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

MAY 2009 IMMIGRATION UPDATE

Posted on May 1, 2009 by Cyrus Mehta

Headlines:

- **1.** **H-1B Cap Not Yet Reached, USCIS Announces** - The agency continues to accept petitions subject to the general cap.
- **2.** **DOL Announces New LCA/PERM Labor Cert Electronic Application System** - 'iCERT' is a new electronic system for submitting the labor condition application (LCA) and the application for permanent labor certification.
- **3.** **DOL Extends Transition Period of Filing Procedures for H-2A Employers** - The transition period is extended to include all employers with a date of need on or before January 1, 2010.
- **4.** **CBP Expands Global Entry Pilot Program to Netherlands** - The expansion of eligibility to qualified citizens of the Netherlands occurred on April 23, 2009.
- **5.** **H-1B, L-1 Reform Legislation Introduced** - Among other things, the bill would allow the DOL to conduct random audits of any company that uses the H-1B program, and require the DOL to conduct annual audits of companies who employ large numbers of H-1B workers.
- **6.** **Labor Organizations Reach Immigration Accord** - The accord calls for, among other things, adjustment of status for undocumented persons and an independent commission to assess and manage future immigration flows based on labor market shortages.
- **7.** **E-Verify Update: Applicability of Contractor Rule Extended; USCIS Issues Reminder; Nebraska Governor Signs Bill** - The effective date of the USCIS final rule requiring federal contractors and subcontractors to begin using the E-Verify system has been postponed to June 30, 2009.
- **8.** **Employment Third Preference, 'Other Worker' Categories Unavailable** - Visa availability in these categories will resume in October.

- **9.** **USCIS Extends Validity of Civil Surgeon Medical Certifications** - The validity of the civil surgeon's endorsement on the I-693, when submitted in support of an adjustment application, is extended until the time of adjudication if no Class A or B medical condition is certified by the civil surgeon.
- **10.** **USCIS Recommends New Procedures for Case Queries** - USCIS has recommended a new protocol for resolving case-specific inquiries.
- **11.** **USCIS Issues Q&A on Cap Gap Extension of Post-Completion Practical Training and F-1 Status for Eligible Students** - USCIS has issued a Q&A addressing the automatic extension of F-1 student status in the U.S. for certain students with pending or approved H-1B petitions for an employment start date of October 1, 2009.

Details...

1. H-1B Cap Not Yet Reached, USCIS Announces

Unlike in recent years, when the H-1B cap was reached immediately, U.S. Citizenship and Immigration Services (USCIS) announced on April 27, 2009, that it had received approximately 45,000 H-1B petitions to be counted against the statutory “cap” of 65,000 H-1B visa numbers for individuals without an advanced degree from a US institution of higher education. Under the Immigration & Nationality Act, Congress set aside an additional 20,000 H-1B visas available annually to foreign nationals with advanced degrees from US institutions of higher education. However, this week’s USCIS announcement reports that the agency already accepted approximately 20,000 H-1B petitions for individuals with US advanced degrees. In other words, all future H-1B petitions that are submitted to USCIS will be subject to the annual limit of 65,000 H-1B visas.

Significantly, on April 9, 2009, USCIS estimated it had received 42,000 H-1B petitions that would be subject to the 65,000 annual cap. Nearly three weeks later on April 27, 2009, USCIS confirmed receipt of only 3,000 additional petitions. Also note that 6,800 of the 65,000 H-1B visas available per year are set aside for Chilean and Singaporean nationals. Therefore, despite the fact that only 3,000 H-1B petitions were submitted between April 9 and April 27, and the pace of filings might appear to be slow, it is still advised that employers file “cap-subject” H-1B cases as soon as possible.

USCIS will provide regular updates on the processing of FY 2010 H-1B petitions.

The updates can are available at http://www.uscis.gov/h-1b_count. The announcement is available at http://www.uscis.gov/files/article/H-1B_count_20apr09.pdf.

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2. DOL Announces New LCA/PERM Labor Cert Electronic Application System

The Department of Labor's Employment and Training Administration (ETA) has announced "iCERT," a new electronic system for submitting the H-1B labor condition application (LCA) and the application for permanent labor certification.

The iCERT portal, located at http://icert.doleta.gov, is available for the submission of ETA 9035Es (electronic LCA H-1B applications). The current electronic LCA system will continue to be available through May 14, 2009. However, effective May 15, 2009, the LCA for the H-1B program will be available for submission only through the iCERT portal system.The PERM labor certification application, Form ETA 9089, will become available for application submission on September 1, 2009. To allow for an appropriate transition, both systems will be active during the month of September. However, beginning October 1, 2009, PERM applications will be submitted electronically only through iCERT system accounts.

The Department plans to deactivate the current electronic version of the ETA 9035E on May 15, 2009, and to deactivate the current electronic version of the Form ETA 9089 on October 1, 2009.
The Department is encouraging employers to copy all necessary application information into the new iCERT system before these deactivation dates. The status of applications submitted before deactivation will continue to be available through current system accounts.

