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

JANUARY 2009 IMMIGRATION UPDATE

Posted on January 6, 2008 by Cyrus Mehta

Headlines:

- **1.** **U.S. Chamber of Commerce Challenges Legality of E-Verify Requirement for Federal Contractors** - The U.S. Chamber of Commerce filed a lawsuit against the DHS challenging the legality of requiring federal contractors to begin using E-Verify by January 15.
- **2.** **DHS Issues Interim Rule on I-9 Verification Documents** - The interim rule, among other things, requires that all documents presented during the verification process be unexpired.
- **3.** **US-VISIT Expanded To Nearly All Noncitizens** - The population of those subject to US-VISIT requirements has been expanded to nearly all non-U.S. citizens, including lawful permanent residents, with some exceptions.
- **4.** **New York Documents Designated for Western Hemisphere Travel Initiative** - DHS has designated enhanced driver's licenses and identity documents issued by New York State as acceptable identity and citizenship documents for entering the U.S. at land and sea ports of entry.
- **5.** **EADs Extended for Salvadoran TPS Beneficiaries** - USCIS announced an automatic extension of the validity of Employment Authorization Documents (EADs) for eligible Salvadoran TPS beneficiaries for six months, through September 9, 2009.
- **6.** **Company Agrees To Pay Largest Settlement Ever in Worksite Enforcement Case** - IFCO, the largest pallet management services company in the U.S., has agreed to pay $20.7 million in civil forfeitures and penalties for employing undocumented workers.
- **7.** **DHS Issues Final Rule, Notice on H-2B Temporary Nonagricultural Workers** - DHS has amended its H-2B regulations regarding temporary nonagricultural workers and their U.S. employers.

- **8.** **DHS Issues H-2A Final Rule** - DHS has amended its H-2A regulations regarding temporary and seasonal agricultural workers and their U.S. employers.
- **9.** **USCIS Announces New Mailing Address Format for National Capital Region Offices** - USCIS announced a new address format for offices within the National Capital Region (NCR), affecting all USCIS headquarters offices, the Arlington Asylum Office, and the Washington District Office.
- **10.** **Activities of CDMA** -Alliance of Business Immigration Lawyers speakers at the American Immigration Lawyers Association's (AILA) New York Chapter annual immigration law symposium, held at the New York Marriott Marquis on December 3, 2008, included Cyrus Mehta.

Details...

1. U.S. Chamber of Commerce Challenges Legality of E-Verify Requirement for Federal Contractors

Under new regulations, federal contractors and subcontractors will be required to begin using the E-Verify online work authorization verification system starting January 15, 2009. The U.S. Chamber of Commerce filed a lawsuit on December 23, 2008, against the Department of Homeland Security (DHS) that challenges the legality of that requirement.

Joining the Chamber as co-plaintiffs in the lawsuit, filed in the U.S. District Court for the District of Maryland, were the Associated Builders and Contractors, the Society for Human Resources Management, the American Council on International Personnel, and the HR Policy Association.

Robin Conrad, executive vice president of the National Chamber Litigation Center (NCLC), the Chamber's public policy law firm, said, "the Administration can't use an Executive Order to circumvent federal immigration and procurement laws. Federal law explicitly prohibits the secretary of Homeland Security from making E-Verify mandatory or from using it to reauthorize the existing workforce."

The Chamber's lawsuit challenges the government's use of an Executive Order coupled with federal procurement law to make E-Verify mandatory for federal contractors with projects exceeding $100,000 and for subcontractors with projects exceeding $3,000. The Chamber also challenged expanding E-Verify to require the reauthorization of existing workers.

"The DHS intends to expand E-Verify on an unprecedented scale in a very short

timeframe, and to impose liability on government contractors who are unable to comply," said Randy Johnson, vice president of Labor, Immigration and Employee Benefits at the Chamber. "Given the current economy, now is not the time to add more bureaucracy and billions of dollars in compliance costs to America's businesses."

The Chamber is the world's largest business federation, representing more than 3 million businesses and organizations of every size, sector, and region. The American Immigration Lawyers Association (AILA), among others, applauded the Chamber's challenge. Charles H. Kuck, president of AILA, noted, "The idea of using an Executive Order to go beyond clear federal immigration and procurement laws and to impose liability on government contractors who are unable to comply is simply misguided and unlawful."

