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US IMMIGRATION & NATIONALITY LAW

NOVEMBER 2009 IMMIGRATION UPDATE

Posted on November 8, 2009 by Cyrus Mehta

Headlines:

- **1.** **Congress Extends Four Immigration Programs for Three Years** - The non-minister religious worker, "Conrad 30," EB-5 immigrant investor pilot, and E-Verify programs are extended for three years, until September 30, 2012.
- **2.** **DHS Rescinds 'No-Match' Rules** - DHS said it will focus its enforcement efforts relating to the employment of unauthorized workers on improved verification.
- **3.** **USCIS Ombudsman Recommends Temporary Acceptance of Filed LCAs for Certain H-1B Filings** - The USCIS ombudsman made several recommendations in light of LCA processing delays and errors at DOL, coupled with USCIS's current H-1B petition initial filing requirements.
- **4.** **Many Visa Number Cut-Off Dates Not Budging in November, State Dept. Says; Two Employment Visa Categories Set To Expire** - It has been necessary to hold most of the employment cut-off dates for November, and the Department said it is not possible to provide an estimate of future cut-off date movements.
- **5.** **State Dept. Issues DV-2011 Visa Lottery Instructions** - Entries for the DV-2011 Lottery must be submitted electronically by noon EST on Monday, November 30, 2009.
- **6.** **State Dept. Issues Final Rule on Documentation of Nonimmigrants in Religious Occupations** - Consular officers must ensure that R-1 visa applicants have obtained an approved USCIS Form I-129 petition before a visa can be issued.
- **7.** **NYC Mayor Bloomberg Announces New Immigration Efforts** - Mayor Bloomberg has called immigrants the "lifeblood of New York City."

- **8.** **State Dept. Receives Petition for New U.S.-Mexico Bridge** - The bridge would enable ticketed airline passengers to travel between Mexico's Tijuana International Airport and San Diego via an enclosed, elevated pedestrian bridge.
- **9.** **USCIS Launches E-Notification** - USCIS has launched an "E-Notification" initiative for immigration applications and petitions filed at one of three USCIS Lockbox facilities.
- **10.** **USCIS Announces New Notice of Entry of Appearance Forms for Attorneys and Accredited Representatives** - A revised Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) and a new Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States (Form G-28I) have been issued.
- **11.** **USCIS, EOIR Issue Interim Final Rule Implementing Extension of U.S. Immigration Laws to Northern Marianas** - The interim final rule amends the regulations governing, among other things, classifications authorized for employment.
- **12.** **ABIL Global: New Indian Immigration Regime** - New stipulations will have a significant impact on foreign nationals wanting to visit India on short-term assignments.
- **13.** **New Publications and Items of Interest**.

Details...

1. Congress Extends Four Immigration Programs for Three Years

On October 28, 2009, President Obama signed into law the fiscal year 2010 appropriations bill for the Department of Homeland Security.

The law (Pub. L. No. 111-83) extends four immigration programs: (1) the non-minister religious worker program (section 568 of the law), the "Conrad 30" program for certain foreign doctors (section 568), the EB-5 immigrant investor pilot program (section 548), and the E-Verify program for electronic verification of workers' eligibility (section 547). All four programs are extended for three years, until September 30, 2012.

The new law also includes statutory authority for U.S. Citizenship and Immigration Services to complete processing of permanent residence applications for surviving spouses and other relatives of immigration sponsors who die during the adjudication process (section 568).

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2. DHS Rescinds 'No-Match' Rules

Effective November 6, 2009, the Department of Homeland Security (DHS) is rescinding the final rules it promulgated in 2007 and 2008 relating to procedures that employers may take to acquire a safe harbor from receipt of "no-match" letters, which the Social Security Administration (SSA) sends to employers when the combination of an employee name and social security number does not match SSA records. DHS proposed to rescind the no-match rules on August 19, 2009, and is issuing this final rule without change.

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 will focus its enforcement efforts relating to the employment of unauthorized workers on improved verification, including participation in E-Verify, the ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs. DHS said that IMAGE is "designed to help the business community develop and implement hiring and employment verification best practices."

USCIS said that "hese tools focus on more universal compliance with the employment eligibility verification requirements of the Immigration and Nationality Act than a safe harbor procedure for a limited number of employers who receive a No-Match letter." The agency said that a no-match letter is "reactive, either one specifically guided to the employment eligibility issue from ICE or one indirectly pointing to a potential employment eligibility issue through social security number record mismatches on tax filings through SSA."

