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US IMMIGRATION & NATIONALITY LAW

NOVEMBER 2007 IMMIGRATION UPDATE

Posted on November 2, 2007 by Cyrus Mehta

Headlines:

- **1.** **Backlogged Immigration Cases 'Could Take Years' to Process, USCIS Says; No Forward Movement of Cut-Off Dates** - USCIS faces huge backlogs because of fee changes combined with confusion over the cut-off date for employment-based applications.
- **2.** **Talent Pool Increasingly Global: EU Blue Cards Proposed, Migrant Policy Web Site Launched** - Will the European Union and other countries' aggressive recruitment strategies leave the U.S. behind in the dust?
- 3. **USCIS Streamlines Readmission for Certain H and L Adjustment Applicants** - The rule removes the requirement that such persons present a receipt notice for their adjustment applications when returning to the U.S. from travel abroad.
- 4. **Labor Dept. Cracks Down on PERM Fraud, Increases Audits** - The risks are high for both employers and attorneys .
- **5.** **Court Issues Preliminary Injunction on No-Match Letter Rule** - The court noted that the planned mailing of the no-match letters and accompanying DHS guidance would have resulted in the "termination of employment to lawfully employed workers."
- **6.** **Congressional Roundup: H-1Bs, Seasonal Workers, Dream Act** - Various immigration-related measures are being considered or have been rejected.
- **7.** **H-2B Half-Year Cap Reached** - USCIS has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the first half of fiscal year 2008.
- **8.** **DHS, New York Reach Agreement on Enhanced Driver's License** - Gov. Spitzer noted that two types of licenses would be issued, federal and non-federal.

- **9.** **USCIS Announces H-2A Centralized Filing Location** - USCIS has established a unit dedicated to processing H-2A petitions at the California Service Center.
- **10.** **GAO Report Released: Removal Decisions** - The GAO recommended that ICE update its guidance and ensure that officers are provided timely information on legal developments affecting their decisions.

Details...

1. Backlogged Immigration Cases 'Could Take Years' to Process, USCIS Says; No Forward Movement of Cut-Off Dates

U.S. Citizenship and Immigration Services faces a large backlog of immigration cases because of fee changes that led to a rush in applications filed in advance of the increases, combined with confusion over the cut-off date for employment-based change or adjustment of status applications. The latter confusion, the *Daily Labor Report* noted, was caused by an announcement effective July 2 and rescinded two weeks later by the Department of State's Visa Office that employment-based visa numbers were no longer available for the remainder of the fiscal year.

Michael Aytes, USCIS's Associate Director for Domestic Operations, was quoted in the *Report* as noting that USCIS received over 2.5 million applications during July and August, including 300,000 employment-based adjustment applications. "It could take years to process all of the applications and issue all the visas," Mr. Aytes said. The *Report* noted that applicants have some protection in the form of more portability for their current visas, allowing them to change jobs more easily. Mr. Aytes said that USCIS is considering some streamlining measures to speed things up, including the possibility of handling specific industries within a single USCIS office that is familiar with the unique demands of that industry, similar to what has already been done for sports teams.

Mr. Aytes also said that USCIS doesn't want a repeat of last year's H-1B debacle, where the H-1B numerical limit for fiscal year 2008 was met the first day applications were received, resulting in a lot of wasted time on preparing and processing applications that went nowhere. "While there was a significant use of resources by USCIS, I am even more concerned about the time and effort used in preparing the applications," he said. USCIS is considering a pre-registration option that would allow the filing of a more limited application, with the remaining portions to be filed if the applicant succeeds. Mr. Aytes

added that he wants "to do everything I can to dissuade" employers from filing multiple petitions for one worker based on different criteria.

Meanwhile, the Visa Bulletin for November 2007 reports that there has been no forward movement of the employment cut-off dates. "The reason for this is that it is still too early to see what impact the movement of the cut-off dates toward the end of FY 2007 may have on demand," the Department noted. Depending on the rate of demand being received from USCIS offices for adjustment of status cases, some forward movement of dates may be possible for December. The Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3827.html .

Back to Top

2. Talent Pool Increasingly Global: EU Blue Cards Proposed, Migrant Policy Web Site Launched

Will the European Union (EU) and other countries' aggressive recruitment strategies leave the U.S. behind in the dust? Robert Hoffman of Oracle warned that could be the case if the U.S. continues down its current discouraging path. With the proposed EU "blue card" for highly skilled workers looming on the horizon, Mr. Hoffman noted in the October 25, 2007, edition of *Information Week* that "he competition for talent is truly global" and that the EU "clearly recognizes the challenges of an aging population and that highly talented individuals are job generators." Franco Frattini, European Commissioner for Justice, Freedom, and Security, said in a speech at the London School of Economics that it is essential for the EU to "become a real magnet for highly skilled immigrants."

