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

SEPTEMBER 2009 IMMIGRATION UPDATE

Posted on August 31, 2009 by Cyrus Mehta

Headlines:

- **1.** **DHS Proposes To Rescind Social Security No-Match Rule; SEVIS Data To Be Integrated Into E-Verify** - DHS has proposed to rescind amendments relating to procedures that employers may take to acquire a safe harbor from receipt of no-match letters.
- **2.** **State Dept. Introduces Online Nonimmigrant Visa Application Form** - The new DS-160 Web-based nonimmigrant visa application form is part of the Visa Office's effort to automate the visa process to the extent possible.
- **3.** **OMB Extends I-9 Approval to August 31, 2012** - Employers may use the I-9 with a revision date of either August 7, 2009, or February 2, 2009.
- **4.** **Seventh Circuit Affirms Time Limits on Labor Certifications** - The U.S. Court of Appeals for the Seventh Circuit affirmed a Department of Labor amended regulation setting time limits on grants of labor certification.
- **5.** **State Dept. Announces Revised Exchange Visitor Skills List** - Exchange visitors who entered the U.S. on a J-1 visa before June 28, 2009, will continue to be governed by the 1997 Exchange Visitor Skills List, as amended, only if their country remains on the revised 2009 list.
- **6.** **Employment-Based Fourth Preference Categories Unavailable for September** - The employment fourth preference is expected to return to "Current" status in October, the first month of the new fiscal year.
- **7.** **USCIS Reopens FY 2009 H-2B Petition Filing Period** - The Department of State received far fewer than expected requests for H-2B visas and has announced that it will immediately accept new H-2B petitions.
- **8.** **USCIS Clarifies Regulatory Requirements for Filing H-2B Petitions by Certain Associations and Their Members** - USCIS said it has noticed

a particular type of filing error, involving "master" petitions, in many H-2B petitions filed by certain associations on behalf of their members.

- **9.** **Visa Waiver Program Emergency/Temporary Passports Must Be Electronic, CBP Says** - All VWP emergency or temporary passports now must be e-Passports to be eligible for travel to the U.S. without a visa.
- **10.** **DHS Announces New Directives on Border Searches of Electronic Media** - DHS announced new directives to enhance and clarify oversight of computer and other electronic media searches at U.S. ports of entry.
- **11.** **USCIS Extends TPS Designation, Work Authorization for Somalians** - USCIS has extended the designation of Somalia for TPS for 18 months, through March 17, 2011.
- **12.** **State Dept. Updates Visa Medical Examination Forms** - Medical exams that have been completed using the older version of the forms do not have to be repeated.
- **13.** **USCIS Resumes Premium Processing for Nonimmigrant Religious Workers** - Only those petitioners who have successfully passed an on-site inspection are eligible to file under Premium Processing Service.
- **14.** **Tata America's Foreign Workers in U.S. Win Right To Court Hearing** - Tata's noncitizen U.S. employees had been required to sign over their federal and state tax refund checks to Tata.
- **15.** **Congress Examines Foreign Investment, Verification, Real ID Issues At Recent Hearings** - The EB-5 Immigrant Investor Regional Center Program is set to expire at the end of September; Sen. Leahy said that making the program permanent "is a critical first step to its continuing success."
- **16.** **International Educators Ask President To Restore Academic Travel To Cuba** - The letter cites the benefits of academic exchanges and notes that opportunities for Americans to study abroad in Cuba have declined precipitously.

Details...

1. DHS Proposes To Rescind Social Security No-Match Rule; SEVIS Data To Be Integrated Into E-Verify

On August 19, 2009, the Department of Homeland Security (DHS) proposed to rescind the amendments promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor

from receipt of no-match letters. Implementation of the 2007 final rule was preliminarily enjoined by the U.S. District Court for the Northern District of California on October 10, 2007. After further review, DHS said it plans to focus its enforcement efforts relating to the employment of unauthorized workers on increased compliance through improved verification, including participation in E-Verify, the ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

DHS noted that in fiscal year 2010, U.S. Citizenship and Immigration Services plans to improve the E-Verify system's ability to automatically verify international students and exchange visitors through the incorporation of ICE's Student and Exchange Visitors Information System (SEVIS) data into E-Verify. By incorporating SEVIS nonimmigrant student visa data into the automatic initial E-Verify check, the number of students and exchange visitors who receive initial mismatches should be reduced, DHS said. In 2010, ICE will launch a new version of SEVIS (SEVIS II), which will include employment eligibility information that E-Verify will be able to access electronically. Currently, the SEVIS database is checked manually by immigration status verifiers after an initial mismatch occurs.