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2. DHS Issues Interim Rule on I-9 Verification Documents

The Department of Homeland Security (DHS) is amending its regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers for employment authorization verification (Form I-9). The interim rule, effective February 9, 2009:

- requires that all documents presented during the verification process be unexpired;
- eliminates List A identity and employment authorization documentation forms I-688, I-688A, and I-688B (Temporary Resident Card and outdated Employment Authorization Cards);
- adds foreign passports containing certain machine-readable immigrant visas to List A;
- adds to List A as evidence of identity and employment authorization valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), along with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI ; and
- makes technical updates.

The DHS noted that it issues temporary I-551 stamps to legal permanent residents (LPRs) on either unexpired foreign passports or the Arrival-Departure Record (Form I-94), to serve as temporary documentation of LPR status while

they wait for the actual Form I-551. Although the regulations refer to temporary I-551 "stamps," the DHS noted that the Department of State has been affixing machine-readable immigrant visas (MRIVs) that contain a pre-printed temporary I-551 notation in the foreign passports of those immigrating to the U.S. for several years. The pre-printed temporary I-551 notation is triggered after the bearer is admitted to the U.S. as an LPR. To update the regulations to reflect this alternate temporary I-551 document, this rule modifies the reference in List A to temporary I-551 stamps on unexpired foreign passports to include pre-printed temporary I-551 notation on MRIVs. Because the pre-printed notation is not included on the I-94, this rule does not make any changes to regulatory references to temporary I-551 stamps on I-94s.

The rule also updates the list of acceptable documents and receipts by including "Form I-94A" next to each reference to the I-94 because the I-94A is nearly identical to the I-94 except that all fields are computer-generated rather than annotated by hand.

The interim rule also replaces the term "employment eligibility" with "employment authorization." The amended I-9 form reflecting these and other form-related changes was published as an attachment to this rule for "informational purposes." USCIS's Web site still has the version of the I-9 form that was revised June 5, 2007.

The interim rule is available at
http://edocket.access.gpo.gov/2008/pdf/E8-29874.pdf.
Questions and answers are available at
http://www.uscis.gov/files/article/I9_qa_12dec08.pdf.

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3. US-VISIT Expanded To Nearly All Noncitizens

The Department of Homeland Security has published a final rule, effective January 18, 2009, that expands the population of those who will be subject to US-VISIT requirements to nearly all non-U.S. citizens, including lawful permanent residents. Exceptions include Canadian citizens seeking short-term admission for business or pleasure under B visas and individuals traveling on A and G visas, among others. Those subject to US-VISIT may be required to provide finger scans, photographs, or other biometric identifiers upon arrival in the U.S. Currently, noncitizens arriving at a U.S. port of entry with a nonimmigrant visa, or those traveling without a visa under the Visa Waiver

Program, are subject to US-VISIT requirements with certain limited exceptions.

On August 31, 2004, the Department promulgated an interim final rule that expanded the US-VISIT program to include those seeking admission under the Visa Waiver Program and travelers arriving at designated land border ports of entry. This rule also finalizes that interim final rule and addresses public comments.

The final rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-30095.pdf.

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4. New York Documents Designated for Western Hemisphere Travel Initiative

Effective December 2, 2008, the Department of Homeland Security has designated enhanced driver's licenses and identity documents (EDLs) issued by the state of New York as acceptable identity and citizenship documents for entering the U.S. at land and sea ports of entry. U.S. citizens possessing these EDLs will be permitted to present the EDLs, in lieu of passports, as acceptable documents under the Western Hemisphere Travel Initiative (WHTI) when entering the U.S. at land and sea ports of entry.

On October 27, 2007, the Secretary of Homeland Security and the Governor of New York signed a Memorandum of Agreement (MOA) to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border crossing purposes. Under the terms of the agreement between DHS and the State of New York, New York will only issue EDLs to U.S. citizens. EDLs also may be issued as photo identification cards to non-drivers.

The notice is available at http://edocket.access.gpo.gov/2008/pdf/E8-28535.pdf.

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5. EADs Extended for Salvadoran TPS Beneficiaries

USCIS announced an automatic extension of the validity of Employment Authorization Documents (EADs) for eligible Salvadoran TPS beneficiaries for six months, through September 9, 2009. Initially, the expiration date for Salvadoran EADs was March 9, 2009. USCIS has automatically extended the EAD validity period to allow for the agency to process and re-issue new EADs for such beneficiaries.