The proposed renewable EU blue card would allow workers to live and work in an EU nation for three years after an application process taking three months, and would allow them to bring their immediate families. Technology companies are likely to invest and expand wherever it is easier for tech employees to work, Mr. Hoffman said, noting that "he competition for talent is truly global." Hoffman said that "if the U.S. immigration policy continues on this path, what choice do we have" but to begin looking elsewhere to expand its options.

A recent graduate of Cornell University who has accepted a postdoctoral stint at the National Institutes of Health commented, "I certainly can't put my life on hold for another 5 to 10 years waiting for a green card, and most definitely

cannot live permanently in this toxic anti-immigrant environment." Another said, "I have recently been transferred to the USA by my company. I can see the red tape and the 10-year wait to get a green card. I don't have the patience or inclination to stay past my initial visa when I can work anywhere in Europe by virtue of my EU passport. The red tape here, and the abrasiveness towards foreigners in general, make this an unattractive place to be."

Leonard Lynn, a professor of management policy at Case Western Reserve University, and Harold Salzman, a sociologist and senior research associate at the Urban Institute in Washington, D.C., recently authored "The Real Global Technology Challenge" for *Change* magazine. They recently asked a class of 80 engineering and science graduates in India how many wanted to go to the U.S. A decade ago, the authors said, almost every hand would have gone up. But now, nobody raised their hand. "Why go to the U.S. when all the opportunity is in India?" the Indian graduates suggested. The authors also noted that Chinese managers they met who had received U.S. degrees were choosing to return to China rather than stay in the U.S., as they had previously planned to do, because opportunities in China were becoming more appealing.

The authors believe that the U.S. is "no longer the universally preferred home for the global technology elite," observing that increasing numbers of scientists and engineers who were educated and have built successful careers in the U.S. are returning to China, India, and other countries, and that many in the younger generation are simply not coming to the U.S. in the first place. Noting these trends, the authors note that "the policy and technology communities are sounding the alarm about an impending U.S. fall from scientific and technological dominance." The declining appeal of science and engineering for American students is compounding the problem, the authors argue, while the numbers of engineers and scientists trained in China and India continue to rise. A summary of this article is available at http://www.heldref.org/change/feas1.php .

Meanwhile, the British Council and Migration Policy Group, leading a consortium of 25 organizations, has launched a Web site, the Migrant Integration Policy Index (MIPEX), which measures policies to integrate migrants in 25 European Union (EU) Member States and three non-EU countries. MIPEX, which is co-financed by the EU, uses over 100 policy indicators to create a multi-dimensional picture of migrants' opportunities to participate in European societies. MIPEX covers six policy areas that shape a migrant's journey to full

citizenship: labor market access, family reunion, long-term residence, political participation, access to nationality, and anti-discrimination. The site includes country profiles and an interactive mapping and charting function.

Over the coming months, the MIPEX Group will host a series of "launch debates" in various European cities. Information on the debates is available at http://www.integrationindex.eu/events/ . MIPEX, and abridged versions of the study, will be available in a number of languages, including English, French, Spanish, German and Polish. MIPEX is available at http://www.integrationindex.eu/ .

Back to Top

3. USCIS Streamlines Readmission for Certain H and L Adjustment Applicants

U.S. Citizenship and Immigration Services (USCIS) published a final rule on November 1, 2007, to streamline the readmission of certain H and L nonimmigrants who have applied for adjustment of status to become permanent residents. The rule removes the requirement that such persons present a receipt notice (Form I-797, Notice of Action) for their adjustment applications when returning to the U.S. from travel abroad.

H-1 nonimmigrants affected by this rule include those under the H-1B classification for specialty occupation workers and the H-1C classification for certain registered nurses. L-1 nonimmigrants affected by this rule include those under the L-1A classification for certain intracompany transferees who are managers or executives, and the L-1B classification for specialized knowledge workers. Dependents of affected H-1s and L-1s, who are admitted as H-4s and L-2s, are also relieved of the receipt requirement.

USCIS also noted that H-1 and L-1 nonimmigrants (and their H-4 or L-2 dependents) are now exempt from the advance parole requirement. Previously, they were required to present a receipt for their adjustment application at the time of readmission to the U.S. following foreign travel. The final rule eliminates the "unnecessary burden" of presenting this receipt, USCIS said, because the information in the receipt is in USCIS databases available to immigration inspectors and adjudicators. Upon application for readmission to the U.S., they still must provide evidence to a U.S. Customs and Border Protection (CBP) Inspector at the port of entry that they are:

- Still eligible for H-1 or L-1 status,
- Coming to resume employment with the same employer for whom they were previously employed, and
- In possession of a valid H-1 or L-1 visa, if required.