DHS's proposed rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-19826.pdf.

Back to Top

2. State Dept. Introduces Online Nonimmigrant Visa Application Form

The Department of State (DOS) recently posted a cable sent to the field in May 2009 introducing the new DS-160 Web-based nonimmigrant visa application form, which is part of the Visa Office's effort to automate the visa process to the extent possible. DOS noted that at least 12 posts currently require applicants to use the DS-160. The new form incorporates all of the current NIV forms (DS-156, 157, 158, 156K, 3032, and parts of the E visa application) into one interactive format, and allows applicants to upload a photo. It is hosted on the Consular Electronic Application Center, which eventually will host online immigrant visa and passport applications, online fee payments, "possible queuing systems," and an online appointment system.

When an applicant fills out and submits the form online, the cable noted, he or

she receives a confirmation page with a barcode that allows consular officers to locate the applicant's case in the Consular Consolidated Database system and load it into the nonimmigrant visa system.

As noted above, 12 posts (including some Mexican and Canadian posts, Dublin, Hamilton, Hong Kong, and Tripoli) are requiring use of the DS-160 by their applicants. These posts' applicant volume makes up about a tenth of the worldwide NIV applicant workload, DOS noted. This summer, the agency is expanding DS-160 use to two additional posts in Mexico, as well as Australia. Current server capacity, however, does not allow DOS to expand DS-160 use more rapidly.

The form is available in English and Spanish, but translations into Arabic, Japanese, Chinese, Russian, Serbian, and French are being developed. DOS hopes to have it available to all posts (and in the above languages) by the end of 2009.

The DOS cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4547.html.

Back to Top

3. OMB Extends I-9 Approval to August 31, 2012

U.S. Citizenship and Immigration Services (USCIS) announced on August 27, 2009, that the Office of Management and Budget has extended its approval of Form I-9 (Employment Eligibility Verification Form) to August 31, 2012. Consequently, USCIS has amended the form to reflect a new revision date of August 7, 2009.

Employers may use the I-9 with a revision date of either August 7, 2009, or February 2, 2009. The revision dates are located on the bottom right-hand portion of the form.

The announcement is available at http://www.uscis.gov/update_I-9_extension0827.pdf.

Back to Top

4. Seventh Circuit Affirms Time Limits on Labor Certifications

The U.S. Court of Appeals for the Seventh Circuit affirmed a Department of Labor amended regulation setting time limits on grants of labor certification. Specifically, the amended regulation states that an approved permanent labor

certification granted on or after July 16, 2007, expires if not filed in support of an I-140 petition within 180 calendar days of the date the Department granted the certification; and that an approved permanent labor certification granted before July 16, 2007, expires if not filed in support of an I-140 petition within 180 calendar days of July 16, 2007.

Between March 2001 and May 2007, 14 unaffiliated Illinois businesses filed applications for labor certification on behalf of 15 potential employees. Thirteen were approved before the amended regulation took effect on July 16, 2007; the other two were approved after that date. After the Department of Homeland Security rejected eight of the workers' visa petitions because of expired labor certifications, the 14 businesses and 15 workers sued the Departments of Labor and Homeland Security. Among other things, the plaintiffs sought a judgment that the Department of Labor's promulgation of the amended regulation was beyond its authority or, alternatively, that retroactive application of the amended regulation was unlawful. The eight workers also sought a writ of mandamus against the Department of Homeland Security to compel the agency to process their visa petitions.

The Seventh Circuit ruled in favor of the government, noting among other things that when the Department of Labor amended its regulation to establish a 180-day time limit for previously approved labor certifications, the plaintiffs' right to the certifications' indefinite validity ended, and the plaintiffs did not possess any vested right that the amended regulation could impair.

The case is available at http://adnet-nyc.com/durable.pdf.