USCIS announced on September 24, 2008, that it would extend through September 9, 2010, TPS status for nationals of El Salvador who have already been granted TPS. Salvadoran nationals (and people having no nationality who last habitually resided in El Salvador) who had been granted TPS must have re-registered for the 18-month extension during the 90-day re-registration period that ended on December 30, 2008. TPS does not apply to nationals of El Salvador who entered the U.S. after February 13, 2001.

Details on the automatic extension of the EADs, including the application requirements and procedures, were published on December 15, 2008, at http://edocket.access.gpo.gov/2008/pdf/E8-29511.pdf.

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6. Company Agrees To Pay Largest Settlement Ever in Worksite Enforcement Case

After a large worksite enforcement operation conducted by U.S. Immigration and Customs Enforcement (ICE), IFCO Systems North America, headquartered in Houston, Texas, and the largest pallet management services company in the U.S., has agreed to pay $20.7 million in civil forfeitures and penalties over four years for employing undocumented workers at its plants.

The settlement amount includes $2.6 million in back pay and penalties relating to IFCO's overtime violations with respect to 1,700 of its pallet workers. IFCO is also paying $18.1 million in civil forfeitures that will be available to support future law enforcement activities.

Following a tip to ICE in February 2005 that undocumented workers at an IFCO plant in Albany, New York, were observed ripping up their W-2 forms, on April 19, 2006, ICE agents, in concert with other federal and state authorities, conducted a worksite enforcement action at over 40 IFCO pallet plants in 26 states, which resulted in the detention of 1,182 undocumented workers. The U.S. Attorney's Office in New York has prosecuted several IFCO managers and employees for criminal offenses associated with the employment of those workers. To date, nine IFCO managers and employees have entered guilty pleas related to such criminal conduct. Four managers are currently pending trial on a felony indictment in the U.S. District Court in the Northern District of New York and the investigation of IFCO employees is continuing. The IFCO settlement agreement concerns only the liability of the corporation and does not address any pending or possible future criminal charges against individual

employees, ICE noted.

ICE found that several IFCO managers and employees harbored and transported undocumented workers, and encouraged and induced them to remain in the U.S. as pallet workers. An analysis of the payroll information IFCO submitted to the Internal Revenue Service (IRS) and the Social Security Administration (SSA), and the hiring patterns and practices at IFCO, suggested to ICE that from 2003 through April 2006, as many as 6,000 undocumented workers were employed at IFCO pallet plants.

IFCO received repeated notices from the SSA and others, dating back to at least 2000, of irregularities in the social security numbers used for employment purposes by many of its pallet workers. ICE found that IFCO failed to take significant measures to verify the social security numbers of these workers, and in 2004 and 2005, failed to make any effort to address the use of invalid social security numbers by numerous pallet employees. Investigative entities further concluded that at 30 of IFCO's pallet plants, the company owed back wages to piece-wage pallet workers, the vast majority of whom were undocumented. Under the settlement agreement, ICE noted, IFCO acknowledged and accepted responsibility for the unlawful conduct of its managers and employees, as described in the agreement. The agreement includes a compliance and reporting program intended to prevent the employment of undocumented workers at IFCO plants in the future. The company will take remedial actions in hiring, such as using the E-Verify online work authorization verification system for all new hires, and will verify the social security numbers of all IFCO employees through SSA.

IFCO also must maintain an employee hotline to receive reports of any suspected violations of law at the company. The agreement runs through the year 2012, at which time, if the company has been in full compliance with all of the agreement's terms and conditions, the U.S. Attorney's Office will not seek to prosecute the company for any criminal charges related to the conduct of its employees before April 2006.

"Today's announcement that IFCO Systems North America will pay the largest settlement amount ever in a worksite enforcement case and the fact that nine IFCO managers have admitted their guilt related to the employment of illegal aliens will send a powerful message that ICE will investigate and bring to justice companies which hire illegal workers," said John P. Torres, Acting Assistant

Secretary of Homeland Security for ICE.

Andrew T. Baxter, Acting United States Attorney, stated, "This settlement accomplishes the government's objective of deterring employers who might seek to subvert the immigration laws of this country. The Agreement severely punishes IFCO for its serious immigration and employment violations; but it also allows the corporation to continue its operations, so that its lawful employees and innocent shareholders do not suffer the consequences of a business failure in this economy. It is our hope that the compliance and reporting requirements under the agreement will serve as a model for other businesses."