DHS also noted that "unscrupulous employers would continue to find ways to take advantage of the system, regardless of whether the No-Match rules were in place." The agency said it focuses criminal and civil enforcement efforts against "the most egregious violators: employers who use unauthorized workers in order to gain a competitive advantage or those who exploit the vulnerable, often engaging in human trafficking and smuggling, identity theft, and social security number and document fraud"; and "employers in the Nation's critical infrastructure sites, including airports, seaports and power plants."

The final rule is available at

http://edocket.access.gpo.gov/2009/pdf/E9-24200.pdf.

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3. USCIS Ombudsman Recommends Temporary Acceptance of Filed LCAs for Certain H-1B Filings

In August and September 2009, the ombudsman for U.S. Citizenship and Immigration Services (USCIS) received complaints concerning H-1B cases with incorrectly denied labor condition applications (LCA/ETA-9035) filed with the U.S. Department of Labor (DOL). The ombudsman said that LCA processing delays and errors at DOL, coupled with USCIS's current H-1B petition initial filing requirements, "are prejudicing employers and individuals who are unable to timely file original or extension H-1B visa petitions." Untimely H-1B petition filings lead to several problems, the ombudsman noted, including: (1) the potential loss of employees' legal status; (2) business operation disruptions due to the loss of continuity in the employment of key employees; and (3) economic loss to employees in the form of lost wages and costs of travel overseas due to loss of status.

Stakeholders have detailed to the ombudsman errors stemming from the new DOL LCA certification process, iCERT, launched on April 15, 2009. For example, the ombudsman noted, DOL is denying LCAs based on false FEIN (Federal Employer Identification Number) mismatches with DOL's database. The ombudsman said that cases involving LCA certification problems represent up to seven percent of total iCERT filings from April 15, 2009, through the beginning of August 2009 (approximately 2,900 denials out of approximately 41,700 LCAs submitted).

The ombudsman noted that despite DOL's jurisdictional ownership of H-1B-related LCA processing problems, these difficulties extend to USCIS through the agency's requirement that petition filings include certified LCAs. "Any costs to USCIS such as issuing RFEs or temporarily lowering production levels, are outweighed by the burden that incorrect denials have on employers and individuals," the ombudsman said. "USCIS currently has the capacity to make what amounts to a minor processing modification to address a temporary situation."

To mitigate the impact of LCA processing difficulties, the ombudsman recommends that USCIS:

(1) reinstate the agency's previous practice of temporarily accepting an H-1B petition (Form I-129) supported by proof of timely filing of an LCA application with DOL, and issue a Request for Evidence (RFE) whereby the H-1B petitioner later provides the certified LCA; and

(2) establish a temporary policy under which the agency would excuse late H-1B filings where the petitioner has documented an LCA submission to DOL that was improperly rejected.

The report is available at http://www.dhs.gov/. USCIS officials have not responded yet to the ombudsman's recommendations.

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4. Many Visa Number Cut-Off Dates Not Budging in November, State Dept. Says

The State Department's Visa Bulletin for November 2009 notes that demand from U.S. Citizenship and Immigration Services offices has far exceeded earlier indications of cases eligible for immediate processing. As a result, the Department said, it has been necessary to hold most of the employment cut-off dates for November, and it is not possible to provide an estimate of future cut-off date movements.

Regarding the employment fourth preference "certain religious workers" category, the Visa Bulletin notes that the non-minister special immigrant program expires on October 30, 2009. No SR-1, SR-2, or SR-3 visas may be issued overseas on or after October 30, 2009. Visas issued before that date may only be issued with a validity date of October 30, 2009, and all individuals seeking admission as a non-minister special immigrant must be admitted into the U.S. no later than midnight on October 30, 2009.

Regarding the employment fifth preference pilot categories (I5, R5), the immigrant investor pilot program was extended through October 30, 2009. I5 and R5 visas may be issued until the close of business on October 30, 2009, and may be issued for the full validity period. No I5-1, I5-2, I5-3, R5-1, R5-2, or R5-3 visas may be issued after October 30, 2009.

The cut-off dates for the categories mentioned above have been listed as "Unavailable" for November. If there is legislative action extending one or both of these categories for fiscal year 2010, the Department said, those cut-off

dates would become "Current" for November. As noted in article #2 above, Congress is about to extend those two categories for three years.

The Visa Bulletin for November 2009 is available at http://travel.state.gov/.

