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

FEBRUARY 2009 IMMIGRATION UPDATE

Posted on February 3, 2009 by Cyrus Mehta

Headlines:

1. **Prepare Early for H-1B Lottery** - The Alliance of Business Immigration Lawyers recommends contacting your ABIL member now to begin preparing your H-1B strategy and paperwork.
2. **New I-9 Form Available, USCIS Delays Change in List of Acceptable Documents**- The new form reflects the DHS's amended regulations governing the types of acceptable documents and receipts that employees may present to verify their work authorization.
3. **Rule Requiring Contractors to Use E-Verify Suspended Again, Until May 21** - The U.S. Chamber of Commerce said the federal government agreed to its request to postpone until May 21, 2009, implementation of the rule requiring federal contractors to use E-Verify.
4. **Several Visa Categories Show Movement in February** - Some categories advanced by several months; others retrogressed.
5. **VWP Travelers Must Apply for Security Clearance Online** - All eligible travelers who wish to travel under the VWP must apply for authorization using the Electronic System for Travel Authorization.
6. **DHS Announces VWP for Guam-Commonwealth of the Northern Mariana Islands** - The revised Guam-CNMI VWP allows visa-free entry beginning June 1, 2009, for nonimmigrant visitors from eligible countries to Guam and the CNMI for business or leisure travel, and extends visiting time from 15 to 45 days.
7. **USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2009**- USCIS announced on January 7, 2009, that it had received a sufficient number of petitions to reach the cap for new H-2B worker petitions requesting employment start dates before October 1, 2009.
8. **EB-5 Immigrant Investor Filing Location Changes** - Petitions and

applications related to the entrepreneur (EB-5) immigrant classifications and Regional Center proposals under the EB-5 immigrant investor pilot program must be filed at the California Service Center.

9. **New Forms Required for H-2A and H-2B Programs** - In conjunction with regulations that went into effect in January 2009 for the H-2A and H-2B programs, the Department of Labor has created new forms to collect the necessary information from employers applying for labor certifications and prevailing wage determinations.

10. **Attorney General Finds No Right To Effective Counsel in Removal Proceedings** - But the Board of Immigration Appeals or an immigration judge may reopen removal proceedings in extraordinary cases.

11. **USCIS Comments on L-1B Intracompany Transferee Denials** - The current standard used by USCIS adjudicators requires more than "just working for a company overseas for a year," USCIS said.

12. **Canada: Recent Amendments Eliminate Passive Investment From Provincial Nominee Programs**

13. **New Publications and Items of Interest**

14. **Government Agency Links**

Details...

1. Prepare Early for H-1B Lottery

Every year, there is a mad scramble for available H-1B visa numbers. As many companies are aware, often they are gone in a single day following a random "lottery" run by U.S. Citizenship and Immigration Services in early April. There are many more applicants than available numbers.

U.S. Citizenship and Immigration Services reportedly plans to issue a rule in the spring or summer of 2009 to streamline the H-1B paperwork required to participate in the fiscal year 2010 lottery. The rule would propose a "pre-registration" system with a shorter application required for the lottery, and the full H-1B petition required for lottery winners. That system will not be in place for this April's H-1B rush, however.

The Alliance of Business Immigration Lawyers recommends contacting your ABIL member, of which CDMA is a member, now to begin preparing your H-1B

strategy and paperwork.

Back to Top

2. New I-9 Form Available, USCIS Delays Change in List of Acceptable Documents

The new I-9 employment authorization verification form is available at http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf. An updated version of the *I-9 Handbook for Employers* is also expected to be released. The new form reflects the Department of Homeland Security's amended regulations governing the types of acceptable documents and receipts that employees may present to their employers for employment authorization verification. The interim rule, among other things, requires that all documents presented during the verification process be unexpired, makes adjustments to List A documents, and makes technical updates.

U.S. Citizenship and Immigration Services (USCIS) announced that it has delayed until April 3, 2009, implementation of the interim rule. USCIS also has reopened the public comment period, until March 4, 2009.

USCIS also announced that more than 100,000 employers have signed up to participate in E-Verify, an online system employers use to verify the work authorization of newly hired employees. USCIS said that employers have run more than two million queries through the system since October 2008.

The new economic stimulus package bill approved by the House of Representatives states that "one of the funds made available in this Act may be used to enter into a contract with an entity that does not participate in the E-verify program."

The E-Verify notice is available at http://www.uscis.gov/files/article/e-verify100K_8jan09.pdf. The USCIS notice announcing the delay in implementation of the interim rule is available at http://www.uscis.gov/files/article/I-9delay_30jan08.pdf. The interim final rule and an informational copy of the revised I-9 are available for public comment at http://www.regulations.gov/.

