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US IMMIGRATION & NATIONALITY LAW

JULY 2009 IMMIGRATION UPDATE

Posted on July 1, 2009 by Cyrus Mehta

Headlines:

- **1.** **Outlook Grim for India, China Employment-Based Visa Categories** - The July cut-off date for the India and China EB-2 categories is January 1, 2000; both could become unavailable in August or September and remain unavailable indefinitely.
- **2.** **Current I-9 Form Validity Extended Beyond June 30** - The I-9 form currently in use will continue to be valid beyond June 30, 2009.
- **3.** **H-1B Processing Time Will Increase July 1** - The ability to file an H-1B extension or change of employer petition for an H-1B employee on a same-day, or even same-week, basis will end on July 1.
- **4.** **E-Verify Federal Contractor Rule Delayed Until September 8, 2009** - The effective date to require federal contractors to use the E-Verify system to confirm the work authorization of new hires has been delayed again.
- **5.** **CBP Reminds Visa Waiver Travelers of New Emergency/Temporary Passport Requirements Effective July 1** - Effective July 1, 2009, all VWP emergency or temporary passports must be electronic.
- **6.** **DHS Proposes To Expand E-Verify Monitoring and Compliance Efforts** - USCIS's Verification Division has created a Monitoring and Compliance (M&C) Branch.
- **7.** **USCIS Discusses Requirements for H-1Bs in Health Care Specialty Occupations** - USCIS issued a memorandum clarifying the standards for adjudicating H-1B petitions filed on behalf of beneficiaries seeking employment in a health care specialty occupation.
- **8.** **USCIS Resumes Premium Processing for Certain I-140s** - Effective June 29, 2009, USCIS has resumed Premium Processing Service for certain I-140 Immigrant Petitions for Alien Worker.

- **9.** **SEVP Posts New Information on Upcoming SEVIS II** - With the full deployment of SEVIS II, ICE will retire the original SEVIS system.
- **10.** **DOS Proposes Electronic Submission of SEVIS Annual Reports** - Annual reports from designated program sponsors assist DOS in oversight and administration of the J-1 visa program.
- **11.** **USCIS Explains "Full-Time," Discusses Job Creation Timing in EB-5 Immigrant Investor Program** - Among other things, USCIS clarified that for purposes of the Immigrant Petition by Alien Entrepreneur adjudication and job creation requirements, USCIS will consider the two-year period to begin six months after approval of the I-526 petition.
- **12.** **USCIS Issues Guidance on Education, Training, Experience Requirements for Foreign Physicians** - In particular, the memo provides guidance on determining whether a foreign medical degree (MD) is the equivalent of a U.S. MD, and thus constitutes an advanced degree for EB-2 purposes.
- **13.** **USCIS Ombudsman Reports on Denials of Adjustment of Status Applications Following a Change of Employment** - The USCIS Ombudsman has received inquiries stating that the agency is not issuing Notices of Intent to Deny following a change of jobs, as required.
- **14.** **President, Members of Congress Discuss Immigration Reform** - Department of Homeland Security Secretary Janet Napolitano will lead a group that will work with key members of the House and the Senate on immigration issues.
- **15.** **DHS Begins Exit Pilot Test of Fingerprint Collections at Two Airports** - DHS has begun collecting digital fingerprints from non-U.S. citizens leaving the U.S. from Hartsfield-Jackson Atlanta International Airport and Detroit Metropolitan Wayne County Airport.
- **16.** **USCIS Discusses U.S. Interest-Related Discretionary Grants of H-2A, H-2B Status** - Limited exceptions to the country requirements can be made when they are determined to be in the U.S. interest.
- **17.** **USCIS, FBI Eliminate Name Check Backlog, Set New Standard** - The goal is to complete 98 percent of name check requests submitted by USCIS within 30 days, and the remaining two percent within 90 days.
- **18.** **USCIS Opens International Adjudication Branch in California** - The International Adjudications Support Branch (IASB) will not accept in-person appointments.
- **19.** **USCIS Issues Court Notice to Pending I-360 Religious Workers** - The

court has ordered USCIS to accept properly filed I-485s and I-765s from beneficiaries of religious worker I-360s, and is allowing individuals whose concurrent filings were rejected previously to reapply for adjustment of status.

- **20.** **DHS Establishes Interim Relief for Widows of U.S. Citizens** - DHS has granted deferred action for two years to widow(er)s of U.S. citizens, and their unmarried children under 21 years old, who reside in the U.S. and were married for less than two years before their spouse's death.
- **21.** **EU Adopts Blue Card for Highly Skilled Foreign Workers** - The Council of the European Union has created a fast-track procedure for third-country citizens in highly qualified employment.