In the case of H-4 or L-2 dependents, the spouse or parent through whom they received their H-4 or L-2 status must meet the above requirements and the dependent must remain eligible for admission in H-4 or L-2 classification.

The full text of the final rule is available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-21506.pdf .

Back to Top

4. Labor Dept. Cracks Down on PERM Fraud, Increases Audits

In response to the Department of Labor's final rule, effective July 16, 2007, requiring, among other things, that employers pay the costs of applications filed under the Program Electronic Review Management (PERM) program, Catherine L. Haight, a Los Angeles-based immigration attorney, said the risks are high for both employers and attorneys and that the Department would not hesitate to enforce the rule. She was quoted in the *Daily Labor Report* as noting that "hey are taking this rule very seriously and are willing to consider any attempt to get around the rule as fraud." Others suggested that the Department would seek out employers and attorneys as examples and conduct more audits of the rationale for applications to show they are serious about rooting out fraud. On the positive side, wait times have been reduced drastically. Academy of Business Immigration Lawyers (ABIL) member firms report increasingly frequent audits, often conducted on a random basis. Sources at the Department have confirmed this trend. If audit frequency continues to climb, processing times will climb once again. ABIL will monitor this situation with the agency closely and report as further news emerges.

The Academy of Business Immigration Lawyers (ABIL), of which this firm is a member, advises filing PERM applications with great care. Contact our firm for guidance.

Back to Top

5. Court Issues Preliminary Injunction on No-Match Letter Rule

On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO, et al. v. Chertoff, et al*. (N.D. Cal. Case No. 07-CV-4472 CRB). The preliminary injunction enjoins and restrains the Department of Homeland Security (DHS) and the Social Security Administration (SSA) from implementing the final rule, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." Plaintiffs are a consortium of labor and business groups. The court said the balance of hardships "tips sharply in plaintiffs' favor" and that plaintiffs have "raised serious issues going to the merits." The court noted that the planned mailing of the no-match letters and accompanying DHS guidance under the final rule, within the timeline allotted, would have resulted in the "termination of employment to lawfully employed workers" because there are numerous errors in the SSA records, and that the "threat of criminal prosecution" represents a major change in DHS policy. Approximately eight million workers would have been affected, and the letters would have gone to about 140,000 employers. The preliminary injunction does not preclude the SSA from sending out its traditional no-match letters without the final rule language.

The preliminary injunction is available at http://www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_order_2007-10-10.pdf .

Back to Top

6. Congressional Roundup: H-1Bs, Seasonal Workers, Dream Act

The Senate recently passed legislation that would increase the H-1B education and training fee to $5,000 and allocate some previously unused green card numbers to nurses and physical therapists upon payment of a $1,500 fee. The House and Senate are now negotiating in conference the details of the legislation, which is part of Departments of Labor, Health and Human Services and Education, and Related Agencies Appropriations Act of 2008. Reportedly, the fee hike and nurse allocations were removed in conference.

The fee increase was intended to fund additional scholarships for American students in mathematics, technology, and health care fields. Compete America said the tripling of the H-1B fee would make the H-1B program cost-prohibitive, especially for smaller businesses, but some IT workers' groups countered that it would help to prevent displacement of U.S. workers for lower-paid foreign workers. The *Wall Street Journal* pointed out in an editorial published on

November 2, 2007, that in addition to the hiring fee, current law already requires H-1B professionals to be paid the higher of the prevailing wage or actual wage paid to U.S. workers in similar positions. "So it's not as if U.S. businesses pursue foreign engineers, computer scientists and the like because they're cheaper to employ. Nor are these foreign workers overrunning the country and displacing Americans. In 2006, new H-1B professionals comprised 0.07 percent of the labor force."

As noted last month, a newly introduced bill, the "Save Our Small and Seasonal Businesses Act of 2007," would continue to exempt returning seasonal workers from an annual numerical limit of 66,000, after the exemption's expiration on September 30, 2007. This legislation, introduced by Sens. Barbara Mikulski (D-Md.) and John Warner (R-Va.), is supported by the U.S. Chamber of Commerce and various business organizations.

Also, the Senate rejected, 52 to 44, the Development, Relief and Education for Alien Minors (Dream) Act, which would have provided undocumented children who were brought to the U.S. before the age of 16 with a path to permanent residence if they served in the military or completed two years of higher education. Sen. Richard J. Durbin (D-Ill.), a supporter of the bill, said that "to turn on these children and treat them as criminals is an indication of the level of emotion and, in some cases, bigotry and hatred that is involved in this debate."

Back to Top

7. H-2B Half-Year Cap Reached

U.S. Citizenship and Immigration Services (USCIS) announced on October 1, 2007, that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap for the first half of fiscal year 2008. USCIS established September 27, 2007, as the "final receipt date" for new H-2B worker petitions requesting employment start dates before April 1, 2008. The final receipt date is the date on which USCIS determines that it has received enough cap-subject petitions to reach the limit of 33,000 H-2B workers for the first six months of FY 2008.