ICE's announcement is at http://www.ice.gov/pi/nr/0812/081219albany.htm.

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7. DHS Issues Final Rule, Notice on H-2B Temporary Nonagricultural Workers

The Department of Homeland Security (DHS) has amended its H-2B regulations regarding temporary nonagricultural workers and their U.S. employers. The final rule, effective January 18, 2009, generally removes the requirement for H-2B petitioners to state on petitions the names of prospective H-2B workers who are outside the U.S. The rule also reduces the waiting period from six months to three months for an H-2B worker who has reached his or her maximum three-year period of stay in H-2B nonimmigrant status before such person may seek an extension of nonimmigrant stay, change of status, or readmission to the U.S. in any H or L nonimmigrant status.

The rule also adjusts the definition of "temporary services or labor," which is generally defined as a period of one year but could be for a specific one-time need of up to three years. The rule also eliminates the DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. The rule also prohibits H-2B petitioners from requesting an employment start date on the Petition for a Nonimmigrant Worker (Form I-129) that differs from the date of need listed on the approved temporary labor certification. The final rule requires H-2B petitioners to notify the DHS when the H-2B worker fails to report for work, is terminated before completing the work for which he or she was hired, or absconds from the worksite.

The final rule also precludes employers from passing the cost of recruiter fees

charged by a petitioner, agent, facilitator, recruiter, or similar employment service to prospective H-2B workers as a condition of an offer of H-2B employment. Under this rule, however, employers and H-2B workers may agree that certain transportation costs and government-imposed fees be borne by H-2B workers, if the passing of such costs to these workers is not prohibited under the Fair Labor Standards Act or any other statute.

Moreover, the rule enforces existing penalties in the case of an employer who fails to meet any of the conditions of the H-2B petition, or who willfully misrepresents a material fact in the H-2B petition. Employers who fail to meet the H-2B conditions or who willfully make material misrepresentations on an H-2B petition may be precluded from approval for a period of up to five years of any H (except H-1B1), L, O, or P-1 nonimmigrant visa petition, or any immigrant visa petition described in section 204 of the INA.

Nationals from the following countries are eligible to participate in the H-2B visa program:

Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; and United Kingdom.

This rule also provides that DHS will publish a notice in the Federal Register listing the countries that the Departments of Homeland Security and State have designated as eligible for their nationals to participate in the H-2B program.

Finally, this rule establishes a pilot exit control program for certain H-2B workers, by requiring them to report their departures at designated ports of entry. U.S. Customs and Border Protection (CBP) published a notice in the Federal Register describing the procedures and requirements for participation in this pilot program at http://edocket.access.gpo.gov/2008/pdf/E8-29787.pdf.

The DHS also published a separate notice, effective January 18, 2009, announcing the manner in which H-2B petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of nonagricultural workers in H-2B nonimmigrant status or job placement fee information. Among other things, the notice sets forth the procedures for H-2B petitioners to notify USCIS when:

- an H-2B worker fails to report to work within five work days of the employment start date on the H-2B petition;
- when the temporary labor or services for which H-2B workers were hired is completed more than 30 days early; or
- when the H-2B worker absconds from the worksite or is terminated before the completion of the temporary labor or services for which he or she was hired.

Regulations require H-2B petitioners to retain evidence of such notification sent to USCIS for a one-year period.

The notice further provides the procedures for H-2B petitioners to notify USCIS, after an H-2B petition has been filed, within two work days of learning that an H-2B worker paid a fee or other compensation to a facilitator, recruiter, or similar employment service as a condition of the offer of obtaining the H-2B employment.

The text of the final rule is available at http://edocket.access.gpo.gov/2008/E8-30094.htm. The notice is available at http://edocket.access.gpo.gov/2008/E8-30098.htm. Another notice announcing the list of eligible H-2B countries is at http://edocket.access.gpo.gov/2008/E8-30114.htm.

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8. DHS Issues H-2A Final Rule

The Department of Homeland Security (DHS) has amended its H-2A regulations regarding temporary and seasonal agricultural workers and their U.S. employers. The final rule, effective January 17, 2009, lengthens the amount of time an agricultural worker may remain in the U.S. after his or her employment has ended and shortens the time period that an agricultural worker whose H-2A nonimmigrant status has expired must wait before he or she is eligible for H-2A nonimmigrant status again.

