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US IMMIGRATION & NATIONALITY LAW

JULY 2007 IMMIGRATION UPDATE

Posted on July 5, 2007 by Cyrus Mehta

Headlines:

- **1.** **Immigration Reform Bill Dies in Senate** - On a procedural vote, the Senate killed the bipartisan bill on comprehensive immigration reform that has been the subject of much debate and controversy and that had the support of President Bush.
- **2.** **DOS Suddenly Announces No More Employment-Based Visa Numbers** - In a stunning policy reversal, the Department of State suddenly announced that, effective July 2, 2007, all employment-based immigrant visa preference numbers are unavailable until October 1.
- 3. **USCIS Issues Interim Guidance on Final Labor Certification Rule** - USCIS has released interim guidance on the DOL's final rule, effective July 16, 2007, which applies to permanent labor certification applications and approved certifications filed under both the PERM program and previous regulations.
- **4.** **Premium Processing Service Suspended Through July** - The suspension of premium processing service will last for at least 30 days, beginning on July 2.
- **5.** **USCIS Issues Reminder on New Fees** - USCIS has issued a reminder that the agency's new fee schedule takes effect on July 30, 2007.
- **6.**USCIS Announces Direct Filing for More Forms - Effective July 30, 2007, USCIS announced new "Direct Filing" instructions for additional immigration forms.
- **7.**California Service Center Experiencing Delays - The California Service Center is experiencing system problems that are causing delays in the printing of certain notices.
- **8.** **DOL Updates Guidance on H-2B Labor Certification for Nonagricultural Workers** **-** The Department of Labor has released

updated guidance on processing H-2B applications in nonagricultural occupations.

- **9. SSA Releases Guidance on Social Security Number Matches -** The SSA has released new technical guidance on the return file format for online Social Security Number verifications, effective August 25, 2007.

Details...

1. Immigration Reform Bill Dies in Senate

On a procedural vote on June 28, 2007, the Senate killed (46-53) the bipartisan bill on comprehensive immigration reform that has been the subject of much debate and controversy and that had the support of President Bush. Comprehensive immigration reform legislation is not likely to be taken up again before the 2008 election. Democratic majority leader Harry Reid, however, held out hope that pieces of the legislation could be passed separately, such as a program for agricultural workers. According to sources, Sen. Dianne Feinstein (D-Cal.) plans to attach that program, dubbed AgJobs, to other legislation in upcoming months.

Among other things, the new bill would have established a temporary guestworker program, and would have introduced a "points system" instead of many of the current employment-based visa categories. Those with education and experience, particularly in science, technology, engineering, and math (STEM) fields, and those with English skills would have been be favored under the legislation. The bill, which contained additional enforcement provisions, also would have allowed many of the estimated 12 million undocumented immigrants currently in the United States to eventually legalize their status. The cap on H-1B temporary professional workers would have been increased from 65,000 to 115,000 for fiscal year 2008, with a possible increase to 180,000 in following years.

Jack Shandley, vice president of meatpacker Swift & Company, seemed to sum up the sentiments of many who feel that business owners are between a rock and a hard place under the current system: "Immigration policy is divorced from enforcement, and the American employer, for one, is caught in the middle," he said.

The defeated Senate bill's text is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01639:

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2. DOS Suddenly Announces No More Employment-Based Visa Numbers

After having stated on June 13 that the EB-1, EB-2, and EB-3 employment-based visa categories would be current for all countries in July, the Department of State (DOS) suddenly announced that effective July 2, 2007, all employment-based green card numbers have been used up for the rest of this fiscal year. DOS blamed the reversal on " sudden backlog reduction efforts" by U.S. Citizenship and Immigration Services (USCIS) during the past month, which resulted in the use of almost 60,000 employment-based numbers. DOS said that employment-based numbers once again will be available beginning October 1, 2007, under the FY 2008 annual numerical limitation. However, it is highly unlikely that they will return to "Current" on October 1.

In light of this revision of the July Visa Bulletin, USCIS has announced that it is rejecting applications to adjust status filed by foreign citizens whose priority dates are not current under the revised July Visa Bulletin.

