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

OCTOBER 2009 IMMIGRATION UPDATE

Posted on October 2, 2009 by Cyrus Mehta

Headlines:

1. **USCIS Says Fees May Rise** -
   A decline in revenue from a decrease in applications could lead to higher application fees.
2. **Labor Dept. Issues FAQ on LCAs** -
   The Department issued a FAQ about the new iCERT Portal and the newly redesigned ETA Forms 9035 and 9035E.
3. **ABIL Alert: Be Prepared for Surprise Enforcement Site Visits** -
   Employers should prepare for unannounced, random immigration-related worksite inspections.
4. **USCIS Issues Guidance on E-Verify Federal Contractor Rule** -
   Companies awarded a contract with the E-Verify clause are now required to enroll in E-Verify within 30 days of the contract award date.
5. **October Visa Bulletin Shows EB-3s Backlogged 7 Years, Several Programs Expiring on September 30** -
   EB-3 cut-off dates are in 2001 and 2002.
6. **USCIS Announces New Web Site Design** -
   USCIS says its redesigned Web site, in English and Spanish, is more customer-centric.
7. **Labor Dept. Issues Proposed Rule on H-2A Temporary Agricultural Workers** -
   The Department has concluded that the policy underpinnings of a 2008 H-2A streamlining final rule do not provide an adequate level of protection for either U.S. or foreign workers.

8. **Interim EADs Issued to Salvadorans** -
   Interim work authorization documents will be issued to Salvadoran TPS beneficiaries who have not yet received a final action on re-registration applications that have been pending for more than 90 days.
9. **Global Entry Program Now Available at Detroit Airport** -
   Global Entry allows pre-screened, approved, registered travelers to use automated kiosks to receive expedited processing upon arrival.
10. **Missouri Plant Pays $450K Fine for Hiring Undocumented Workers** -
    A Missouri poultry-processing plant where 136 undocumented workers were arrested in 2007 recently paid a $450,000 administrative fine as a result of a worksite enforcement investigation.
11. **USCIS Proposes Nonimmigrant Investor Visa Classification for Northern Marianas** -
    This status would be available only to investors in the CNMI who have been granted a qualifying status by the CNMI before November 28, 2009.
12. **Change in CBP Policy on Deferred Inspection of Legal Permanent Residents with Criminal Convictions - October 1, 2009 -**
    CBP has told AILA that, beginning on October 1, 2009, there is a greater likelihood that returning Legal Permanent Residents (LPRs) with criminal convictions will be put in removal proceedings at ports of entry versus a grant of deferred inspection.

1. **Details...**

1. USCIS Says Fees May Rise

Alejandro Mayorkas, the new director of U.S. Citizenship and Immigration Services, said recently that the agency has received a significantly lower number of applications lately and that the resulting decline in revenue could lead to higher application fees. At a press conference in Albuquerque, New Mexico, on September 24, 2009, Mr. Mayorkas said there is a $118 million budget shortfall and that he has asked for Congress's help. "The potential fee increase is not something that is taken lightly. We understand very well its impact upon the community. In my personal view, it would be something of last resort."

Mary Giovagnoli, director of the Immigration Policy Center, noted that an

increase in fees could result in even fewer applicants. "Congress has been really reluctant to revisit this whole idea that we shouldn't be trying to finance our immigration system basically solely on the backs of applicants. I think the agency and the applicants are both kind of caught between a rock and hard place."

Fee increases were imposed two years ago, but a budget gap remains. For more on the drop in applications and its effect on USCIS's budget, see http://www.abqjournal.com/news/state/apimmigrationfees09-14-09.htm.
A news article about Mr. Mayorkas' press conference is posted at http://www.abqjournal.com/news/state/apimmigfeesmayorkas109-24-09.htm.
A USCIS Q&A on paying immigration fees and what types of payment are accepted is available at http://www.uscis.gov/files/article/Check_Instructions.pdf. For more guidance on how to pay immigration fees, see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3850a99ba78af110VgnVCM1000004718190aRCRD&vgnextchannel=7d316c0b4c3bf110VgnVCM1000004718190aRCRD.

Back to Top

2. Labor Dept. Issues FAQ on LCAs

The Department of Labor recently issued frequently asked questions (FAQ) about the new iCERT Portal and the newly redesigned ETA Forms 9035 and 9035E. Topics discussed include how to correct an invalid federal employer identification number after denial of a labor condition application (LCA) on that ground; filing on behalf of a new company created through a merger, acquisition, or sale; what contact information to enter for employer point of contact; how to enter a prevailing wage survey on the new LCA; and how to withdraw an LCA after receiving certification via the iCERT Portal.
The FAQ is available at http://www.foreignlaborcert.doleta.gov/pdf/FAQ_iCERT_090909_%20FINAL_Elissa_090909.pdf. A press release is available at http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/FY%2009/September%202009/website_redesign.pdf.