Under current law, USCIS noted, a returning worker who was counted toward the H-2B numerical limit during FYs 2004, 2005 or 2006 was exempt from being counted against the FY 2007 H-2B cap. USCIS noted that Congress has not yet

reauthorized or extended the returning worker provisions for FY 2008. Absent such reauthorization or extension, USCIS must count all petitions requesting H-2B workers for new employment with an employment start date of October 1, 2007, or later toward the FY 2008 H-2B cap.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on September 27, 2007. Petitions for workers who are currently in H-2B status do not count toward the congressionally mandated bi-annual H-2B cap. USCIS will continue to process petitions filed to extend the stay of a current H-2B worker in the United States; change the terms of employment for current H-2B workers and extend their stay; or allow current H-2B workers to change or add employers and extend their stay.

The announcement is available at http://www.uscis.gov/files/pressrelease/H2B_1oct07.pdf .

Back to Top

8. DHS, New York Reach Agreement on Enhanced Driver ' s License

Secretary of Homeland Security Michael Chertoff and New York's Governor Eliot Spitzer jointly announced on October 27, 2007, that New York and the Department of Homeland Security (DHS) have reached an agreement to launch a program to issue an "enhanced" driver's license in accordance with security concerns and provisions of the Western Hemisphere Travel Initiative and the REAL ID Act. Secretary Chertoff said the enhanced license will "help ensure the security of New York's northern border" and ensure economic vitality. He said that the DHS hopes to announce a final regulation shortly "that provides a sensible solution from a cost, convenience and privacy perspective." Gov. Spitzer noted that "iven that as a result of the expected final REAL ID regulations that we understand will address our previous concerns, New York's license will already be close to compliance with the new federal requirements. So we now believe we can implement both REAL ID and our policy change at the same time."

In response to questions about whether the new license would be issued to undocumented individuals, Gov. Spitzer noted that two types of licenses would be issued. "he only difference between the REAL ID license and the non-REAL ID license, federal versus the non-federal, will be the demarcation in print that will

say, on the non-REAL ID license, 'Not valid for federal identification.' " The latter, he said, would not allow the licensee to board a plane or cross the border -- in short, to do anything other than drive.

Meanwhile, Sen. Hillary Clinton's remarks during the debate in Philadelphia, Pennsylvania, on October 30, 2007, about allowing undocumented persons to obtain a New York driver's license produced heated exchanges with the other candidates. The driver's license issue, and immigration in general, are expected to be a highlight of the upcoming presidential campaign, said commentator Chris Matthews. Stay tuned.

The DHS- New York announcement is available at http://www.dhs.gov/xnews/releases/pr_1193749447502.shtm .

Back to Top

9. USCIS Announces H-2A Centralized Filing Location

U.S. Citizenship and Immigration Services (USCIS) has established a unit dedicated to processing H-2A petitions at the California Service Center (CSC). The CSC has established mailing addresses for all H-2A filings. Effective today, H-2A petitioners are encouraged to use the addresses listed in the announcement for all H-2A petitions(this change will become mandatory once USCIS publishes a notice in the *Federal Register*). The announcement, which contains additional advice about filing H-2A petitions, is available at http://www.uscis.gov/files/pressrelease/H2AUpdate17Oct07.pdf .

Back to Top

10. GAO Report Released: Removal Decisions

In a new Government Accountability Office (GAO) report, "Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making," the GAO found that the Bureau of Immigration and Customs Enforcement (ICE) has begun to update and enhance training curricula to better support officer decision-making but that the agency has not taken steps to ensure that written guidance to promote the appropriate exercise of discretion during apprehension and removal is comprehensive and up to date and has not established time frames for updating guidance. For example, the GAO noted, field operational manuals have not been updated to provide information about the appropriate exercise of discretion in light of a recent expansion of

ICE worksite enforcement and fugitive operations, in which officers are more likely to encounter persons with humanitarian issues or who are not targets of investigations. Also, ICE does not have a mechanism to ensure the timely dissemination of information on legal developments that would enable officers to make decisions in line with the most recent interpretations of immigration law. As a result, the GAO said, ICE officers are "at risk of taking actions that do not support operational objectives and making removal decisions that do not reflect the most recent legal developments."

The GAO recommended that ICE update its guidance to include factors officers should consider when making apprehension and removal decisions and establish time frames for this task; ensure that officers are provided timely information on legal developments affecting their decisions; and evaluate the costs and alternatives for developing a mechanism to analyze officer decision-making systematically. The Department of Homeland Security agreed and identified actions ICE plans to take to implement the GAO's recommendations. The report, GAO-08-67, is available at http://www.gao.gov/new.items/d0867.pdf .

Back to Top