On the other hand, July 2007 consular appointments do not seem to be affected by the visa bulletin mess according to a recent communication from State Department's Legalnet to an American Immigration Lawyers Association (AILA) member:

> "Prior to Employment Prefernce visa numbers becoming unavailable on July 2, the consular posts had already been allocated their numbers for the month of July. The posts may continue to use their July allocations of Employment Prefernce numbers, and therefore continue to issue IVs, for the rest of this month for those applicants who were scheduled for IV interviews in July."

Cyrus D. Mehta & Associates, P.L.L.C. (CDMA) believes the actions by DOS and USCIS are illegal. The revision to the July Visa Bulletin in effect is tantamount to a new agency "rule" that required prior public notice and an opportunity to comment before the change could take effect under the Administrative Procedure Act. In CDMA's view, the revision to the July Visa Bulletin and the actions in response taken by USCIS violate the requirements of President Bush's January 18, 2007, Executive Order requiring prior review of "significant guidance documents" by the Office of Management and Budget.

CDMA also believes that these agency actions are contrary to settled agency

practice. For many years, DOS's practice has been to maintain the immigrant visa cut-off dates in place during the entire month for which the Visa Bulletin is published. The public, employers, foreign nationals, and the legal community have all relied on the agency's longstanding practice. Because DOS and USCIS provided no advance notice or opportunity for comment, CDMA believes the revised July Visa Bulletin should not be given legal effect.

The Legal Action Center of the American Immigration Law Foundation (AILF) will file a lawsuit shortly seeking to reverse these agency actions and require the acceptance of adjustment of status applications during the month of July. At the time of going to press on July 6, 2007, a Chicago based law firm filed a law suit too in the US District Court for the Northern District of Illinois. AILF is seeking plaintiffs who can show the hardships and costs they incurred as a result of the agencies' actions. The American Immigration Lawyers Association and others are also working with USCIS and DOS to try to reach some sort of agreement. These organizations are also pushing for legislation that will address the EB retrogression and H-1B cap issues that Congress seemed willing to pass before comprehensive immigration reform legislation failed in the Senate. Now that the legislation is dead, the EB retrogression and H-1B provisions could be tacked onto another bill, with enough pressure from companies and individuals. Please contact your attorney or us for legal advice or if you'd like to help these organizations continue this fight on your behalf. Please also contact your representatives in Congress.

Many applicants who were eligible to file in July 2007 are still asking whether they should keep on filing adjustment applications. Clearly, the filing of an application will result in a rejection. Some case law - involving the extensions of filing deadlines in other immigration contexts - indicates that where an applicant did not apply or permitted the agency to "front desk an application" (turned the applicant away where he/she had applied) those beneficiaries would not be eligible for remedies ordered by the court. While at this time it is completely speculative whether AILF or others will prevail in the law suit, and if so, whether the court will give preference to applicants who were ‘front-desked," there is no downside if one attempts to file an application for it to get rejected if it might result in a future benefit through a successful law suit. Clearly, those who intend to become named plaintiffs in the law suit, particularly those with children who will not get the benefit of the Child Status Protection Act, should consider filing an adjustment application before the end

of July 2007. Prospective adjustment applicants should make this decision in consultation with their attorneys.

Meanwhile, Rep. Zoe Lofgren (D-Cal.) issued a statement in response to DOS's update of the July Visa Bulletin and the subsequent rejection of applications for adjustment of status by USCIS. She said that DOS and USCIS "have seriously undermined the stability and predictability of U.S. immigration law. Thousands of individuals and businesses rely on the monthly bulletins to prepare and plan for the submission of applications. In addition, thousands of dollars in legal fees and other application-related expenses are incurred in preparation for filing applications based on these monthly bulletins. " Rep. Lofgren wrote letters to Secretary of State Condoleezza Rice and Secretary of Homeland Security Michael Chertoff asking them to reconsider. The complete text of both letters is available at http://lofgren.house.gov:80/PRArticle.aspx?NewsID=1808 .