Details...

1. Outlook Grim for India, China Employment-Based Visa Categories

The July cut-off date for the India and China EB-2 categories is January 1, 2000. The Department of State reports that these categories could become unavailable in August or September and remain unavailable indefinitely. The Department said there is a backlog of at least 25,000 India EB-2 cases awaiting visa numbers. Charles Oppenheim of the Department of State's Visa Office reportedly stated that without legislative relief, the waiting time for Indian EB-2 applicants may be measured in years, even decades.

Meanwhile, the EB-1 category for India and China is not likely to stay current, although the EB-1 category worldwide is expected to remain current. EB-3 visa numbers worldwide and for India, China, and Mexico are expected to remain unavailable for the remainder of this fiscal year at least. The EB-3 category for India could remain unavailable indefinitely.

The third preference and "other workers" employment categories are unavailable in July.

The Visa Bulletin for July 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html.

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2. Current I-9 Form Validity Extended Beyond June 30

U.S. Citizenship and Immigration Services (USCIS) has announced that the I-9

Employment Eligibility Verification Form (rev. 2/2/09) currently in use will continue to be valid beyond June 30, 2009.

USCIS has requested that the Office of Management and Budget approve the continued use of the current I-9. While this request is pending, the form will not expire.

USCIS will update the I-9 when the extension is approved. Employers will be able to use either the I-9 with the new revision date or the I-9 with the 2/2/09 revision date at the bottom of the form.

The announcement is available at http://www.uscis.gov/files/article/update_employ_eligible_i9.pdf.

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3. H-1B Processing Time Will Increase July 1

The ability to file an H-1B extension or change of employer petition for an H-1B employee on a same-day, or even same-week, basis will end on July 1.

In the past several years, employers have become used to immediate turnaround of H-1B petitions, made possible by the Department of Labor's (DOL) electronic system for filing and certification of the required Labor Condition Application (LCA). Effective June 30, 2009, the new iCert system for LCAs will eliminate same-day LCA approvals in many cases. Instead, the DOL may take up to seven business days to certify the LCA. Early experience with the system indicates that DOL is using all seven business days or more.

In the era of iCert, advance planning is a must. Employers should monitor the expiration dates of H-1B employees and allow sufficient time (4-6 months) for the preparation and filing of H-1B extensions and amendments. This delay in filing H-1B petitions will also affect the usefulness of H-1B portability, because an individual in H-1B status will only be authorized to work for the new employer upon the filing of the new petition, and a certified LCA is required to make that filing. Under the new system, LCA delays will likely add at least a week to 10 days to that process. Unfortunately, employees who fall victim to the economy will also feel the impact of the delayed LCA certification timing

because it will delay their ability to file a new H-1B petition once they have obtained new employment.

If you have further questions on how iCert affects your workforce, contact your Alliance of Business Immigration Lawyers attorney for more information.

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4. E-Verify Federal Contractor Rule Delayed Until September 8, 2009

The effective date to require federal contractors to use the E-Verify system to confirm the work authorization of new hires has been delayed again, to September 8, 2009. There is strong bipartisan support for electronic verification of new hires using federal systems, so the Alliance of Business Immigration Lawyers (ABIL) cautions all employers not already using E-Verify to be prepared for it in 2010.

Contact your ABIL attorney for guidance on I-9 audits, transitioning from paper to electronic I-9s, E-Verify training and policies, and related matters. We have many tools and resources available for employers to use in navigating through the new era in employment verification.

For more on this topic, see U.S. Citizenship and Immigration Services' (USCIS) response to the USCIS Ombudsman on E-Verify: http://www.dhs.gov/xlibrary/assets/uscis_response_cis_ombudsman_recommendation_38.pdf.

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5. CBP Reminds Visa Waiver Travelers of New Emergency/Temporary Passport Requirements Effective July 1

U.S. Customs and Border Protection (CBP) recently reminded Visa Waiver Program (VWP) travelers that effective July 1, 2009, all VWP emergency or temporary passports must be electronic. Under the VWP, an e-Passport contains an integrated chip that stores biographic data, a digitized photograph, and other information about the true bearer as indicated by a symbol on the passport cover. In lieu of a e-Passport, foreign nationals may apply for visitor's visas from the State Department instead of traveling through the VWP.

CBP may exercise discretion for those who do not have e-Passports if they are traveling for medical or other emergency reasons.

The announcement is available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/epssprt_vwp.xml.

