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

SEISMIC ACTIVITY IN IMMIGRATION LAW

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by
Cyrus D. Mehta*

During the week ending May 18, 2007, there has been significant seismic activity that could radically change the way we know US immigration law. Rumblings have gone on throughout the week involving advances in employment –based visa numbers, a DOL rule that will eliminate substitutions and prohibit foreign nationals from paying attorney fees, and Senators targeting heavy H-1B users. But we leave the one that will record the highest on the Richter scale till the last, namely, the possibility of radical comprehensive immigration reform.

June 2007 Visa Bulletin

The Department of State's (DOS) Visa bulletin for June 2007, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html, caused "happy" rumblings from those who have been most affected by the retrogression in the Employment-based categories. The Employment-based Third Preference (EB-3) for India moved to June 1, 2003. Previously, it had been stuck at May 8, 2001 for several months. China and Mexico are also now in tandem with India at June 1, 2003. However, for the rest of the world and the Philippines, the EB-3 happily advanced to June 1, 2005.

The Employment-based Second Preference (EB-2) has done even better. The EB-2 for India moved from January 8, 2003 to April 1, 2004. It continues to remain current for the rest of the world, while China is at January 1, 2006. The sudden and rapid strides in the otherwise torpid visa numbers resulted in euphoria among people born in India who have been waiting patiently for several years for some movement. For those whose priority dates have become current, it would be advisable to file adjustment of status applications between

June 1 and June 30, 2007. There is no need to rush to file so that applications are received by June end, like the scramble to file H-1B visas by April 1. Eligible applicants have the whole month to file, and even thereafter, so long as their priority date remains current. However, it is advisable to file within the month of June because it is hard to predict what will happen in July 2007 and thereafter.

The DOS has indicated in its Visa Bulletin that these advances have been effected to maximize the number use under the annual numerical limits. The DOS further points out that there will be additional advances during the coming months. On the other hand, the DOS cautions that once demand begins to exceed the supply, it will be necessary to make "adjustments" to the cut off date. While it is not possible to predict when these adjustments will occur, the DOS has indicated that such adjustments should be expected.

Senators Grassley and Durbin Issue Letters To Large H-1B Users

Senator Grassley and Durbin have issued letters to nine Indian-based companies questioning them about the use of the H-1B program and expressing concern about "reported fraud and abuse of the H-1B and L visa programs, and their impact on American workers." This is redolent of a prior dark era when the infamous Senator McCarthy hauled up immigrants who were suspected of being communist sympathizers.

According to Senator Grassley in his press release, "Considering the high amount of fraud and abuse in the visa program, we need to take a good, hard look at the employers who are using H-1B visas and how they are using them." The letters, posted on Grassley's website, http://grassley.senate.gov, have been issued to the three largest Indian-based companies - Infosys Technologies Ltd., Wipro Ltd. and Tata Consultancy Services Ltd. - among several others. These companies, according to the Senators, used 20,000 of last year's H-1B cap comprising 65,000 visas plus another 20,000 reserved for advanced degree holders.

The two Senators are questioning these companies because of erroneous and preconceived notions of these companies abusing the H-1B program. Indeed, the two Senators have proposed a bill, S. 1035, which seeks to prohibit the outplacement of H-1B employees to client sites, among other restrictive measures. It appears that the Senators have targeted these companies in order to develop information that would bolster support for their ill conceived bill

that has no bearing on economic realty. It is perfectly legal for an IT consulting company to assign an H-1B worker to a client site under current H-1B law.This bill will also prohibit companies from having more than 50% of their workforce on H-1B visas if they employ more than 50 employees on H-1B visas.

Fortunately, the companies that have been targeted are the "crown jewel" IT companies in India that are not likely to intentionally abuse the H-1B program. It is hoped that their response to the letter will establish that these companies are crucial in supporting the information technology needs of corporate America, which in turn renders them more efficient in the global economy.

DOL Publishes Final Rule Eliminating Substitutions, Preventing Employees From Paying Attorney's Fees, and Other Issues

The DOL published its final rule, effective July 16, 2007, which would eliminate the ability of employers to substitute the foreign national originally sponsored in the labor certification. If an employer has an approved labor certification, which it is unable to use for the sponsored alien beneficiary, it has only till July 15, 2007, to request that another foreign national with similar qualifications be substituted for the original beneficiary. The USCIS has also announced that it will not accept Premium Processing filings of Form I-140 petitions for Immigrant Alien Workers with substituted labor certifications from May 18, 2007 as it will not be able to cope with the rush in filings prior to July 16, 2007.

The final rule also provides for a 180-day validity period of an approved labor certification, and thus employers will have 180 calendar days within which to file an approved labor certification in support of the Form I-140. If the labor certification was already approved prior to July 16, 2007, the employer will have 180 days from that date to file the Form I-140 petition.

