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

MARCH 2009 IMMIGRATION UPDATE

Posted on March 4, 2009 by Cyrus Mehta

Headlines:

- **1.** **Economic Stimulus Bill Includes H-1B Restrictions for TARP Recipients, Strips E-Verify Provisions; Fails To Extend EB-5 Regional Center Pilot** - Section 1611 of the American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill") includes H-1B restrictions for recipients of TARP (Troubled Assets Relief Program) funds.
- **2.** **CBP Discusses Immigrant Intent for Trade NAFTA Applicants** - A recently released letter discusses immigrant intent for TN applicants whose spouses are the beneficiary of an I-140 petition.
- **3.** **State Dept. Releases Guidance on B-1 Visas for Missionaries** - The Department of State released guidance on B-1 visas for missionaries to all diplomatic and consular posts.
- **4.** **US-VISIT Procedures Expanded to Additional Travelers** - All non-U.S. citizens,*except certain Canadians,* must follow US-VISIT procedures when entering the U.S.
- **5.** **DHS Directive Includes Analysis of E-Verify** - The directive requires specific federal agencies to work with state and local partners to address concerns about the E-Verify system.
- **6.** **E-Verify and Three Employment Visa Categories Set To Expire; May Be Renewed** - The E-Verify program and three employment visa categories are currently set to expire.
- **7.** **New Orleans Hotelier Need Not Reimburse H-2B Workers for Certain Expenses, Court Rules** - Recruitment, transportation, and visa expenses that the workers incurred before relocating to the U.S. to work for the hotelier need not be reimbursed.
- **8.** **DOL To Release New LCA and PERM Forms** - The DOL has redesigned

the Labor Condition Application (LCA) Form ETA 9035, effective April 15, 2009, and the Labor Certification Form 9089 (PERM form), effective July 1, 2009.

- **9.** **DHS Issues Final Rule Providing Employment Verification for Certain Enlistees of Armed Forces** - The rule also adds the military identification card to the list of documents acceptable for I-9 purposes, but only for use by the Armed Forces to verify the employment eligibility of persons lawfully enlisted.
- **10.** **Supreme Court Remands to BIA for Re-examination of Persecutor Bar to Asylum** - *Negusie v. Holder*, 07-499 (slip op. March 3, 2009), holds that the law does not necessarily bar grants of asylum to those who have involuntarily persecuted others while under duress
- **11.** **Recent Firm News** Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm) was a panelist on the Training Visa and Labor Certification Update Panel at the 30th Annual Immigration Law Update, American Immigration Lawyers Association (AILA)-Southern Florida Chapter, South Beach, Florida, held on February 5, 2009.

Details...

1. Economic Stimulus Bill Includes H-1B Restrictions for TARP Recipients, Strips E-Verify Provisions; Fails To Extend EB-5 Regional Center Pilot

Section 1611 of the American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill") includes H-1B restrictions for recipients of TARP (Troubled Assets Relief Program) funds. It specifies that, effective during the two-year period beginning on the date of enactment, February 17, 2009, any recipient of TARP funding (under title I of the Emergency Economic Stabilization Act of 2008 or section 13 of the Federal Reserve Act) is generally prohibited from hiring any H-1B nonimmigrant unless the recipient is in compliance with the requirements for an H-1B dependent employer.

An H-1B dependent employer has to comply with the following attestations:

- That the employer has, prior to filing the H-1B petition, taken good-faith steps to recruit U.S. workers for the position for which the H-1B worker is sought, offering a wage that is at least as high as that required under law to be offered to the H-1B worker. The employer must also attest that, in

connection with this recruitment, it has offered the job to any U.S. worker who applies and is equally or better qualified for the position.
- That the employer has not laid off, and will not lay off, any U.S. worker in a job that is essentially equivalent to the H-1B position in the area of intended employment to of the H-1B worker within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing.

Although the H-1B dependent employer rule provides exemption from these attestations, if an H-1B worker either possesses a master's degree or who receives wages of $60,000, the new legislation does not allow recipients of TARP funding to claim these exemptions.

Only employers that receive funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343, also known as the "TARP Bill") or that received funding under Section 13 of the Federal Reserve Act (12 U.S.C. §342 *et seq*., authorizing the Federal Reserve's "Discount Window" for short-term, secured loans to financial institutions and other companies) are subject to these restrictions. Companies that will receive funds under the recently enacted stimulus bill, American Recovery and Reinvestment Act of 2009, are not subject to these H-1B restrictions.