An E-Verify fact sheet is available at http://www.uscis.gov/files/article/everify_fact_sheet8Jan09.pdf. The House bill is available at http://thomas.loc.gov/cgi-bin/query/D?c111:2:./temp/~c1116lrDtW::.

Back to Top

3. Rule Requiring Contractors to Use E-Verify Suspended Again, Until May 21

The U.S. Chamber of Commerce said the federal government agreed to its request to postpone implementation until May 21, 2009, of a new rule requiring federal contractors to use E-Verify. "The federal government agreed that the new administration needs time to re-think mandatory E-Verify use, particularly in light of the stressed economy," said Robin Conrad, executive vice president of the National Chamber Litigation Center, the Chamber's public policy law firm. "We are hopeful that the incoming administration will agree that E-Verify is the wrong solution at the wrong time."

Randy Johnson, vice president of Labor, Immigration and Employee Benefits at the U.S. Chamber, said, "The new administration's interest in reviewing the rule is a promising development, but it doesn't change the fact that the executive branch may not make E-Verify use mandatory when Congress clearly said that it must be voluntary. We're cautiously optimistic that the incoming administration will make the right choice, but if not it will be up to the court to settle the issue."

This was the second recent postponement. The American Council on International Personnel (ACIP) reported that an agreement previously was reached with the Department of Homeland Security to suspend implementation of the rule until February 20, 2009. It had been slated to take effect on January 15, 2009.

USCIS also announced that more than 100,000 employers have signed up to participate in E-Verify, an online system employers use to verify the work authorization of newly hired employees. USCIS said that employers have run more than two million queries through the system since October 2008.

Meanwhile, the new stimulus package bill approved by the House of Representatives on January 28, 2009, includes provisions that would mandate the use of E-Verify by federal contractors receiving stimulus funds. The bill states that "one of the funds made available in this Act may be used to enter into a contract with an entity that does not participate in the E-verify program." The Senate is expected to act on the economic stimulus bill this week. It remains to see whether this E-Verify provision will remain in the final bill.

The Chamber of Commerce's announcement is available at http://www.uschamber.com/nclc/090128_pr.htm. The House bill is at http://thomas.loc.gov/cgi-bin/query/D?c111:2:./temp/~c1116lrDtW::.

Back to Top

4. Several Visa Categories Show Movement in February

For February 2009, the Department of State's Visa Bulletin shows movement in the priority dates for several employment-based categories. For example, although the Worldwide category stays put, the China-mainland born second preference category moves ahead almost six months, from July 8, 2004, to January 1, 2005. India's second preference category advances six months, from July 1, 2003, to January 1, 2004. China's third preference category similarly advances four months, from June 1, 2002, to October 1, 2002. Mexico's third preference employment-based category advances four and a half months, from November 15, 2002, to April 1, 2003.

In February, however, China's "Other Workers" category retrogresses from March 15, 2003, to October 1, 2002, as do India's (from March 15, 2003, to October 15, 2001) and Mexico's (from March 15, 2003, to October 15, 2001). The Philippines third preference and "Other Workers" categories stay put at May 1, 2005, and March 15, 2003, respectively.

The Visa Bulletin for February 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4417.html.

Back to Top

5. VWP Travelers Must Apply for Security Clearance Online

Those seeking to travel to the U.S. under the Visa Waiver Program are now

subject to enhanced security requirements as of January 12, 2009. All eligible travelers who wish to travel under the Visa Waiver Program must apply for authorization using the Electronic System for Travel Authorization (ESTA), available at https://esta.cbp.dhs.gov/. All VWP travelers applying for admission at a U.S. port of entry, including VWP travelers who have obtained travel authorization via ESTA, also must present a completed Form I-94W to U.S. Customs and Border Protection.

The stimulus package bill passed by the House of Representatives includes provisions on the Visa Waiver Program that would enhance program security requirements and extend the VWP to nationals of foreign countries "that are partners in the war on terrorism." The bill also would "support and expand tourism and business opportunities to enhance long-term economic competitiveness," and would establish a "maximum visa overstay rate" for participating countries.

More information about ESTA is available at http://www.cbp.gov/xp/cgov/travel/id_visa/esta/. Additional information about the VWP is available at http://travel.state.gov/visa/temp/without/without_1990.html. The full text of the House bill, H.R. 1, is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1enr.txt.pdf.