Back to Top

5. State Dept. Announces Revised Exchange Visitor Skills List

The Department of State (DOS) recently released a cable sent to the field in June 2009 announcing the revised 2009 J-1 Exchange Visitor Skills List. Exchange visitors who entered the U.S. on a J-1 visa before June 28, 2009, will continue to be governed by the 1997 Exchange Visitor Skills List, as amended, only if their country remains on the revised 2009 list. Exchange visitors whose countries were removed from the revised 2009 skills list are retroactively not subject to the two-year home residence requirement based on the Exchange Visitor Skills List, even if they entered the U.S. before the effective date.

The DOS cable is available at

http://travel.state.gov/visa/laws/telegrams/telegrams_4548.html. The revised list was published in the Federal Register at http://edocket.access.gpo.gov/2009/pdf/E9-9657.pdf.

Back to Top

6. Employment-Based Fourth Preference Categories Unavailable for September

The Department of State's Visa Bulletin for September notes that heavy applicant demand for numbers in the employment fourth, and employment fourth "Certain Religious Worker," categories has resulted in their becoming "Unavailable" for September. This unavailable status took effect immediately in August because the annual limit for those categories was reached. Therefore, the Department said, no further requests for numbers in those categories can be processed during fiscal year 2009.

The employment fourth preference is expected to return to "Current" status in October, the first month of the new fiscal year. The employment fourth "Certain Religious Workers" category is scheduled to expire on September 30, 2009, and future availability will depend on legislative action.

The latest Visa bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4558.html.

Back to Top

7. USCIS Reopens FY 2009 H-2B Petition Filing Period

On August 6, 2009, U.S. Citizenship and Immigration Services (USCIS) reopened the fiscal year (FY) 2009 H-2B petition filing period and announced that it will immediately accept new H-2B petitions. The H-2B program allows U.S. employers to bring foreign nationals to the U.S. to fill temporary nonagricultural jobs for which there is a shortage of available U.S. workers. Typically, H-2B workers fill labor needs in occupational areas such as education, construction, health care, landscaping, manufacturing, food service/processing, and resort/hospitality services.

Although on January 7, 2009, USCIS announced that it had accepted and approved a sufficient number of H-2B petitions to meet the congressionally mandated annual cap of 66,000, the Department of State received far fewer than expected requests for H-2B visas and, as a result, has issued only 40,640 H-2B visas for FY 2009 to date. This means that approximately 25,000 visas

could go unused because they have not been granted. Because of the low visa issuance rate, USCIS is reopening the filing period to allow employers to file additional petitions for qualified H-2B temporary foreign nonagricultural workers.

The normal (non-premium processing) adjudication timeframe for H-2B petitions is 60 days. USCIS said it will make visa numbers available to petitions in the order in which the petitions are filed. However, because H-2B petitions (Forms I-129) for FY 2009 visas must be received, evaluated, and adjudicated by the FY 2009 deadline of September 30, 2009, USCIS said it cannot guarantee approval of any H-2B petition by that date. The agency therefore encourages employers to file as soon as possible and to request premium processing by filing a Form I-907 and submitting the $1,000 premium processing fee, which will allow for expedited adjudication.

The USCIS notice, which includes instructions on how to qualify for a FY 2009 H-2B cap number, is available at http://www.uscis.gov/USCIS/h-2b_petitions_fy09.pdf. A related Q&A is available at http://www.uscis.gov/QA_USCIS_Reopens_H-2B_Filing.pdf. Information on how to use premium processing service is available at http://www.uscis.gov/. A USCIS guide to hiring a foreign national for short-term employment in the U.S. is available at http://www.uscis.gov/files/article/E1eng.pdf.

Back to Top

8. USCIS Clarifies Regulatory Requirements for Filing H-2B Petitions by Certain Associations and Their Members

U.S. Citizenship and Immigration Services (USCIS) issued a clarification on August 28, 2009, to associations and their members of certain regulatory requirements for filing petitions for H-2B classification on behalf of foreign workers. USCIS said it has noticed a particular type of filing error in many H-2B petitions filed by certain associations on behalf of their members. Rather than filing an individual petition with USCIS, some employers who are members of an association have sought H-2B non-agricultural workers via a "master" petition filed by their association.