The rule further prohibits the sale or barter of labor certifications. In addition, the rule requires employers to pay the costs for preparing, filing and obtaining labor certification including attorney's fees with respect to this process. An employer is prohibited from transferring to the foreign national beneficiary any costs in the labor certification process. However, the rule would still allow the beneficiary to pay his or her own legitimate cost in the labor certification process, but where the attorney represents both the employer and the foreign national, the employer must pay the attorney's fee. It is thus clear that an employer has to pay the attorney fees and costs directly associated with the preparation and filing of the labor certification. Finally, the rule reinforces the

sanctions that would ensue from providing fraudulent or false information on a labor certification and elaborates procedures under which the employer, attorney or agent could be both investigated and debarred from the labor certification program.

While the rules will be further analyzed in a subsequent article, the most troubling provision is 20 C.F.R. Section 656.12, entitled “Improper Commerce And Payment.” While this writer is not troubled with the prohibition to sell or barter labor certifications, the prohibition against foreign nationals paying the attorney’s fee is extremely problematic because this rule interferes with the attorney-client relationship. The attorney generally represents both the foreign national and the employer in the labor certification process, and in many instances, it is the foreign national who wishes to select his or her own attorney and pays the fees. The specific provision, 20 C.F.R. Section 656.12(b), expressly prohibiting the foreign national from paying the attorney fee is provided below:

> “An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.”

What is most troubling is that foreign nationals who have already entered into contracts with an attorney would not be able to pay further fee installments after this provision becomes effective, July 16, 2007. After that date, only the employer will be able to pay the attorney. If the employer chooses not to pay the fees, the rule would prohibit the foreign national beneficiary from paying the fee and thus the labor certification may be put in jeopardy. Correspondingly, if the employer has an agreement requiring reimbursements

associated with the labor certification, especially if the employee leave prior to a certain time frame, such an agreement would be null and void after July 16, 2007.

Senate Approves "Grand Bargain" That Would Radically Overhaul The Immigration System

This seismic activity has been so intense that it will result in a tsunami that will completely shake up the immigration system. The Senate announced on May 17, 2007, that it struck a "grand bargain" on a "point system" that would radically change the way we know immigration law today and would prioritize immigrants' education and skill level over family connections in deciding how to award green cards. Points will be awarded to those in "specialty" occupations, STEM (Science, Technology, Engineering and Math) workers, English (which escalate based on acumen) and some points for family connections in close "tie breaker" cases. Up until now, the US immigration system has been based on a specific sponsorship by an employer or a qualifying family member.

The proposal would immediately abolish the family-based first, second (2B), third and fourth preferences. However, filings under the soon to be eliminated family preferences prior to May 1, 2005 will get processed under the old system. The rest of the family-based beneficiaries will have to re-apply under the new points system.

In exchange for these changes, the proposed agreement would allow illegal immigrants to come forward and obtain a Z visa after paying a fee of $5,000 fine if they have been unlawfully present as of January 1, 2007, and continuously present since that date. Upon obtaining the Z visa, it would take about 8 to 13 years for this individual to become a permanent resident. Heads of household would have to return to their home countries first. Before the Z visa program is implemented, undocumented aliens could come forward right away to claim a probationary card that would let them live and work legally in the US.

A new temporary guest worker program, the Y visa, would also have to wait until the so-called "triggers" have been activated, which include securing the border with more patrols and a fence. Those workers would have to return home after work stints of two years, with little opportunity to gain permanent legal status or ever become US citizens. A Y worker who fails to timely depart is permanently barred from any future immigration benefit. However, a special

category of 10,000 exceptional Y-3 workers would be able to obtain permanent residence under the points system.

The proposal also will increase the H-1B cap to 115,000 visas from the current limitation of 65,000 with an escalator to 180,000. The negotiators are also considering giving more visas in the Employment-based preferences to clear existing backlogs.

The American Immigration Lawyers Association (AILA) and other immigrant rights organizations oppose this "grand bargain." According to AILA, "The deal, as announced, would eviscerate family-based immigration; institute a radically new, untested "merit" system; provide inadequate numbers of green cards; and preclude a meaningful path to permanent residence for new temporary workers." While AILA supports the legalization proposal, which also includes the DREAM Act and AJOBS, it opposes a system that would reorient the system from one grounded in familial and employment relationships to one disconnected from direct ties to the US and the US economy. "Combined with the creation of a large, churning pool of 'guest workers' who cannot lay down roots in the US, this point system raises the specter of a new tide of immigrants lacking the infrastructure and opportunity to effectively assimilate into this country," states the AILA press release.

For further details, please see the White House Fact Sheet.

*** Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, practices immigration law in New York City and is the managing member of Cyrus D. Mehta & Associates, P.L.L.C. He is the Past Chair of the Board of Trustees of the American Immigration Law Foundation and recipient of the 1997 Joseph Minsky Young Lawyers Award. He is also Secretary of the Association of the Bar of the City of New York and former Chair of the Committee on Immigration and Nationality Law of the same Association. He frequently lectures on various immigration subjects at legal seminars, workshops and universities.**