Back to Top

6. DHS Announces VWP for Guam-Commonwealth of the Northern Mariana Islands

The U.S. Department of Homeland Security (DHS) announced an interim final rule that replaces the current Guam Visa Waiver Program (VWP) with a new Visa Waiver Program for Guam and the Commonwealth of the Northern Mariana Islands (CNMI), to be implemented June 1, 2009. The rule also authorizes the department's U.S. Customs and Border Protection (CBP) to establish as many as six new ports of entry in the region to administer and enforce the Guam-CNMI VWP and to allow for immigration inspections.

The revised Guam-CNMI VWP allows visa-free entry for nonimmigrant visitors

from eligible countries to Guam and the CNMI for business or leisure travel, and extends visiting time from 15 to 45 days. The current Guam VWP and CNMI immigration laws will continue to apply until June 1, 2009.

Travelers seeking admission to Guam under the new program must possess a valid, unexpired machine-readable passport and present valid and completed CBP Forms I-94 and I-736, and must not have previously violated the terms of any admission to the U.S.

According to the interim final rule, current members of the Guam-CNMI VWP include Australia, Brunei, Indonesia, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, Republic of Korea, Singapore, Solomon Islands, Taiwan, the United Kingdom, Hong Kong, Vanuatu, and Western Samoa.

The interim final rule, published in the Federal Register on January 16, 2009, is available at http://edocket.access.gpo.gov/2009/pdf/E9-942.pdf.

Back to Top

7. USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2009

U.S. Citizenship and Immigration Services (USCIS) announced on January 7, 2009, that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap of 33,000 for the second half of fiscal year 2009, for new H-2B worker petitions requesting employment start dates before October 1, 2009.

If deemed necessary, USCIS said it may apply a computer-generated random selection process to all petitions that are subject to the cap and received on January 7, 2009. USCIS will reject, and return the fee, for all cap-subject petitions not selected.

Petitions for workers who are currently in H-2B status do not count toward the biannual H-2B cap. USCIS will continue to process petitions filed to extend the stay of a current H-2B worker in the U.S.; 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 H-2B notice is available at http://www.uscis.gov/files/article/h2b_8jan09.pdf.

Back to Top

8. EB-5 Immigrant Investor Filing Location Changes

U.S. Citizenship and Immigration Services (USCIS) announced that petitions and applications related to the entrepreneur (EB-5) immigrant classifications and Regional Center proposals under the EB-5 immigrant investor pilot program must be filed at the California Service Center (CSC).

Previously, EB-5 petitions and applications were filed at either the Texas Service Center (TSC) or the CSC, depending on where the entrepreneur's commercial enterprise was located. Regional Center proposals were submitted to the Chief of Service Center Operations at USCIS headquarters. USCIS said this change in filing locations is necessary to improve efficiency in processing EB-5-related filings. USCIS has established a unit at the California Service Center with adjudicators dedicated to EB-5 adjudications.

This change was effective January 26, 2009. For a 30-day period that began on January 9 and ends on February 9, 2009, EB-5 related petitions and applications mailed to USCIS headquarters or the Texas Service Center will be forwarded to the California Service Center. After February 9, EB-5 petitions and applications received at an incorrect filing location will be rejected and returned with instructions to re-file at the correct address.

For direct mail, send to:

U.S. Citizenship and Immigration Services
California Service Center, Attn: EB-5 Processing Unit
P.O. Box 10526
Laguna Niguel, CA 92607-0526

For non-U.S. Postal Service deliveries (e.g., private couriers), send to:

U.S. Citizenship and Immigration Services
California Service Center, Attn: EB-5 Processing Unit

24000 Avila Road, 2nd Floor
Laguna Niguel, CA 92677

The notice is at http://www.uscis.gov/files/article/update_eb5_filing_location_change_12Jan08.pdf, and a related notice was published in the Federal Register on January 9, 2009, at http://edocket.access.gpo.gov/2009/pdf/E9-231.pdf.

Back to Top

9. New Forms Required for H-2A and H-2B Programs

In conjunction with regulations that went into effect in January 2009 for the H-2A and H-2B programs, the Department of Labor has created new forms to collect the necessary information from employers applying for labor certifications. Employers must begin using Form ETA-9142. In addition, for the H-2A program, employers must fill out and submit Appendix A.1 and Appendix A.2. For the H-2B program, employers must fill out and submit Appendix B.1. For instructions on how to complete the form and appendices, see http://www.foreignlaborcert.doleta.gov/pdf/OMBETAForm9142_Instructions.pdf.

The H-2B final rule requires the use of the new ETA-9141 for prevailing wage determinations. However, the use of this form will only begin after the transition period outlined in the rule is completed. Therefore, the DOL said that the ETA-9141 will be posted toward the end of the transition period.