Back to Top

3. ABIL Alert: Be Prepared for Surprise Enforcement Site Visits

As part of the Department of Homeland Security's stepped-up enforcement efforts that include increased audits of businesses to detect immigration and labor law violations, employers are reporting random, unannounced visits by the Fraud Detection and National Security Division (FDNS) of U.S. Citizenship and Immigration Services. FDNS inspectors often use a script of questions and ask to speak with an employer representative and any foreign workers. FDNS is also using what it learns to add fraud indicators to its database in an effort to identify patterns and potential fraud during adjudications.

The Alliance of Business Immigration Lawyers (ABIL) recommends that employers prepare for immigration-related worksite inspections by developing and implementing robust compliance policies, auditing their I-9s and H-1B public access files, and planning in advance how to respond when immigration agents visit. ABIL recommends designating an immigration compliance officer, who should contact immigration counsel immediately upon an FDNS site visit, and implementing an investigation response plan in advance that includes everyone from upper management to receptionists. Contact your ABIL attorney for help in preparing for potential onsite FDNS inspections.

Back to Top

4. USCIS Issues Guidance on E-Verify Federal Contractor Rule

U.S. Citizenship and Immigration Services (USCIS) reminded federal contractors and subcontractors that effective September 8, 2009, they "may be required" to use the E-Verify system to verify their employees' eligibility to work in the United States if their contract includes the Federal Acquisition Regulation (FAR) E-Verify clause. The regulation states that federal contracts will be awarded only to employers who use E-Verify to check employee work authorization.

The E-Verify federal contractor rule extends use of the E-Verify system to cover both federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds. Applicable federal contracts awarded and solicitations issued on or after September 8 will include a clause committing government contractors to use E-Verify.

Companies awarded a contract with the E-Verify clause now must enroll in E-Verify within 30 days of the contract award date. With certain exceptions, E-Verify must be used to confirm that all new hires, whether employed on a federal contract or not, and existing employees directly working on these

contracts are legally authorized to work in the U.S.

More than 148,000 participating employers at nearly 560,000 worksites nationwide currently use E-Verify to electronically verify their workers' employment eligibility, according to USCIS.
The agency noted that since October 1, 2008, more than 7.8 million employment verification queries have been run through the system and approximately 96.9 percent of all queries are now automatically confirmed as work-authorized within 24 hours or less.

The USCIS announcement is available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/EVerifyFederalContractorRule8Sep09.pdf.

USCIS also has issued the *E-Verify Supplemental Guide for Federal Contractors.* The guide discusses regulations affecting federal contractors; instructions for verifying new and existing employees;
E-Verify enrollment and participation as a federal contractor; enrollment instructions for certain organizations that qualify as exceptions; qualifying contracts, exemptions, and exceptions; subcontractors,
independent contractors, and affiliates; and information for designated agents.
The guide is available at http://www.uscis.gov/USCIS/E-Verify/Federal%20Contractors/Supplemental%20Guidance%20for%20Federal%20Contractors%20082709%20FINAL.pdf.
Other E-Verify guidance includes the *E-Verify User Manual for Employers*, available at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf, and the *E-Verify User Manual for General Users, Program Administrators and Designated Agents*, available at http://www.uncp.edu/hr/employment/E-VerifyUserManual.pdf.

Back to Top

5. October Visa Bulletin Shows EB-3s Backlogged 7 Years, Several Programs Expiring on September 30

The Department of State's October 2009 Visa Bulletin shows a cut-off date for employment-based third preference visa numbers of June 1, 2002, for all chargeability areas except for China-mainland born (February 22, 2002); India (April 15, 2001); and Mexico (May 1, 2002).
All chargeability areas are current for EB-2 numbers, except for China-mainland

born (March 22, 2005), and India (January 22, 2005). For the third preference "Other Workers" category, all chargeability areas have a cut-off date of June 1, 2001, except for India (April 15, 2001).
Meanwhile, the employment-based fourth preference non-minister special immigrant program and the employment-based fifth preference category were due to expire on September 30, 2009. However, Congress has passed a continuing resolution to continue those programs for 30 days, to the end of October.
The Visa Bulletin for October 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4575.html.