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5. State Dept. Issues DV-2011 Visa Lottery Instructions

On October 6, 2009, the Department of State announced that entries for the DV-2011 Lottery must be submitted electronically between noon, Eastern Daylight Time (EDT) (GMT-4), Friday, October 2, 2009, and noon, Eastern Standard Time (EST) (GMT-5) Monday, November 30, 2009.

Applicants may access the electronic Diversity Visa (E-DV) Entry Form at http://www.dvlottery.state.gov/ during the registration period. Paper entries will not be accepted. The Department strongly encourages applicants not to wait until the last week of the registration period to enter. Heavy demand may result in Web site delays. No entries will be accepted after noon, EST, on November 30, 2009. All entries by an individual will be disqualified if more than one entry for that individual is received, regardless of who submitted the entry.

For DV-2011, no countries have been added or removed from the previous year's list of eligible countries. For DV-2011, natives of the following countries are not eligible to apply because the countries sent a total of more than 50,000 immigrants to the United States in the previous five years: Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, Poland, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

The full instructions, including details on eligibility and how to apply, are available at http://edocket.access.gpo.gov/2009/pdf/E9-24077.pdf.

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6. State Dept. Issues Final Rule on Documentation of Nonimmigrants in Religious Occupations

To comply with the Department of Homeland Security regulation requiring sponsoring employers to file petitions for all persons for whom R-1 nonimmigrant status is sought, the Department of State issued a final rule,

effective October 6, 2009, that establishes a requirement that consular officers ensure that R-1 visa applicants have obtained an approved U.S. Citizenship and Immigration Services (USCIS) Petition for a Nonimmigrant Worker (Form I-129) before a visa can be issued.

The Department explained that USCIS has implemented the petition requirement for nonimmigrant religious workers as a way to determine the bona fides of a petitioning religious organization located in the U.S. and to determine that a religious worker will be admitted to the U.S. to work for a specific religious organization at the request of that organization.

The final rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-24089.pdf.

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7. NYC Mayor Bloomberg Announces New Immigration Efforts

In a recent speech at CUNY Graduate Center, New York City Mayor Michael Bloomberg said the city "needs more immigrants." As part of his plan for a possible third term should he be reelected on November 3, 2009, Mayor Bloomberg has called immigrants the "lifeblood of New York City" and expressed his support for comprehensive immigration reform with a pathway to citizenship and for the DREAM Act, "which would allow children of undocumented immigrants to become citizens in exchange for attending college or performing military service." Mr. Bloomberg also plans to create an Immigrant Advisory Board "with members of the religious, labor, business, cultural, and community-based networks to meet quarterly."

Mr. Bloomberg noted that in June 2009, the city's Department of Small Businesses Services (SBS) unveiled an initiative to help Latino small business owners that included a financing fair, a full-day seminar on business assistance and government resources, information resources in Spanish and English (http://nyc.gov/html), the launch of an online directory on the National Hispanic Business Information Clearinghouse Web site (http://hispanicbic.org/), and the opening of a new NYC Business Solutions satellite office in Washington Heights. "This targeted strategy to assist Hispanic small businesses will be replicated for other immigrant small business communities," Mr. Bloomberg said. "SBS will be charged with developing and executing community-specific strategies for the largest immigrant small business communities in New York City over the third

term."

Among other things, Mr. Bloomberg also said that New York City will partner with private law firms to dispatch deferred legal associates to immigrant communities in need of quality legal assistance and representation. The associates will be deployed for a minimum one-year fellowship. The city will commit $2 million to the effort to cover a team of supervising attorneys and ongoing training of associates and technical assistance in the area of immigration law. The city also will work with local law schools to engage alumni into a "Call to Service for the Legal Community" to provide pro bono legal assistance to immigrants.

"Immigrants: The Lifeblood of New York City" is available at http://www.mikebloomberg.com/.

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8. State Dept. Receives Petition for New U.S.-Mexico Bridge

The Department of State recently received an application for a Presidential permit to construct, operate, and maintain a new international pedestrian bridge, the "San Diego-Tijuana Airport Cross Border Facility (CBF)," to be located on the U.S.-Mexico border near San Diego, California, and Tijuana, Baja California, Mexico. Otay-Tijuana Venture, L.L.C., consists of companies owned by U.S. and Mexican investors and is undertaking the project as a for-profit, commercial activity. The CBF would enable ticketed airline passengers to travel between Mexico's Tijuana International Airport and San Diego via an enclosed, elevated pedestrian bridge. The CBF would allow such travelers to bypass San Diego's ports of entry and to avoid driving through the city of Tijuana.

Written comments are invited by December 31, 2009, and should be sent to the person named in the notice, which is available at http://edocket.access.gpo.