The H-2A final rule is available at http://www.foreignlaborcert.doleta.gov/pdf/H2A_FinalRule.pdf. The H-2B final rule is available at http://www.foreignlaborcert.doleta.gov/pdf/H2BFinalRule.pdf.

Back to Top

10. Attorney General Finds No Right To Effective Counsel in Removal Proceedings

In *Matter of Compean*, Attorney General Michael Mukasey found on January 7, 2009, that noncitizens have no constitutional right to an attorney in immigration removal proceedings. Although they have a statutory privilege to

retain a lawyer, if that counsel is ineffective, they have no recourse, the Attorney General said. The decision notes that the Board of Immigration Appeals or an immigration judge may reopen removal proceedings in extraordinary cases based on egregious error by a lawyer, accredited representative, or nonlawyer that the person erroneously believed to be a lawyer.

The decision provides a framework and a list of documentation for filing a claim of deficient performance of counsel. The decision is available at http://www.usdoj.gov/eoir/vll/intdec/vol24/3632.pdf. The American Immigration Lawyers Association, which filed an amicus brief, is following this case and posting updates at http://www.ailf.org/lac/lac-ineffective.shtml.

Back to Top

11. USCIS Comments on L-1B Intracompany Transferee Denials

U.S. Citizenship and Immigration Services reportedly plans to address complaints about an L-1B visa denial increase some time this year. "Companies are trying to expand the definition of what is 'specialized knowledge' under the L-1B program to use it as an alternative to the H-1B visa because there is no congressionally mandated cap on L-1B visas," USCIS Acting Deputy Director Michael Aytes said, adding that the current standard used by USCIS adjudicators requires more than "just working for a company overseas for a year."

Back to Top

12. Canada: Recent Amendments Eliminate Passive Investment From Provincial Nominee Programs

Effective September 2, 2008, the Immigration and Refugee Protection Regulations have been amended to clarify the provisions related to passive investment in provincial nominee programs.

Under the Provincial Nominee Program (PNP), provinces and territories can nominate individuals whom they consider to be important to their economic development. Under the terms of the provincial nominee agreements, provinces and territories are responsible for designing the criteria for their respective nomination categories, which can include business immigrants.

However, the intent of the entrepreneurial component within the PNPs was to permit provinces and territories to nominate business people who would meet the specific demographic and economic objectives of the nominating provinces or territories by settling there and opening or investing in a business that they would actively manage on a day-to-day basis. Selection on the basis of the ability to invest capital without involvement in the management of the recipient business/organization has always been exclusive to the Federal Immigrant Investor Program. By making the recent amendments, Citizenship and Immigration Canada (CIC) is making it clear that it was never intended for provinces and territories to select passive investors under their PNPs.

This information was supplied by Clark Wilson LLP's *Immigration Lines*. For more information, see http://www.cwilson.com/newsletters/immigration/.

Back to Top

13. New Publications and Items of Interest

EB-5 investor visas; AC21 issues. U.S. Citizenship and Immigration Services (USCIS) has added comments and Q&A from a teleconference to its online library: "Teleconference on EB-5 Investor Visas: Opportunities and Challenges," recorded in September 2008. The teleconference is available at http://www.dhs.gov/xabout/structure/gc_1232142118947.shtm. USCIS also has added an update on AC21 issues: "Did USCIS Immediately Deny Your Adjustment of Status Application Following a Change of Employment?", available at http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm%231.

On December 12 and 15, 2008, the Department of Labor (DOL) held stakeholder briefings on revised H-2A regulations that took effect on January 17, 2009. DOL staff described procedures under the new regulation for filing and reviewing H-2A labor certification applications, and preparation of the new application form, ETA Form 9142. The briefings also included discussion of changes to DOL enforcement procedures. To see the PowerPoint slide presentation on the new H-2A foreign labor certification process and form, go to the January 16, 2009, entry at http://www.foreignlaborcert.doleta.gov/eta_default.cfm%23backlog and click on the link.

Q&A on religious worker final rule. U.S. Citizenship and Immigration Services (USCIS) published a final rule on the special immigrant and nonimmigrant religious worker visa categories on November 26, 2008. A supplemental Q&A for religious workers is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e51026e8bb89e110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Back to Top

14. Government Agency Links

Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

USCIS Service Center processing times online:
https://egov.uscis.gov/cris/jsps/ptimes.jsp
Department of Labor processing times and information on backlogs:
http://www.foreignlaborcert.doleta.gov/times.cfm
Department of State Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

Back to Top