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3. USCIS Issues Interim Guidance on Final Labor Certification Rule

U.S. Citizenship and Immigration Services (USCIS) has released interim guidance on the Department of Labor (DOL)'s final rule, effective July 16, 2007, which applies to permanent labor certification applications and approved certifications filed under both the Program Electronic Review Management (PERM) program and previous regulations governing the permanent labor certification program. The DOL rule's major provisions include a prohibition on the substitution of beneficiaries, a 180-day validity period for approved labor certifications, a requirement that employers pay the costs of labor certification, the establishment of procedures for debarment from the permanent labor certification program, and clarification of the DOL's "no modifications" policy for applications filed on or after March 28, 2005, under the PERM process.

USCIS said it will continue to accept Immigrant Petitions for Alien Worker (Forms I-140) that request labor certification substitution that are filed before July 16, 2007. I-140 petitions that request labor certification substitution and are filed before July 16, 2007, will be adjudicated to completion according to the procedures outlined in the March 1996 DOL Delegation Memorandum of Understanding, to include the adjudication of any relating motions to reopen or reconsider, or an appeal (Form I-290B) by the Administrative Appeals Office.

With the exception noted below, USCIS will reject I-140 petitions that require an

approved labor certification that are filed with a supporting approved labor certification that has expired. Such petitions that are accepted by USCIS in error will be denied based on the fact that the petition was filed without a valid approved labor certification. *Exception:* USCIS will continue to accept amended or duplicate I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate I-140 petition is filed, if the original approved labor certification was filed in support of a previously filed petition during the labor certification's validity period. Such filings may occur when a new petition is required due to successor-in-interest, where the petitioning employer wishes to file a new petition subsequent to the denial, revocation, or abandonment of the previously filed petition and the labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application; in instances where the amended petition is requesting a different visa classification from the one requested in the previously filed petition; or when the previously filed I-140 has been determined to have been lost by USCIS or the Department of State.

USCIS's press release, dated June 1, 2007, is available at http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf . The final rule was published on May 17, 2007, and is available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/
E7-9250.pdf .

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4. Premium Processing Service Suspended Through July

Effective July 2, 2007, USCIS has temporarily suspended premium processing service for the Immigrant Petition for Alien Worker (Form I-140). USCIS said it anticipates a substantial increase in the number of petitioning employers that will file such petitions because of "pent up demand for preference visa categories." The volume of I-140 petitions filed that request premium processing service is expected to exceed USCIS's capacity to provide the service, which guarantees that within 15 calendar days of receipt of a petition, USCIS will issue an approval notice, a notice of intent to deny, or a request for evidence, or will open an investigation for fraud or misrepresentation.

The suspension of premium processing service will last for at least 30 days, beginning on July 2, 2007, and ending on August 1, 2007. During this period,

USCIS will determine whether it is able to process these cases within 15 calendar days of receipt. If so, premium processing service once again will be made available for I-140 petitions.

USCIS's announcement of the temporary suspension is available at http://www.uscis.gov/files/pressrelease/I140PPSTempSusp062706.pdf . USCIS also announced that it is extending a suspension of premium processing service for religious workers (R-1) for another 6 months, with an expiration date of December 18, 2007. That notice is at http://www.uscis.gov/files/pressrelease/R1PremProcessing061807.pdf .

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5. USCIS Issues Reminder on New Fees

U.S. Citizenship and Immigration Services (USCIS) has issued a reminder that the agency's new fee schedule takes effect on July 30, 2007. Applications or petitions postmarked or otherwise filed on or after that date must include the new fees. USCIS announced the new fee schedule last month. Under the new schedule, application and petition fees will increase, on average, about 66 percent. The reminder is available at http://www.uscis.gov/files/pressrelease/FeeUpdate_07Jun29.pdf . The final fee rule is available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-10371.pdf . USCIS's press release is available at http://www.uscis.gov/files/pressrelease/FinalFeeRulePressRelease052907.pdf . Questions and answers from USCIS are available at http://www.uscis.gov/files/pressrelease/FinalFeeRuleQsAs052907.pdf .

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6. USCIS Announces Direct Filing for More Forms

U.S. Citizenship and Immigration Services (USCIS) announced new "Direct Filing" instructions for additional immigration forms that were transitioned last year into the "Bi-Specialization" initiative. Direct filing is the process by which USCIS requires applicants to file their petitions and applications with the USCIS service center that will process the filings, based on the place of temporary employment or place of residence. The center where they file also will generate the receipt notice and complete the adjudication.