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6. DHS Proposes To Expand E-Verify Monitoring and Compliance Efforts

U.S. Citizenship and Immigration Services' Verification Division has created a Monitoring and Compliance (M&C) Branch, which will seek to "identify potential cases of misuse, abuse, discrimination, breach of privacy, or fraudulent use of SAVE and E-Verify."

The M&C Branch is developing detailed procedures for both monitoring verification transactions and performing compliance activities on defined non-compliant behaviors. For example, DHS notes, with respect to the misuse of Social Security numbers, M&C will identify when a single social security number is used multiple times for employment authorization verifications through E-Verify. DHS acknowledges that it would not be uncommon for a single individual to be verified several times through E-Verify because one person may hold multiple jobs or change jobs frequently, but it would be unusual for a single individual to hold 30 or 40 jobs simultaneously. M&C has developed procedures for identifying when a certain threshold number of verifications of a single SSN would be likely to indicate misuse. If this threshold is met, M&C may contact or visit an employer to research the issue and determine if there is a system problem the Verification Division needs to correct; a user misunderstanding that requires additional training for the employer; or potentially fraudulent activity that may need to be reported to a law enforcement agency. Information also may be shared with other government agencies.

The management of compliance activities and storage of the supporting information will be handled by the Compliance Tracking and Management System (CTMS). Activities that will be monitored may include:

- Fraudulent use of Alien Numbers (A-Numbers) and SSNs by E-Verify users;

- Termination of an employee because he receives a tentative nonconfirmation (TNC);
- Failure of an employer to notify DHS, as required by law, when an employee who receives a final nonconfirmation (FNC) is not terminated;
- Verification of existing employees (as opposed to new hires);
- Verification of job applicants, rather than new employees (pre-screening);
- Selectively using E-Verify or SAVE for verifications based on foreign appearance, race/ethnicity, or citizenship status;
- Failure to post the notice informing employees of participation in E-Verify;
- Failure to use E-Verify, consistently or at all, once registered;
- Failure of a SAVE agency to initiate additional verification when necessary;
- Unauthorized searching and use of information by a SAVE agency user; and
- Fraudulent use of visas, permits, and other DHS documents by SAVE users.

DHS also notes that employers are required to post notification of their participation in E-Verify conspicuously for their employees. This notification provides the employees with information concerning their rights and responsibilities regarding E-Verify, including contact information. M&C compliance activities on this front most likely would occur based on a complaint or hotline report, or during a compliance visit researching other potential noncompliance. M&C might also identify potential noncompliance from media reports or tips from law enforcement agencies.

The related proposed rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-11966.pdf. The Privacy Act notice is available at http://edocket.access.gpo.gov/2009/pdf/E9-11967.pdf.

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7. USCIS Discusses Requirements for H-1Bs in Health Care Specialty Occupations

U.S. Citizenship and Immigration Services (USCIS) has issued a memorandum clarifying the standards for adjudicating H-1B petitions filed on behalf of beneficiaries seeking employment in a health care specialty occupation.

Among other things, the memo notes that if the petitioner provides

documentary evidence that the beneficiary has a valid license to practice a health care occupation (and meets the definition of specialty occupation) in the state in which the beneficiary will be employed, the adjudicator "should not look beyond the license." However, the petitioner will still need to provide evidence that the beneficiary is admissible. This guidance applies regardless of whether the beneficiary has a bachelorXs degree, masterXs degree, or doctoral degree in the health care occupation.

If the beneficiary has an unrestrictedlicense and the petition is otherwise approvable, the memo states that an adjudicator should approve the petition for the full H-1B period requested (up to three years) but may not approve the petition beyond the validity of the labor condition application. The memo notes that most states require a license to be renewed periodically. If the beneficiary has an unrestricted license, the memo states that the renewal date should not be considered when determining the validity period of the approval.

The memo is available at http://www.uscis.gov/files/nativedocuments/health_care_occupations_20may09.pdf.

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8. USCIS Resumes Premium Processing for Certain I-140s

U.S. Citizenship and Immigration Services (USCIS) has announced that effective June 29, 2009, it has resumed Premium Processing Service for certain I-140 Immigrant Petitions for Alien Workers. USCIS will accept premium processing requests for I-140s involving the EB-1 (extraordinary ability and outstanding professors/researchers), EB-2 (members of professions with advanced degrees or exceptional ability not seeking a national interest waiver), and EB-3 (professionals, skilled workers, and other workers) categories.

Premium processing is still not available for I-140s involving EB-1 multinational executives and managers and EB-2 members of professions with advanced degrees or exceptional ability seeking a national interest waiver.