Back to Top

6. USCIS Announces New Web Site Design

U.S. Citizenship and Immigration Services (USCIS) says its redesigned Web site, in English and Spanish, is more customer-centric, providing users with a "one-stop shop" for immigration services and information.
Before the redesign, users described the USCIS Web site as "frustrating" and "hard to navigate." The new "Where to Start" tool, located on the top left of the homepage, allows for direct navigation to information.
By clicking on the first drop-down menu, users have the opportunity to choose who they are from a number of options. After selecting who they are, clicking on the second drop-down menu allows them to select what they want to do. USCIS says the "Where to Start" tool will take users to the information they want without having to search the entire site. Applicants for citizenship may also follow the progress of their cases online, and receive notifications via e-mail or text messages when their application status changes.
The USCIS Web site is at http://www.uscis.gov/portal/site/uscis. A related fact sheet is available at http://www.uscis.gov/USCIS/New%20Structure/Press%20Releases/FY%2009/September%202009/Where%20to%20Start%20Fact%20Sheet_ckn%2016Sept09.pdf.

Back to Top

7. Labor Dept. Issues Proposed Rule on H-2A Temporary Agricultural Workers

The Department of Labor's Wage and Hour Division proposes to amend its regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. The proposed rule reexamines the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2A status. The Department also proposes to provide for enforcement under the H-2A program so that workers are protected when employers fail to meet H-2A requirements.

The Department said it has concluded that the policy underpinnings of a 2008 H-2A streamlining rule do not provide an adequate level of protection for either U.S. or foreign workers. In addition, the Department noted, one of the goals of the 2008 final rule was to increase usage of the H-2A program and make it easier and more affordable for the average employer. Applications have decreased since implementation of that rule, however. Employers filed 3,176 applications in the first three and a half months of fiscal year 2009, before implementation of the 2008 final rule. In the six and a half months from January 17, 2009, to July 31, 2009, employers filed 4,214 applications. When compared to the previous year (fiscal year 2008), however, in which employers filed 8,360 applications, it is apparent that employers are not increasing their usage of the H-2A program. "While factors other than the regulatory changes may play a role in this decrease, without accomplishing the prior rule's goal of increasing program usage, the Department can no longer justify the significant decrease in worker protections," the Department said.

The Department also said it believes that there are insufficient worker protections in the attestation-based model in which employers merely confirm, but do not demonstrate to the satisfaction of a government observer, that they have performed an adequate test of the U.S. labor market. Even in the first year of the attestation model, the Department said, employers are attesting to compliance with program obligations with which they have not complied, "either from a lack of understanding or

otherwise." Specific situations the Department noted include employers "who have imposed obstacles in the way of U.S. workers seeking employment. Examples of this have included the requirement of interviewing in-person at remote interview sites that require payment to access; multiple interview processes for job opportunities requiring no skills or experience; test requirements that are not disclosed to the applicants; contact information that is disconnected, is located outside the U.S., or proves incorrect; farm labor contractors who attest to a valid license but have none; and contractors who have not obtained surety bonds."

The Department also noted that the shift from the Adverse Effect Wage Rate (AEWR) as calculated under a 1987 rule to the recalibration of the prevailing wage as the AEWR under the 2008 final rule has resulted in a substantial reduction of farmworker wages in a number of labor categories.
The proposed rule, which includes a number of requirements and a proposed timetable under the proposed H-2A program, is available at http://edocket.access.gpo.gov/2009/pdf/E9-21017.pdf. The Department made a technical correction to the proposed rule, available at http://edocket.access.gpo.gov/2009/pdf/E9-21274.pdf.

Back to Top

8. Interim EADs Issued to Salvadorans

USCIS announced that it will issue interim Employment Authorization Documents (EADs) to Salvadoran temporary protected status (TPS) beneficiaries who have not yet received a final action on their re-registration applications and whose re-registration applications have been pending for more than 90 days.
Initially, the expiration date for Salvadoran EADs was March 9, 2009. USCIS automatically extended the EAD validity period to September 9, 2009. USCIS said that issuance of the interim EADs will allow TPS beneficiaries to continue working while the agency completes processing of their re-registration applications.
USCIS said it has already processed over 99.5 percent of the Salvadoran re-registration applications for the current TPS designation period ending September 9, 2010. This includes a substantial number of re-registration applications filed after the re-registration period closed. A small number of pending re-registration applications are still under review by USCIS and

awaiting further information from the applicants.
Any applicant who receives an interim EAD must still respond to any USCIS requests, including for additional evidence, documents, or biometric/fingerprint appointments. To maintain employment authorization through September 9, 2010, an applicant had to respond to any USCIS requests and resolve all issues so that a new EAD could be provided.
For more information, see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=5de2eb7cf98c3210VgnVCM100000b92ca60aRCRD&vgnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD.