Effective July 30, 2007, the following forms are included in the direct filing process: Form I-129F (Petition for Alien Fiancé(e)), Form I-131 (Application for Travel Document), Form I-140 (Immigrant Petition for Alien Worker), Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant), Form I-485 (Application To Register Permanent Residence or Adjust Status), Form I-765 (Application for Employment Authorization), and Form I-907 (Request for Premium Processing Service). USCIS will implement direct filing incrementally for all remaining petition and application forms transitioned into the Bi-Specialization initiative.

The July 30 effective date coincides with the effective date of the fee increase for all immigration benefit applications and petitions. During the first 30 days of direct filing (July 30 to August 28), USCIS will not reject any form incorrectly filed at the prior filing location. Applicants must include the correct fee and must meet all other requirements for a proper filing, however. Beginning on or after August 29, 2007, USCIS will reject any of the forms listed above that are filed with the incorrect filing location.

USCIS's notice is available at http://www.uscis.gov/files/pressrelease/UpdateDirectFiling062107.pdf .

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7. California Service Center Experiencing Delays

U.S. Citizenship and Immigration Services' California Service Center (CSC) is experiencing system problems that are causing delays in the printing of certain notices. USCIS said it believes the delays are primarily affecting approval notices for cases decided between April 2007 and the present, although production of some receipt notifications may be affected as well. USCIS said it "is attempting to identify the source of the problem and generate the delayed notices as quickly as possible." See http://www.uscis.gov/files/pressrelease/UpdateCSCSystems062607.pdf for the CSC's interim procedures.

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8. DOL Updates Guidance on H-2B Labor Certification for Nonagricultural Workers

The Department of Labor has released updated guidance for State Workforce

Agencies (SWAs) and Employment and Training Administration National Processing Centers (NPCs) on processing H-2B temporary worker applications in nonagricultural occupations.

On April 4, 2007, the Department issued TEGL 21-06, which updated procedures for SWAs and NPCs to use in the processing of temporary labor certification applications under the H-2B program. The Department then held two public briefing sessions in Chicago and Atlanta on May 1 and May 4, 2007, to inform employers and other stakeholders of the updated processing guidance contained in TEGL 21-06. The attendees raised important questions and concerns, and the Department issued new guidance to outline certain modifications to TEGL 21-06 as a response to the issues raised and to improve the processing of H-2B applications by the SWAs and NPCs.

In the guidance, the Department reminds employers and other stakeholders of their right to request review of an SWA prevailing wage determination by the NPC; provides notification that the NPCs will no longer accept incomplete applications for processing from the SWAs; establishes a process for NPC Certifying Officers to issue a Request for Information (RFI) in certain circumstances; outlines the conditions under which NPC Certifying Officers may grant a partial temporary labor certification to an employer; and advises employers of the right to file a new application in circumstances where the NPC Certifying Officer issues a notice that a certification is denied. These modifications replace and supersede the previous corresponding operating procedures issued under TEGL 21-06, and apply to all pending and new temporary labor certification applications received by the SWAs on or after June 1, 2007.

The updated guidance is available at http://www.foreignlaborcert.doleta.gov/pdf/tegl21-06c1.pdf . A fact sheet is available at http://www.foreignlaborcert.doleta.gov/pdf/H-2Stakeholder_Factsheet_060607.pdf .

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9. SSA Releases Guidance on Social Security Number Mismatches

The Social Security Administration (SSA) has released new technical guidance on the return file format for online Social Security Number verifications,

effective August 25, 2007.

In general, there are two Internet verification options employers may use to verify that employee names and Social Security numbers match the SSA's records. An employer may verify up to 10 names and SSN's (per screen) online and receive immediate results, such as to verify new hires. An employer also may upload overnight files of up to 250,000 names and SSNs and usually receive results the next government business day, the SSA said. This option may be used to verify an entire payroll database or when hiring a large number of workers. Although the service is available to all employers and third-party submitters, it can only be used to verify current or former employees and only for wage reporting (Form W-2) purposes.

The SSA's new guidance is available at http://www.ssa.gov/employer/SSNVSTechfactSheet07.pdf . Additional information and instructions on how to use the Social Security Number Verification Service are available at http://www.ssa.gov/employer/ssnv.htm .

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