The term "hire" is defined in the statute as permitting "a new employee to commence a period of employment." Therefore, the restriction should not apply to H-1B extension requests filed on behalf of current H-1B employees of covered employers. It also should not cover existing current employees who are in another status such as F, TN, L-1A and are seeking to change status to H-1B. However, the new legislation will likely cover new employees seeking to transfer in H-1B status from another employer to a covered employer. Note that neither USCIS nor DOL have implemented any regulations or guidance as yet.

The legislation deletes the E-Verify provisions that had been in the House of Representatives version. The final legislation also fails to extend the EB-5 regional center pilot program.

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2. CBP Discusses Immigrant Intent for Trade NAFTA Applicants

A recently released letter sent on April 21, 2008, from Paul M. Morris, Executive Director, Admissibility and Passenger Programs, U.S. Customs and Border Protection (CBP), to Micron Technology, Inc., discusses immigrant intent for Trade NAFTA (TN) applicants whose spouses are the beneficiary of an I-140 petition. Mr. Morris states that CBP's determination is that "the mere filing or approval of an immigrant petition does not automatically constitute intent on the part of the beneficiary to abandon his or her foreign residence. This would hold for a TN principal who may be riding on a spouse's immigrant petition."

The letter notes that a TN applicant could have the intent to immigrate or adjust status at a future time, but as long as his or her intent at the time of filing the application for admission is to be in the U.S. for a temporary period under NAFTA and applicable regulations, he or she could be admitted. However, "once a TN files an application for an immigrant visa or adjustment of status, then the TN would no longer be eligible for admission or an extension of stay as a TN nonimmigrant. The NAFTA professional must establish that the intent of entry is not for permanent residence."

In an earlier letter, sent in 1996 from Yvonne M. LaFleur, Chief, Business and Trade Services Branch, to ABIL Member William Z. Reich, Ms. Fleur states that "he fact that an alien is the beneficiary of an approved I-140 petition may not be, in and of itself, a reason to deny an application for admission, readmission, or extension of stay if the alien's intent is to remain in the United States temporarily. Nevertheless, because the Service must evaluate each application on a case-by-case basis with regard to the alien's intent, this factor may be taken into consideration along with other relevant factors every time that a TN nonimmigrant applies for admission, readmission or a new extension of stay. Therefore...if the inspecting officer determines that the individual has abandoned his or her temporary intent, that individual's application for admission as a TN nonimmigrant may be refused."

The new letter may be helpful in that it reaffirms the policy of allowing TNs, who may stay in the U.S. up to three years, to enter and extend their stay, assuming their intent is to remain only. Application of the law remains inconsistent across various ports of entry. Many cases come down to proving

that the individual is not entering the U.S. with the intent to establish permanent residence upon that entry.

Contact your Alliance of Business Immigration Lawyers member for details and help with TN cases.

The April 2008 letter is available at http://www.aila.org/content/default.aspx?docid=28002. An excerpt from the 1996 letter is available at http://www.naftatnlawyer.com/i-140-filing-not-dispositive-f/.

Additional information on presumption of immigrant intent is available at http://www.naftatnlawyer.com/presumption-of-immigrant-inten/.

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3. State Dept. Releases Guidance on B-1 Visas for Missionaries

The Department of State released the following guidance on B-1 visas for missionaries to all diplomatic and consular posts on February 13, 2009:

1.VO has recently received inquiries from a religious group claiming that applicants applying for visas to perform missionary work in the United States, who are ineligible for R status because they have not been members of the religious organization for two years, are not alternatively considered eligible for B-1 .... This cable reminds posts that the B-1 note regarding religious activities is still in effect and provides an alternative method for bona fide religious workers to enter the United States.

2.In cases where the applicant is a recent member of the religion and cannot demonstrate two-year membership in an affiliated organization, B-1 status remains an option where the applicant meets the requirements in 9 FAM 41.31 note 9.1. This is true even if the applicant who meets the qualifications in the note intends a stay of one year or more in the United States. 9 FAM 41.31 note 3.1 provides that the period of stay in a given case may exceed six months or one year is not in itself controlling, provided the consular officer is satisfied that the intended stay has a time limitation and is not indefinite in nature.