Under premium processing, USCIS guarantees petitioners that for a $1,000 processing fee in addition to the normal filing fee, it will issue an approval

notice, a notice of intent to deny, a request for evidence, or an investigation for fraud or misrepresentation within 15 calendar days of receipt. If the petition is not processed within 15 calendar days, USCIS will refund the $1,000 fee and continue to process the request. In addition to faster processing, petitioners who participate in the program may use a dedicated phone number and e-mail address to check on the status of their petitions or ask related questions.

Premium processing continues to be available for previously designated classifications within the I-140 and within the I-129 Petition for Nonimmigrant Worker.

The notice is available at http://www.uscis.gov/files/article/premproc_22jun09.pdf.

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9. SEVP Posts New Information on Upcoming SEVIS II

The Student and Exchange Visitor Program (SEVP) has added a new section to its Web site on the development of the SEVIS II database. SEVIS II supports the application and admission of students and exchange visitors under the F, M, and J classifications. SEVIS II maintains personal information about these foreign nationals and any accompanying dependents. In addition, SEVIS II maintains personal information about officials of approved schools and designated exchange visitor sponsors who host nonimmigrant students and exchange visitors.

SEVIS II will deploy in two phases: the first phase is expected to occur in October 2009, and the second, final phase will occur in March 2010. With the full deployment of SEVIS II, U.S. Immigration and Customs Enforcement says it will retire the original SEVIS system. All necessary data from the original system will be migrated to SEVIS II before the deployment of the first phase.

For more information, see http://www.ice.gov/sevis/sevisii/index.htm.

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10. DOS Proposes Electronic Submission of SEVIS Annual Reports

The Department of State (DOS) has proposed allowing electronic submission of Student and Exchange Visitor Information System (SEVIS) annual reports.

Annual reports from designated program sponsors assist DOS in oversight and administration of the J-1 visa program. The reports provide statistical data on the number of exchange participants an organization has sponsored by category. The reports also summarize the activities in which exchange visitors were engaged and evaluate program effectiveness. Program sponsors include government agencies, academic institutions, and private sector entities.

Annual reports currently are completed through SEVIS and then printed and signed by a sponsoring official, and sent to DOS by mail or fax. DOS is working with the Department of Homeland Security to expand SEVIS functions and enable the collection of electronic signatures. Annual reports will be submitted to the Department electronically as soon as the mechanism for doing so is approved and in place, DOS said.

See http://edocket.access.gpo.gov/2009/pdf/E9-12147.pdf.

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11. USCIS Explains "Full-Time," Discusses Job Creation Timing in EB-5 Immigrant Investor Program

U.S. Citizenship and Immigration Services (USCIS) recently issued a guidance memorandum providing USCIS adjudication officers with instructions related to the timing of job creation and the meaning of "full-time" positions in the EB-5 Immigrant Investor Program.

The memo clarifies that for purposes of the Immigrant Petition by Alien Entrepreneur (Form I-526) adjudication and job creation requirements, USCIS will consider the two-year period to begin six months after approval of the I-526 EB-5 petition.

USCIS officers will ensure that the business plan filed with the I-526 reasonably demonstrates that the requisite number of jobs will be created by the end of the two-year period. For Regional Center petitions and for purposes of indirect job creation, USCIS adjudicators may consider economic models that rely on certain variables to show job creation and the amount of investment to determine whether the required infusion of capital or creation of direct jobs will result in a certain number of indirect jobs.

USCIS also has concluded that certain direct and indirect jobs that previously would have been considered to be temporary or intermittent (such as construction jobs) may be considered as permanent jobs for purposes of the EB-5 program if the positions can be expected to last at least two years.

A notice announcing the memo is available at http://www.uscis.gov/files/article/EB-5_Guidance.pdf. The memo is available at http://www. uscis.gov/files/nativedocuments/eb5_17jun09.pdf.

Alliance of Business Immigration Lawyers attorney Steve Yale-Loehr has written an article analyzing USCIS's EB-5 memo. The article is available at http://www.millermayer.com/Immigration/EB5Investors/USCISClarifiesKeyAspectsofEB5 Program/tabid/394/Default.aspx.

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12. USCIS Issues Guidance on Education, Training, Experience Requirements for Foreign Physicians

U.S. Citizenship and Immigration Services (USCIS) has issued a memorandum providing guidance on adjudication of the I-140 Petition for Alien Worker filed for certain physicians. In particular, the memo provides guidance to Immigration Services Officers (ISOs), formerly known as Information Immigration Officers (IIOs) or Adjudications Officers (AOs), on determining whether a foreign medical degree (MD) is the equivalent of a U.S. MD, and thus constitutes an advanced degree for EB-2 purposes.