The rule also provides temporary employment authorization for agricultural workers seeking an extension of their H-2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user in good standing with the E-Verify employment eligibility verification program.

In addition, the rule modifies the current notification and payment requirements for employers when a worker fails to show up at the start of the

employment period, an H-2A employee's employment is terminated, or an H-2A employee absconds from the worksite. The rule also requires certain employer attestations and precludes the imposition of fees by employers or recruiters on prospective beneficiaries.

Under the final rule, the DHS also will revoke an H-2A petition if the Department of Labor revokes the petitioner's underlying labor certification.

Finally, the rule establishes criteria for a pilot program under which workers admitted on certain temporary worker visas at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographical information upon departure. U.S. Customs and Border Protection (CBP) will publish a notice designating which temporary workers must participate in the program, which ports of entry are participating in the program, and the types of information that CBP will collect from the departing workers.

Nationals from the following countries are eligible to participate in the H-2A visa program: Argentina; Australia; Belize; Brazil; Bulgaria; Canada; Chile; Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Indonesia; Israel; Jamaica; Japan; Mexico; Moldova; New Zealand; Peru; Philippines; Poland; Romania; South Africa; South Korea; Turkey; Ukraine; and United Kingdom.

The DHS also published a notice, effective January 17, 2009, announcing the manner in which petitioners must notify U.S. Citizenship and Immigration Services regarding their employment of agricultural workers in H-2A nonimmigrant status or job placement fee information. Among other things, the regulations require H-2A petitioners to provide notification to DHS within two work days in the following instances:

- when an H-2A worker fails to report to work within five work days of the employment start date on the H-2A petition or within five work days of the start date established by the petitioner, whichever is later;
- when the agricultural labor or services for which H-2A workers were hired is completed more than 30 days early; or
- when the H-2A worker absconds from the worksite or is terminated before the completion of agricultural labor or services for which he or she

was hired.

The regulations also require H-2A petitioners to retain evidence of the notification filed with DHS for a one-year period beginning from the date of the notification. Petitioners who use a different employment start date than that stated on the H-2A petition must retain evidence of the changed start date and make such evidence available for inspection by DHS officers for a one-year period beginning on the newly established employment start date.

The final rule is available at http://edocket.access.gpo.gov/2008/E8-29888.htm. The notice is available at http://edocket.access.gpo.gov/2008/E8-29786.htm. The list of eligible H-2A countries is at http://edocket.access.gpo.gov/2008/E8-29785.htm.

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9. USCIS Announces New Mailing Address Format for National Capital Region Offices

U.S. Citizenship and Immigration Services (USCIS) announced on December 3, 2008, a new address format for offices within the National Capital Region (NCR), affecting all USCIS headquarters offices, the Arlington Asylum Office, and the Washington District Office.

To ensure the timely delivery of USCIS mail, correspondence addressed to the affected offices should list a unique mailstop and corresponding ZIP code + 4 number. If the address does not list a mailstop and corresponding ZIP code + 4 number, the correspondence will still be delivered but may be subject to minor delays as a result of the new mail process.

The new format for the address of the Information and Customer Service Division, which handles all general inquiries, is:

Information and Customer Service Division MS 2260
U.S. Citizenship & Immigration Services
111 Massachusetts Ave. N.W.
Washington, D.C. 20529-2260

This address format change does not apply to USCIS offices outside the National Capital Region (such as the Baltimore District). It also currently does not apply to the Alexandria Application Support Center.

The notice is available at

http://www.uscis.gov/files/article/update_addresschange_3dec2008.pdf. The list of the unique mailstop and corresponding ZIP code + 4 number for each affected office is at http://www.uscis.gov/files/article/external_mailstop_plus_four_chart_3dec08.pdf.

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10. Activities of CDMA

Alliance of Business Immigration Lawyers speakers at the American Immigration Lawyers Association's (AILA) New York Chapter annual immigration law symposium, held at the New York Marriott Marquis on December 3, 2008, included Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm),

Mr. Mehta was on an AILA Web seminar panel on "Equivalency Degree Issues for Advanced Practitioners," held on December 11, 2008.

Mr. Mehta and Poorvi Chothani (bio: http://www.abil.com/lawyers/lawyers-chothani.cfm), both ABIL Global members, spoke in Pune, India, on January 2, 2009, in a program sponsored by the Indo-American Chamber of Commerce. Topics included immigration to the U.S. pre- and post-Obama, and employing foreign nationals in India.

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