3.We would also like to remind posts that many cases involving religious workers generate substantial public or congressional interest. Therefore, it may be prudent to consider requesting an advisory opinion, or sending information cables to the Department in cases where a refusal might generate a response from the sponsoring religious organization.

The text of this cable is posted at http://travel.state.gov/visa/laws/telegrams/telegrams_4430.htm.

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4. US-VISIT Procedures Expanded to Additional Travelers

Under a Department of Homeland Security final rule effective January 18, 2009, all non-U.S. citizens,*except Canadians applying for admission to the U.S. as B-1/B-2 visitors for business or pleasure and those specifically exempted,* must follow US-VISIT procedures when entering the U.S. US-VISIT requires the non-Citizen to be photographed and fingerprinted so that appropriate databases can be checked.

The following additional non-U.S. citizens are required to provide biometrics when entering or re-entering the United States:

- Lawful permanent residents of the United States (LPRs);
- Persons entering the U.S. who seek admission on immigrant visas;
- Persons entering the U.S. who seek admission as refugees and asylees;
- Canadian citizens who are currently required to obtain a Form I-94 (Arrival-Departure Record) upon entry or who require a waiver of inadmissibility to enter the U.S. (this excludes most Canadian citizens entering the U.S. for purposes of shopping, visiting friends and family, vacation or short business trips);
- Persons paroled into the U.S.; and
- Persons applying for admission under the Guam VWP.

Also as of January 18, 2009:

- Canadians applying for admission to the U.S. under a B-1 or B-2 nonimmigrant classification for business or pleasure, which represents most Canadian travelers to the U.S., are not required to enroll in US-VISIT.

- Canadian citizens who must now enroll in US-VISIT are those issued an I-94, including:
    - Canadians applying for admission in the following nonimmigrant classifications: C, D, F, H, I, J, L, M, O, P, Q 1, Q 3, R, S, T, TN; and
    - Canadians who are granted a waiver of inadmissibility to enter the U.S.
- H-1B visa holders will follow existing protocols and will be screened through US-VISIT when applying for a new multiple entry I-94 or when referred to secondary inspection for other reasons.
- At seaports, LPRs returning from a "closed loop" cruise (cruises that begin and end at the same port in the U.S.) will be exempt from US-VISIT processing. LPRs returning to the U.S. from an "open" cruise will be subject to US-VISIT processing.
- Non-U.S. citizens entering or re-entering the U.S. at a land border port of entry will be processed somewhat differently, as follows, at the inspecting officer's discretion:
    - LPRs will provide biometrics only if they are referred to secondary inspection.
    - All other non-U.S. citizens included in this final rule, unless specifically exempt, will experience US-VISIT procedures during secondary inspection, just as most non-U.S. citizens already subject to US-VISIT procedures currently do (e.g., those who require an I-94).
- Non-U.S. citizens who seek admission with Border Crossing Cards and who do not have an I-94 will still go through US-VISIT procedures, at the discretion of U.S. Customs and Border Protection officers.
- Would be nice if we could state what the practical impact of all this is, ie how it will affect those with visa issues from entering.

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

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5. DHS Directive Includes Analysis of E-Verify

U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano announced on January 30, 2009, a wide-ranging action directive on immigration and border security. The directive requires specific DHS? offices and components to work with state and local partners [can we be more specific or

is the info not available - are we talking about state law enforcement offices, employment discrimination agencies? to address, among other things, the status of, and concerns about, the E-Verify system. The full text of the directive is available at http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm.

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6. E-Verify and Three Employment Visa Categories Set To Expire; May Be Renewed

The E-Verify program and three employment visa categories are currently set to expire:

E-Verify: This program allows employers to electronically verify their workers' employment eligibility. General information about E-Verify is at http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm. E-Verify is a pilot program. Absent a congressional extension, it will expire March 6, 2009.

Three other visa programs are also currently scheduled to expire March 6: (1) the special immigrant program for certain religious workers (EB-4); (2) the EB-5 immigrant investor program for regional centers; and (3) the Conrad state 30 program for certain J-1 foreign doctors working in medically underserved areas. Efforts are underway to extend all four programs. An omnibus appropriations bill now pending in the Senate contains six-month extensions of the EB-5 and E-Verify programs. That bill is expected to pass by March 6. On March 4, 2009, the House of Representatives passed by voice vote H.R. 1127, a bill that would extend the religious worker and Conrad 30 programs through September 30. The measure now moves to the Senate for further consideration. It is unclear whether the Senate will be able to vote on H.R. 1127 before the sunset of the religious worker and Conrad 30 programs on March 6.