USCIS noted that a "master" petition is a petition that:

- Is filed by an association (listing the association as petitioner) on behalf of several of its member-employers

- Includes multiple temporary labor certifications that have been issued by the Department of Labor (DOL) for each individual member-employer, rather than a single temporary labor certification certified for the particular association itself as an employer or "joint employer."

USCIS said it recognizes that the facts of each case may be different, but that association member-employers generally should file a petition for H-2B classification directly and separately (listing themselves as the petitioner) with USCIS, rather than through a "master" petition filed by an association (listing the association as the petitioner) on behalf of several of its members. Petitions filed by associations that fail to meet the petitioner requirements for H-2B classification will be denied, USCIS warned.

The clarification, which includes discussion and analysis of the reasons why H-2B petitions filed by associations on behalf of their employer members generally would not qualify for H-2B classification, is available at http://www.uscis.gov/h2b-filed-by-associations.pdf.

Back to Top

9. Visa Waiver Program Emergency/Temporary Passports Must Be Electronic, CBP Says

All Visa Waiver Program (VWP) emergency or temporary passports now must be electronic passports (e-Passports) to be eligible for travel to the U.S. without a visa. This includes VWP applicants who present emergency or temporary passports to transit the U.S. An e-Passport contains an integrated chip that stores biographic data, a digitized photograph, and other information about the bearer, and is distinguished by a gold-colored symbol on the passport's front cover. VWP applicants arriving in the U.S. with a non-compliant passport may be required to undergo further processing and/or denied admission. U.S. Customs and Border Protection (CBP) may exercise discretion at the ports of entry in cases of medical or other emergency travel.

The CBP notice released July 14, 2009, contains additional country-by-country details and is available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/epssprt_vwp.xml.

Back to Top

10. DHS Announces New Directives on Border Searches of Electronic Media

On August 27, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced new directives to enhance and clarify oversight of computer and other electronic media searches at U.S. ports of entry. The new directives address the circumstances under which U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) can conduct border searches of electronic media consistent with the Department's authority to search other sensitive non-electronic materials, such as briefcases, backpacks and notebooks, at U.S. borders.

DHS said the new directives will also allow the agency "to develop automated, comprehensive data collection and analytic tools to facilitate accurate, thorough reporting on electronic media searched at the border, the outcomes of those searches and the nature of the data searched."

Between October 1, 2008, and August 11, 2009, CBP encountered more than 221 million travelers at U.S. ports of entry. Approximately 1,000 laptop searches were performed during that time. Of those, 46 were "in-depth."

Among other things, related CBP guidance issued on August 20, 2009, notes:

Officers may encounter materials that appear to be legal in nature, or an individual may assert that certain information is protected by attorney-client or attorney work product privilege. Legal materials are not necessarily exempt from a border search, but they may be subject to the following special handling procedures: If an Officer suspects that the content of such a material may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the Officer must seek advice from the CBP Associate/Assistant Chief Counsel before conducting a search of the material, and this consultation shall be noted in appropriate CBP systems of records. CBP counsel will coordinate with the U.S. Attorney's Office as appropriate.

Other possibly sensitive information, such as medical records and work-related information carried by journalists, shall be handled in accordance with any applicable federal law and CBP policy.

Officers encountering business or commercial information in electronic devices shall treat such information as business confidential information and shall protect that information from unauthorized disclosure. Depending on the nature of the information presented, the Trade Secrets Act, the Privacy Act, and other laws, as well as CBP policies, may govern or restrict the handling of the

information. Any questions regarding the handling of business or commercial information may be directed to the CBP Associate/Assistant Chief Counsel.

Information that is determined to be protected by law as privileged or sensitive will only be shared with federal agencies that have mechanisms in place to protect appropriately such information.

The CBP guidance also notes that an officer at the border may "detain" electronic devices or copies of information contained in them for "a reasonable period of time to perform a thorough border search," which may take place either on-site or at another location. The guidance states that unless extenuating circumstances exist, the detention of such devices ordinarily should not exceed five days and should be completed "as expeditiously as possible." Supervisory approval is required for detaining electronic devices, or copies of information contained in them, for continuation of a border search after an individual's departure. Port Director, Patrol Agent in Charge, or other equivalent level manager approval is required to extend any such detention beyond five days.