The Office of Foreign Labor Certification has implemented a Help Desk Unit for program assistance at the Chicago National Processing Center (CNPC) to serve as a resource to employers and their representatives in filing LCAs.

Program-related questions may be e-mailed to LCA.Chicago@dol.gov. The LCA Help Desk e-mail box will be monitored by the CNPC from 8:30 a.m. to 5 p.m. Central Time, Monday through Friday.

The ETA's notice is available at

http://edocket.access.gpo.gov/2009/pdf/E9-8505.pdf.

Meanwhile, the DOL redesigned the ETA 9035 (H-1B LCA form) effective April 15, 2009, and the 9089 (PERM labor certification 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.) Both revised forms require more information and details 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).

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3. DOL Extends Transition Period of Filing Procedures for H-2A Employers

The Department of Labor's Employment and Training Administration issued an interim final rule on April 16, 2009, to extend the transition period of the application filing procedures currently in effect for all H-2A employers with a date of need on or before July 1, 2009, as established in the H-2A final rule published on December 18, 2008, and in effect as of January 17, 2009. The transition period is extended to include all employers with a date of need on or before January 1, 2010. Comments may be submitted by May 18, 2009.

The interim final rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-8815.pdf.

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4. CBP Expands Global Entry Pilot Program to Netherlands

U.S. Customs and Border Protection (CBP) is conducting an international trusted traveler pilot program, "Global Entry," at seven U.S. airports. Under an arrangement between the U.S. and the Netherlands, CBP is expanding eligibility for participation in the pilot to include citizens of the Netherlands who participate in Privium, an expedited travel program in the Netherlands, and who otherwise satisfy the requirements for participation in Global Entry. Currently, eligibility is limited to U.S. citizens, U.S. nationals, and U.S. lawful

permanent residents (LPRs). Pursuant to this same arrangement, U.S. citizens who participate in the Global Entry pilot will also have the option to apply for participation in Privium.

The expansion of eligibility to qualified citizens of the Netherlands occurred on April 23, 2009. The CBP Federal Register notice is available at http://edocket.access.gpo.gov/2009/pdf/E9-9221.pdf.

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5. H-1B, L-1 Reform Legislation Introduced

Sens. Richard Durbin (D-Ill.) and Chuck Grassley (R-Iowa) introduced the "H-1B and L-1 Visa Reform Act" on April 23, 2009. The Durbin-Grassley bill would:

- Require all employers who want to hire an H-1B worker to first make a good-faith attempt to recruit a qualified U.S. worker. Employers would be prohibited from using H-1B visa holders to displace qualified U.S. workers.
- Prohibit "H-1B only" ads and prohibit employers from hiring additional H-1B and L-1 workers if more than 50 percent of their employees are H-1B and L-1 visa holders.
- Permit the Department of Labor (DOL) to initiate investigations without a complaint and without the Labor Secretary's personal authorization;
- Authorize the DOL to review H-1B applications for fraud;
- Allow the DOL to conduct random audits of any company that uses the H-1B program;
- Require the DOL to conduct annual audits of companies who employ large numbers of H-1B workers.

The Durbin-Grassley bill also would establish a process to investigate, audit, and penalize L-1 visa violations. The two senators introduced a similar bill in March 2007, which was folded into a comprehensive immigration reform bill that failed.

Meanwhile, President Obama reportedly plans to speak publicly about immigration issues in May, and to convene working groups over the summer to discuss possible legislation.

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6. Labor Organizations Reach Immigration Accord

The AFL-CIO and Change to Win labor federations have agreed to jointly

support a specified set of comprehensive immigration reform measures. The accord endorses legalizing the status of undocumented individuals already in the U.S. and improving current temporary worker programs, but opposes any new guestworker programs. Immigration of workers would be managed via a national commission, which would set the permanent and temporary numbers to be admitted each year each year based on labor market demands.

The accord includes five features:

- An independent commission to assess and manage future flows, based on labor market shortages that are determined on the basis of actual need;
- A secure and effective worker authorization mechanism;
- Rational operational control of the border;
- Adjustment of status for the current undocumented population; and
- Improvement, not expansion, of temporary worker programs, limited to temporary or seasonal, not permanent, jobs.

The new accord did not sit well with many in the business community who favor a guestworker program. "If the unions think they're going to push a bill through without the support of the business community, they’re crazy," said Randel Johnson, the U.S. Chamber of Commerce's vice president of labor, immigration and employee benefits. "As part of the trade-off for legalization, we need to expand the temporary worker program." Others, such as Rep. Steve King (R-Iowa), a member of the House of Representatives' immigration subcommittee, objected to the idea of legalizing undocumented workers: "In our current economic crisis, Americans cannot afford to lose more jobs to illegal workers.”

An article released by the AFL-CIO in April 2009 summarizing the new accord is available at http://www.aflcio.org/issues/civilrights/immigration/upload/immigrationreform041409.pdf.

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7. E-Verify Update: Applicability of Contractor Rule Extended; USCIS Issues Reminder; Nebraska Governor Signs Bill

U.S. Citizenship and Immigration Services (USCIS) has postponed to June 30, 2009, the effective date of a rule that will require federal contractors and subcontractors to begin using the E-Verify system to verify the work

authorization of new hires. USCIS said the extension will provide an opportunity to review the entire rule before it applies to federal contractors and subcontractors.

