the response time to be provided, and sets a maximum of 30 days to respond to a NOID.

The rule also describes the circumstances under which the agency will issue an RFE or NOID before denying an application or petition, but USCIS said it will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information.

The rule also clarifies when petitioners and applicants may submit copies of documents in lieu of originals.

USCIS said it intends to issue policy guidance setting clear standards for when a timeframe less than these maximums will be afforded before the effective date

of the rule.

USCIS noted that it recognizes the value of a predictable timeframe for responding to an RFE or NOID, and stated that it did not intend to make this an unpredictable, discretionary process with timeframes determined by individual adjudication officers. USCIS said it will set clear timeframes and standards for submission of different kinds of evidence in different circumstances. The timeframes will be set out in internal guidance to adjudicators. USCIS said it foresees no reason why this guidance also would not be publicly disclosed after it is developed or whenever it is adjusted.

USCIS noted that important processing steps (such as background checks) may need to be repeated if processing extends beyond certain timeframes. Repeating steps may significantly delay the eventual acquisition of an immigration benefit. Longer timeframes can work against a timely response also because applicants and petitioners given almost three months to respond may delay responding simply because they consider that additional time in the U.S. to be a benefit, USCIS pointed out. Recognizing that the majority of applications and petitions are eventually approved, USCIS said it does not want to restrict arbitrarily a reasonable opportunity to submit material to prove eligibility. USCIS added that it recognizes that documents from certain countries other than the U.S. are "occasionally difficult to obtain"; thus, the timeframe flexibility will take into account these situations. Nevertheless, USCIS asserted, most applicants and petitioners can provide required documents in fewer than 12 weeks.

The final rule is available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/-edocket.access.gpo.gov/2007/pdf/E7-7228.pdf .

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6. Seventh Circuit Finds Labor Dep't, Not DHS, Decides Job Requirements

In *Hoosier Care, Inc., v. Chertoff*, the U.S. Court of Appeals for the Seventh Circuit noted that the DHS's Administrative Appeals Office (AAO) had ruled that two workers' college majors were not relevant postsecondary education for prospective positions in a residential care facility for profoundly disabled children and adults, because neither agriculture nor transportation is a field of

knowledge that relates to the care of such persons. Relevant majors, the AAO suggested, would include those in such fields as psychology and education. Although the court said that interpretation was not necessarily unreasonable, it noted that the determination of what kind of training is required to classify someone as a "skilled" worker is made by the Department of Labor (DOL), not the DHS, which determines whether the worker satisfies those requirements; that is, whether he or she has the training the DOL believes is required for the job.

The court said it did not know how closely the DOL examines the suitability of the job requirements specified in an employer's application for labor certification, but that the DHS did not argue that in conducting such an investigation in this case it was simply doing the DOL's work for it. "If it wants to do that it will have to change its regulation and probably also persuade Congress to change the statute," the court said, reversing the judgment of the district court and returning the case to the DHS for further proceedings.

The full text of the case is available at http://www.bibdaily.com/pdfs/Hoosier%20Care%207%204-11-07.pdf .

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7. Court Finds Jurisdiction to Review Adjustment Application Before Renewal in Removal Proceedings

In *Hillcrest Baptist Church v. U.S.A.*, the plaintiffs filed a complaint for relief after U.S. Citizenship and Immigration Services denied their adjustment of status applications. The government moved to dismiss because the plaintiffs had not renewed their applications in removal proceedings and, thus, had not yet exhausted their administrative remedies. The U.S. District Court for the Western District of Washington concluded, however, that Ninth Circuit precedent supported the finding that the court had jurisdiction to review the USCIS's denial of adjustment of status.

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8. USCIS Proposes Revisions for Religious Worker Visa Classifications

U.S. Citizenship and Immigration Services (USCIS) is proposing to amend

existing regulations pertaining to special immigrant and nonimmigrant religious worker visa classifications. The proposed rule focuses on how the agency can best ensure the integrity of the religious worker program by eliminating opportunities for fraud in the program while, at the same time, streamlining the process for legitimate petitioners.

In 1999, USCIS noted, the Government Accountability Office (GAO) reported incidents of fraud in the religious worker program. The GAO found that fraud often involved false statements by petitioners about the length of time an applicant was a member of a religious organization, the qualifying work experience, and the position being filled. The GAO also noted problems with applicants making false statements about their individual qualifications and plans while in the U.S.

USCIS has since continued to assess the potential for fraud in the religious worker program. The agency's Office of Fraud Detection and National Security (FDNS) found a 33 per cent rate of fraud in the program. The FDNS's assessment also indicated patterns of potential fraud and weaknesses that created vulnerabilities for fraud to occur. Together with the GAO's earlier report, the FDNS assessment showed a "justifiable and compelling need to address the issue," USCIS said.

USCIS is proposing a variety of changes, including but not limited to requiring the filing of a petition in every instance (the requirement already exists for special immigrants and for organizations seeking to extend the stay or adjust status for nonimmigrant religious workers already in the U.S.). USCIS said this proposed requirement will allow the agency to verify the legitimacy of the petitioner and the job offer before the issuance of a visa or admission to the U.S. USCIS also would notify petitioners that the agency may conduct on-site inspections of any organization seeking to employ either a nonimmigrant or a special immigrant religious worker. Inspections would be "intended to increase deterrence and detection of fraudulent petitions and to increase the ability of the agency to monitor religious workers and ensure their lawful status in the U.S. is maintained."

USCIS also is proposing to amend the standard initial period of stay for nonimmigrant religious workers from three years to one. In addition, every petition for an R-1 classification would be required to be initiated by a prospective or existing employer through the filing of a Form I-129 (Petition for

Nonimmigrant Worker) with USCIS. The beneficiary (the religious worker) would no longer be able to obtain an R-1 visa at a U.S. consulate abroad or at a port-of-entry without prior approval of the I-129 by USCIS.

In addition, USCIS proposes to change certain related definitions. For example, USCIS proposes to expand its interpretation of prior work experience to include work that is not in the "exact same" position as the job offered. Also, USCIS proposes to expand the definition of "religious occupation" to focus on duties that "primarily, directly, and substantially relate to the religious beliefs or creed of the denomination." Such a change, USCIS said, distinguishes between committed religious work and non-qualifying work that, while it may be incident to religious duties, cannot by itself warrant classification in the religious worker category.

Public comments are being accepted until June 25, 2007. For more information, see http://www.uscis.gov/files/pressrelease/RvisaRelease19Apr07.pdf (announcement) and http://www.uscis.gov/files/-pressrelease/RvisaFactSheet19Apr07.pdf (fact sheet).

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9. Children in Immigrant Families Generally Fluent in English

A new report finds that children in newcomer families have strong ties to their adopted country. Four out of five are U.S. citizens and three out of four are fluent in English. Children in newcomer families account for 20 percent of all children in the U.S., and their numbers are growing faster than any other group of children in the nation, the report notes.

The report, "Children in America's Newcomer Families," by Child Trends and the Center for Social and Demographic Analysis of the University at Albany, State University of New York, is available at http://www.childtrends.org/Files//-Child_Trends-2007_04_01_RB_ChildrenImmigrant.pdf . Additional data is available at http://www.albany.edu/csda/children/ .

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