Back to Top

9. Global Entry Program Now Available at Detroit Airport
Global Entry, U.S. Customs and Border Protection's (CBP) new clearance system for international air passengers, is now open at Detroit Metropolitan International Airport.
Global Entry allows pre-screened, approved, registered travelers (including U.S. citizens, lawful permanent residents of the U.S. and citizens of certain other countries) to use automated kiosks to receive expedited processing upon arrival at Detroit Metropolitan Airport.
Global Entry participation is voluntary. Participants must possess a machine-readable U.S. passport or permanent resident card, pay a non-refundable $100 application fee, submit an online application, and complete an interview at a CBP enrollment center.
"Detroit is a major international gateway, especially for flights from Asia and Europe, as well as a hub airport for Delta, the world's largest airline," said airport authority CEO Lester Robinson. "We treasure our international passengers and this added convenience provided by is one more customer service we can highlight when marketing our airport and our region."
Global Entry is now available at Miami, Atlanta, Los Angeles, Chicago, Sea-Tac, Dallas, Newark, San Francisco, Boston, Orlando, Honolulu, Las Vegas, Orland-Sanford, Philadelphia, San Juan and Fort Lauderdale, as well as Detroit.
The Detroit announcement is available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/09182009_4.xml.
Additional information on the Global Entry program (including enrollment

application) is available at http://www.cbp.gov/xp/cgov/travel/trusted_traveler/global_entry/.

Back to Top

10. **Missouri Plant Pays $450K Fine for Hiring Undocumented Workers**

A Missouri poultry-processing plant where 136 undocumented workers were arrested in 2007 recently paid a $450,000 administrative fine as a result of a worksite enforcement investigation conducted by U.S. Immigration and Customs Enforcement (ICE). George's Processing, Inc., paid the fine on September 11, 2009, as part of a settlement agreement.
ICE said it will use the funds to promote future law enforcement programs and activities in worksite enforcement. During a May 2007 enforcement action at the George's plant in Cassville, Missouri, ICE agents administratively arrested 136 undocumented workers from Mexico and Guatemala. Twenty-eight of those workers were criminally prosecuted for various immigration violations, including falsely claiming U.S. citizenship. Two of the company's hiring personnel subsequently were convicted of harboring undocumented workers and inducing them to remain in the United States.
George's Processing, Inc., headquartered in Springdale, Arkansas, employs 4,000 workers at its three poultry processing facilities in Arkansas, Missouri, and Virginia.
The USCIS announcement is available at http://www.ice.gov/pi/nr/0909/090915springfield.htm.

Back to Top

11. DHS Proposes Nonimmigrant Investor Visa Classification for Northern Marianas

The Department of Homeland Security (DHS) issued a proposed rule on September 14, 2009, proposing to recognize a Commonwealth of the Northern Mariana Islands (CNMI)-specific nonimmigrant investor visa classification. The "E-2 CNMI Investor" status is one of several CNMI-specific provisions in the Consolidated Natural Resources Act of 2008, which extended most provisions of federal U.S. immigration law to the CNMI. This status would be available only to investors in the CNMI who have been granted a qualifying status by the CNMI before the "transition period," which begins on November 28, 2009, and

ends on December 31, 2014. With E-2 CNMI Investor nonimmigrant status, eligible CNMI investors would be able to remain in the CNMI for an initial period of two years, and the period would be renewable through the duration of the transition period. CNMI investors would be able to exit and enter the CNMI with valid E-2 CNMI Investor visas.

DHS said it is proposing temporary provisions for the transition period "to provide for an orderly transition from the current CNMI permit system to the immigration laws of the U.S., to lessen potential effects on the CNMI economy, and to give foreign long-term investors time to identify and obtain appropriate U.S. immigrant or nonimmigrant status."

The proposed rule is available at 74 Fed. Reg. 46,938 (Sept. 14, 2009) (http://edocket.access.gpo.gov/2009/pdf/E9-21967.pdf). Related questions-and-answers are available at http://www.uscis.gov/USCIS/Office%20of%20Communications/Press%20Releases/FY%2009/September%202009/CNMI_InvestorQandA.pdf.

Back to Top

12. Change in CBP Policy on Deferred Inspection of Legal Permanent Residents with Criminal Convictions - October 1, 2009

CBP has told AILA that, beginning on October 1, 2009, there is a greater likelihood that returning Legal Permanent Residents (LPRs) with criminal convictions will be put in removal proceedings at ports of entry versus a grant of deferred inspection so that they can further provide clarification on their admissibility. In addition, depending on the nature of the conviction, CBP staffing, and available detention bedspace, among other factors, it also is possible that more returning LPRs with criminal convictions will be detained. CBP confirmed, however, that deferred inspection for such returning LPRs is still an option. CBP explained that it modified its policy based on information reflecting that an appreciable percentage of those granted deferred inspection do not show up for such inspection. More guidance to the field will be forthcoming from CBP, but be aware of the likelihood of an increase in the number of LPRs being detained and/or issued NTAs at ports of entry. CBP confirmed that this policy already had been in place in Georgia and Florida.

Back to Top