USCIS issued a reminder that the revised Form I-9, Employment Eligibility Verification (rev. 02/02/09), went into effect on April 3, 2009, for all U.S. employers. The revision date is printed on the lower right-hand corner of the form.

Meanwhile, Nebraska Governor Dave Heineman signed a bill on April 8, 2009, to require public employers and those receiving state or local contracts or tax incentives (including subcontractors) to use E-Verify for newly hired employees effective October 1. The bill also prohibits undocumented persons from receiving state and local public benefits.

Michael Aytes, USCIS Acting Deputy Director, noted in testimony on April 2, 2009, that over 117,000 employers are enrolled in E-Verify, representing over 456,000 locations. He said that an average of 1,000 employers enroll each week and participation has more than doubled each fiscal year since 2007. Employers have run over 3.6 million queries thus far in fiscal year (FY) 2009, Mr. Aytes noted, adding that the volume of queries doubled from FY 2007 to FY 2008 from 3.27 million to 6.6 million, and that according to an analysis of Bureau of Labor Statistics data, over 14 percent of all nonagricultural new hires in the U.S are run though E-Verify.

The USCIS announcement extending the E-Verify contractor rule is available at http://www.uscis.gov/files/article/UpdateContractor_%20Rule_Extended_16apr09.pdf. The I-9 reminder is available at http://www.uscis.gov/files/article/revised-i-9-update.pdf, along with a link to the revised *Handbook for Employers*, which includes instructions on completing the I-9. Questions and answers on the revised I-9 form are available at http://www.uscis.gov/files/article/revised-i-9-q-a.pdf. Mr. Aytes's testimony is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d3ace7c336c60210VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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8. Employment Third Preference, 'Other Worker' Categories Unavailable

The Department of State's Visa Bulletin for May 2009 states that the employment third preference and third preference "Other Workers" categories have become "Unavailable." The Department explained that the cut-off dates for those categories were held and then retrogressed in an effort to bring demand within the average monthly usage targets and the overall annual numerical limits. Despite these efforts, the amount of demand for adjustment of status cases with priority dates that were significantly earlier than the established cut-off dates remained extremely high.As a result, these annual limits have been reached and both categories have become unavailable.

Visa availability in these categories will resume in October, the first month of the new fiscal year. The Visa Bulletin for May 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html.

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9. USCIS Extends Validity of Civil Surgeon Medical Certifications

U.S. Citizenship and Immigration Services (USCIS) has extended the validity of civil surgeon endorsements on Form I-693, Medical Examination of Aliens Seeking Adjustment of Status.

A memorandum from Donald Neufeld, USCIS Acting Associate Director for Domestic Operations, sent to the field on December 10, 2008, notes that a USCIS policy memorandum issued in January 2008 extended the validity of the civil surgeon endorsement on the I-693 until the adjustment of status application could be adjudicated. That policy was set in consultation with the Centers for Disease Control and Prevention and was limited to those applications where no Class A or B medical condition was certified. The policy was in effect until January 1, 2009. The new memo states that due to the continuing backlog of some adjustment applications, the validity of the civil surgeon's endorsement on the I-693, when submitted in support of an adjustment application, is extended until the time of adjudication if no Class A or B medical condition is certified by the civil surgeon. This policy will remain in effect until January 1, 2010.

The memo is available at http://www.uscis.gov/files/nativedocuments/extension_of_validity_of_medical_certifications

_i693_10dec08.pdf.

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10. USCIS Recommends New Procedures for Case Queries

The American Council on International Personnel announced that U.S. Citizenship and Immigration Services has recommended a new protocol for resolving case-specific inquiries:

(1) Employers should first call the National Customer Service Center (NCSC) at 1-800-375-5283 with case-related inquiries.

(2) If the issue has not been resolved after a reasonable period of time (e.g., 30 days), the employer may e-mail the query to:

> California Service Center: csc-ncsc-followup@dhs.gov
> Vermont Service Center: vsc.ncscfollowup@dhs.gov
> Nebraska Service Center: ils.nebraska@dhs.gov
> Texas Service Center: pending

(3) If the issue has still not been resolved after a reasonable period of time after contacting the Service Center directly, usually 14 days, employers may e-mail: SCOPSSCATA@dhs.gov. Employers may also use this e-mail address to ask about a new policy or a new trend. Once the request reaches this level, USCIS intends to respond within 5 days.

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11. USCIS Issues Q&A on Cap Gap Extension of Post-Completion Practical Training and F-1 Status for Eligible Students

U.S. Citizenship and Immigration Services (USCIS) has issued questions and answers addressing the automatic extension of F-1 student status in the U.S. for certain students with pending or approved H-1B petitions (indicating a request for change of status from F-1 to H-1B) for an employment start date of October 1, 2009, under the FY 2010 H-1B cap. The Q&A states that once a timely H-1B filing has been made, the automatic "cap gap" extension will begin and will continue until the H-1B process has been completed.

The Q&A, which contains additional details, is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?

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