The State Department has issued advice on visa issuance for the EB-4 and EB-5 categories if Congress fails to extend those categories by March 6:

Employment Fourth Preference, Certain Religious Workers: The nonminister special immigrant program expires on March 6, 2009.No SR-1, SR-2, or SR-3 visas may be issued overseas on or after March 6, 2009. If Congress fails to renew the category by that date, visas issued before that date may only be

issued with a validity date of March 5, 2009, and all individuals seeking admission as a nonminister special immigrant must be admitted into the U.S. no later than midnight on March 5, 2009.

Employment Fifth Preference Pilot Categories (I5, R5): The immigrant investor pilot program expires on March 6, 2009. If Congress fails to renew the pilot program by March 6, no I5-1, I5-2, I5-3, R5-1, R5-2, or R5-3 visas may be issued after March 6, 2009.

The initial cut-off dates for the categories mentioned above have been listed as "current" in the State Department's March Visa Bulletin. If these categories have not been extended based on legislative action, those cut-off dates will become "unavailable" effective March 7, 2009.

The Visa Bulletin for March 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4428.html.

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7. New Orleans Hotelier Need Not Reimburse H-2B Workers for Certain Expenses, Court Rules

The aftermath of Hurricane Katrina required New Orleans hotelier Decatur Hotels, L.L.C, to look to foreign sources of labor. A group of these employees who held H-2B visas while working for Decatur, contend that the hotelier violated the Fair Labor Standards Act (FLSA) by paying them less than the minimum wage, free and clear, when Decatur refused to reimburse them for recruitment, transportation, and visa expenses that they incurred before relocating to the U.S. to work for Decatur.

In an interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit, Decatur raised three issues of first impression for the court: whether, under the FLSA, an employer must reimburse guest workers for (1) recruitment expenses, (2) transportation expenses, or (3) visa expenses, which the workers incurred before relocating to the employer's location. The court concluded on February 11, 2009, that the FLSA does not require an employer to reimburse any of these expenses. The court therefore reversed the district court's order, and

remanded the case with instructions that it be dismissed.

The decision is available at http://www.ca5.uscourts.gov/opinions/pub/07/07-30942-CV0.wpd.pdf.

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8. DOL To Release New LCA and PERM Forms

The Department of Labor (DOL) has redesigned the Labor Condition Application (LCA) Form ETA 9035, effective April 15, 2009, and the Labor Certification Form 9089 (PERM form), effective July 1, 2009. The DOL also noted at a February 4, 2009, public briefing that it has up to seven working days, effective with the new form on April 15, 2009, to certify an LCA. (The old LCA form may be used without the seven-day requirement up to May 14.) In both forms, more information and details are required about the employer, employee, job title, and attorney.

The new ETA Form 9089 is available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9089_PEC.pdf . The new ETA Form 9035/9035E is available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035_LCA_Non_Immigrant.pdf . Links to handouts, instructions, and a fact sheet are available at http://www.foreignlaborcert.doleta.gov/ (scroll down).

The Department of Labor has also announced a new Office of Foreign Labor Certification visa portal, the "iCERT System." The system allows users to prepare and submit applications, pre-populate visa forms with business and contact information; create and manage sub-account users (e.g., human resources staff or in-house legal counsel) to prepare and submit applications on a person's behalf; track the status of applications across visa programs through a single account; submit requests to withdraw applications or authorize sub-account users to do so on a person's behalf; and notify the Department of Labor if an application for labor certification has been submitted without the user's authorization. See http://www.ilw.com/immigdaily/news/2009,0205-PERM.pdf.

Meanwhile, the Department of Labor also released the following information about fiscal year 2009 PERM certifications (October 1, 2008, to December 31, 2008):

Approximately 3,074 cases were certified during the first quarter of FY 2009; 74% of these foreign workers were on H-1B visas. The top five states of intended employment for these permanent labor certifications were California (509), New York (474), New Jersey (326), Florida (211); and Pennsylvania (173). Beneficiaries representing 122 different countries were certified for permanent employment in the U.S. The top 10 countries of citizenship of beneficiaries included India (1,219), China (254), Canada (174), South Korea (120), Philippines

(113), Mexico (99), United Kingdom (79), Colombia (54), Venezuela (52), and France (46).