The memorandum also addresses how to determine whether a foreign physician has met the education, training, and experience requirements of labor certification and licensure in the area of intended employment. The memo clarifies that all EB-2 and EB-3 physicians must overcome the "unqualified physician" provisions of INA ¤ 212(a)(5)(B) at the time of the permanent job offer.

The memo notes that the U.S. is one of the few countries where medical school applicants must obtain a bachelor's degree as a prerequisite to admission to medical school. As a result, a U.S. MD is considered to be an advanced degree. In many other countries, USCIS noted, a person may be admitted to medical

school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than the program for a less specialized foreign bachelor's degree (generally 3-4 years in duration.)

The memo is available at http://www.uscis.gov/files/nativedocuments/AFM_alien_physicians_i140_afm_update_ad09_10.doc.pdf.

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13. USCIS Ombudsman Reports on Denials of Adjustment of Status Applications Following a Change of Employment

The U.S. Citizenship and Immigration Services (USCIS) Ombudsman has received inquiries stating that the agency is not issuing Notices of Intent to Deny following a change of jobs, as required by the American Competitiveness in the 21st Century Act (AC21) and USCIS policy guidance, but instead is immediately denying pending Form I-485 (Application to Register Permanent Residence or Adjust Status) applications.

If a foreign national is: (1) the beneficiary of an approved Form I-140 (Petition for Immigrant Worker); and (2) has a Form I-485 pending for 180 days or more, he or she is eligible to change to a same or similar position. If the underlying approved I-140 is withdrawn, and no evidence of a new qualifying offer of employment was submitted, then USCIS must issue a Notice of Intent to Deny the pending I-485.

However, the ombudsman noted that USCIS may deny the I-485 in cases of portability (the ability to change jobs) before first issuing a Notice of Intent to Deny in certain limited circumstances. These include, for example, where the beneficiary is ineligible for the benefits of the I-485 by statute, or the I-140 is withdrawn before the I-485 was pending for 180 days.

If you think your case was erroneously denied, the ombudsman asks that you forward a description of the problem using DHS Form 7001 with the subject line, "AC21 Evidence of Immediate Denial." Include a copy of your denial notice,

detailed information about the reasons for the immediate denial, and, if appropriate, evidence that you submitted a Motion to Reopen or Reconsider. "If we consider your case to be an erroneous denial, we will forward it directly to USCIS for further review," the ombudsman states.

For more information, including links to USCIS Interoffice Memoranda further clarifying USCIS processing of these cases, see http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm%231.

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14. President, Members of Congress Discuss Immigration Reform

President Barack Obama met on June 25, 2009, with several members of his cabinet, advisors, and Congress to discuss immigration reform. President Obama noted that Department of Homeland Security Secretary Janet Napolitano will lead a group that will work with key members of the House and the Senate on immigration issues. President Obama said that "we've got a responsible set of leaders sitting around the table who want to actively get something done and not put it off until a year, two years, three years, five years from now, but to start working on this thing right now."

Meanwhile, Charles Schumer (D-N.Y.), chair of the Senate's immigration subcommittee, said on June 24 that he will hold hearings on employment-related immigration in July. Stay tuned.

President Obama's statement is available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-after-meeting-with-members-of-Congress-to-discuss-immigration/.

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15. DHS Begins Exit Pilot Test of Fingerprint Collections at Two Airports

The Department of Homeland Security (DHS) has begun collecting digital fingerprints from non-U.S. citizens departing the U.S. as part of a pilot program at Hartsfield-Jackson Atlanta International Airport and Detroit Metropolitan Wayne County Airport.

Non-U.S. citizens leaving from Detroit and Atlanta airports should expect to have their fingerprints collected before boarding their flights. U.S. Customs and Border Protection (CBP) officers will collect fingerprints at the boarding gate from non-U.S. citizens departing from Detroit; U.S. Transportation Security Administration (TSA) officers will collect fingerprints at security checkpoints from non-U.S. citizens departing from Atlanta. The pilot tests are expected to continue through early July. US-VISIT plans to begin implementing new biometric exit procedures based on these pilots for non-U.S. citizens departing the U.S. by air within the next year.

Non-U.S. citizens departing the U.S. from all other ports of entry will continue to follow current exit procedures, which require travelers to return their paper Form I-94 (Arrival-Departure Record) or I-94W (for Visa Waiver Program travelers) to an airline or ship representative.

Since 2004, the U.S. Department of State (DOS) and U.S. Customs and Border Protection (CBP) have collected biometrics from most non-U.S. citizens between the ages of 14 and 79, with some exceptions, when they apply for visas or arrive at U.S. ports of entry. The US-VISIT program has simultaneously worked to create a congressionally mandated automated biometric