The DHS notice and CBP guidance are available at http://www.aila.org/content/default.aspx?docid=29899.

Back to Top

11. USCIS Extends TPS Designation, Work Authorization for Somalians

U.S. Citizenship and Immigration Services (USCIS) has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of September 17, 2009, through March 17, 2011. USCIS also automatically extended the validity of employment authorization documents (EADs) issued under the TPS designation of Somalia for six months, through March 17, 2010, to give re-registrants sufficient time to receive their new EADs after their current EADs expire.

The USCIS notice sets forth procedures necessary for nationals of Somalia, or those having no nationality who last habitually resided in Somalia) to re-register with USCIS for TPS. Re-registration is limited to persons who previously registered for TPS under the designation of Somalia and whose applications have been granted by, or remain pending with, USCIS. The 60-day re-registration period began on July 27, 2009, and will remain in effect until September 25, 2009.

The notice is available at http://edocket.access.gpo.gov/2009/pdf/E9-17862.pdf. A related Q&A is available at http://www.uscis.gov/.

Back to Top

12. State Dept. Updates Visa Medical Examination Forms

Updated visa medical forms are now being used. The forms are:

- DS-2053 - Medical Examination for Immigrant or Refugee Applicant (1991 TB TIs)
- DS-2054 - Medical Examination for Immigrant or Refugee Applicant (2007 TB TIs)
- DS-3024 - Chest X-Ray and Classification Worksheet (1991 Centers for Disease Control (CDC) Technical Instructions (TIs) on tuberculosis (TB))
- DS-3030 - Chest X-Ray and Classification Worksheet (2007 TB TIs)
- DS-3026 - Medical History of Physical Examination Worksheet (all posts), and
- DS-3025 - Vaccination Documentation Worksheet (all posts).

The Department of State recently released a cable sent to the field in June 2009 listing the forms and noting that all posts should begin using the DS-2053, DS-3024, DS-3026, and DS-3025 forms immediately, and discontinue use of any older version of these forms. Medical exams that have been completed using the older version of the forms, however, do not have to be repeated.

The cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4550.html. Related information from the CDC, including CDC global TB control activities for U.S. immigration and TIs for TB screening and treatment, is available at http://www.cdc.gov/ncidod/dq/panel_2007.htm. Other CDC information on proposed vaccination criteria for U.S. immigration, and guidelines for medical examination of immigrants, is available at http://www.cdc.gov/ncidod/dq/refugee/index.htm.

Back to Top

13. USCIS Resumes Premium Processing for Nonimmigrant Religious Workers

After a suspension of several years, U.S. Citizenship and Immigration Services (USCIS) announced that it has resumed premium processing service for nonimmigrant religious worker petitions filed by certain R-1 petitioners. Only

those petitioners who have successfully passed an on-site inspection are eligible to file under premium processing service. Under premium processing service, USCIS guarantees petitioners that, for a $1,000 processing fee, within 15 calendar days of receipt it will issue either an approval notice or, where appropriate, a denial notice, a notice of intent to deny, or a request for evidence, or will open an investigation for fraud or misrepresentation.

The notice is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb9591D. A related Q&A is available at http://www.uscis.gov/portal/site/uscis/menuitem. Information on how to use premium processing service is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35.

Back to Top

14. Tata America's Foreign Workers in U.S. Win Right To Court Hearing

The U.S. Court of Appeals for the Ninth Circuit has denied Tata America International Corp.'s attempt to compel arbitration in Mumbai, India, and dismiss a class action by Tata's noncitizen U.S. employees, who had been required to sign over their federal and state tax refund checks to Tata. The suit, *Vedachalan v. Tata America International Corp.*, included a proposed class of thousands of current and former noncitizen U.S. employees of Tata working in the U.S.

According to plaintiffs' representative Lieff Cabraser Heimann & Bernstein, LLP, the complaint claims that Tata has paid its employees less than promised; has failed to pay its employees overtime pay and has misclassified them as exempt from overtime; and has failed to compensate employees for earned but unused vacation pa