Top job titles certified for permanent employment included Computer Software Engineers (632), Computer Systems Analysts (194), Computer and Information System Managers (135), Financial Analysts (115), Electronics Engineers (105), Electrical Engineers (88), Accountants (77), Mechanical Engineers (76), Restaurant Cooks (71), and Operations Research Analysts (70).

Additional information is available at http://www.ilw.com/immigdaily/news/2009,0205-PERM.pdf.

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9. DHS Issues Final Rule Providing Employment Verification for Certain Enlistees of Armed Forces

Effective February 23, 2009, the Department of Homeland Security (DHS) has issued a final rule providing for employer-specific employment authorization for certain people lawfully enlisted into the U.S. Armed Forces, and those whose enlistment the Secretary with jurisdiction over the force to which the person belongs has determined would be vital to the national interest. This rule also adds the military identification card to the list of documents acceptable for establishing employment eligibility and identity for the Employment Eligibility Verification Form (Form I-9), but only for use by the Armed Forces to verify employment eligibility of persons lawfully enlisted in the Armed Forces.

The full text of the final rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-3801.pdf.

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10. Supreme Court Remands to BIA for Re-examination of Persecutor Bar to Asylum

In Negusie v. Holder, 07-499 (slip op. March 3, 2009), the Supreme Court rejected the BIA's conclusion that a strict interpretation of the INA's "persecutor bar" to asylum and withholding of removal is statutorily mandated. Instead, the Court held, the BIA may apply the bar so as to exclude from its prohibition those who were coerced into involuntarily engaging in acts that would constitute persecution of others.

The definition of "refugee" in the INA, as put in place by the Refugee Act of 1980, excludes "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). Such persons are ineligible both for asylum and for withholding of removal, although they may qualify for deferral of removal under the Convention Against Torture. The BIA had interpreted this exclusion to apply whether or not the participation in persecution was voluntary, finding this interpretation compelled by the Court's previous ruling in Fedorenko v. United States, 449 U.S. 490 (1981). In Negusie, the Court held that this was error, and that Fedorenko - which had interpreted a different statute, the Displaced Persons Act of 1948 - did not compel such a broad interpretation of the persecutor bar.

Although the vote was 8-1 for remand, with Justice Thomas the only dissenter, the Court was split on the question of whether the BIA could return to the same interpretation on remand upon further analysis. Justice Stevens and Justice Breyer, who concurred in part and dissented in part, took the view that some sort of exception for involuntary persecution was required by the statute. Justice Scalia and Justice Alito, who joined the majority opinion, indicated in a concurring opinion that they believe the BIA has the authority to revert to its strict interpretation of the persecutor bar if it wishes to do so upon

reconsideration not controlled by a misunderstanding of Fedorenko. The majority opinion, authored by Justice Kennedy and joined without further comment by Chief Justice Roberts and Justices Souter and Ginsburg, expressed no view on the question.

The decision is available at http://www.supremecourtus.gov/opinions/08pdf/07-499.pdf.

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11. Recent Firm News

Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm) was a panelist on the Training Visa and Labor Certification Update Panel at the 30th Annual Immigration Law Update, American Immigration Lawyers Association (AILA)-Southern Florida Chapter, South Beach, Florida, held on February 5, 2009. He also was a panelist on Labor Certification: PERM 101, at the AILA-New York Chapter, February 12, 2009.

An updated and expanded version of "Walking The High Wire Without A Net - The Lawyer's Role in the Labor Certification Process," co-authored by Gary Endelman and Cyrus D. Mehta, was published in *Bender's Immigration Bulletin* on February 1, 2009.

"The Path Less Taken: Is There An Alternative To Waiting For Comprehensive Immigration Reform?," co-authored by Gary Endelman and Cyrus D. Mehta, was published in *Immigration Daily* (http://www.ilw.com/articles/2009,0225-endelman.shtm) on February 25, 2009.

Cora-Ann V. Pestaina was a speaker at the second session of the ILW teleconference: PERM for Beginners - Preparation of the PERM application on February 18, 2009.

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