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9. USCIS Launches E-Notification

U.S. Citizenship and Immigration Services (USCIS) has launched an "E-Notification" initiative for immigration applications and petitions filed at USCIS Lockbox facilities in Chicago, Illinois; Phoenix, Arizona; and Lewisville, Texas. If you file your USCIS applications and/or petitions at one of these facilities, you will have the option to receive an e-mail and/or text message informing you

that USCIS has accepted your application or petition. If you would like to receive an E-Notification that your application or petition has been accepted, complete Form G-1145, E-Notification of Application/Petition Acceptance, and attach it to the top of your application or petition.

Forms that are currently processed through the USCIS Lockbox facilities relate to:

- Family-based forms
- Applications for Temporary Protected Status
- Card replacement
- Citizenship and naturalization forms
- Adoption forms

By the end of 2009, the following additional forms are expected to be filed through Lockbox facilities:

- All remaining adjustment-of-status forms
- All employment authorization request forms
- All requests for travel documents

A fact sheet is available at http://www.uscis.gov/.

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10. USCIS Announces New Notice of Entry of Appearance Forms for Attorneys and Accredited Representatives

U.S. Citizenship and Immigration Services (USCIS) has announced that a revised Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) and a new Notice of Entry of Appearance as Attorney in Matters Outside the Geographical Confines of the United States (Form G-28I) have been issued.

USCIS has extended a "grace period" so that G-28s currently in the mail will be considered valid when received at the USCIS Lockbox facility or USCIS Service Center. The grace period is effective until USCIS further refines the form, which the agency expects to complete soon. The new G-28 is not required for receiving updates or interviews unless a new attorney is representing the applicant.

The new G-28I is for use by attorneys admitted to practice law who seek to appear before the Department of Homeland Security (DHS) in matters outside

of the U.S. Acceptance by a DHS entity of a completed G-28I does not itself constitute approval by the DHS entity for the attorney to represent the applicant or petitioner in the matter for which the G-28I was filed. The G-28I may not be filed for matters in DHS offices within the U.S.

The American Immigration Lawyers Association (AILA) has noted concerns with the short implementation timeframe for the new forms, as well as other issues, including the fact that the revised G-28 requires marking the form with specific USCIS form numbers to which the attorney's appearance is related. AILA also noted that the revised form has separate areas that would be filled out if the matter is before Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP). In practice, AILA noted, this could have serious implications where related issues are handled by different components of the Department of Homeland Security, such as when a file is transferred from USCIS to ICE for investigation.

The announcement is available at http://www.uscis.gov/. The new G-28 form is available at http://www.uscis.gov/. The new G-28I form is available at http://www.uscis.gov/.

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11. USCIS, EOIR Issue Interim Final Rule Implementing Extension of U.S. Immigration Laws to Northern Marianas

U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review issued an interim final rule effective November 28, 2009, implementing the extension of U.S. immigration laws to the Commonwealth of the Northern Mariana Islands (CNMI) under the Consolidated Natural Resources Act of 2008 (CNRA). The rule amends the regulations governing, among other things, references to the geographical "United States" and its territories and possessions; classifications authorized for employment; acceptable documents for employment eligibility verification; employment of undocumented workers; and adjustment of status of immediate relatives admitted under the Guam-CNMI Visa Waiver Program. The stated purpose of the rule is "to ensure that the regulations apply to persons and entities arriving in or physically present in the CNMI to the extent authorized by the CNRA."

USCIS has established a transitional worker program for foreign nationals to live and work in CNMI. For more information, see http://www.uscis.gov/.

Written comments should be submitted by November 27, 2009, according to the instructions in the interim rule, which was published in the Federal Register on October 28, 2009, and is available at http://edocket.access.gpo.

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12. ABIL Global: New Indian Immigration Regime

Recently, the Indian Ministry of Commerce and Industry (MCI) announced that business visas cannot be granted to foreign nationals to work on projects or specific contracts in India. The formal announcement also requires all foreign nationals on such visas to leave India and return on employment visas. Initially they were required to leave before the end of September 30, 2009, but the Ministry of Home Affairs (MHA) extended the deadline to October 31, 2009. Individuals who are in India on business visas in connection with investments, joint ventures, or buying and selling industrial products can continue to remain in the country. Both government communications also state that in the future, business visas will only be issued for activities specified in their circulars. However, because the circulars were rather ambiguous, the Ministry of Home Affairs published a set of frequently asked questions on October 29, 2009. These provide some clarity but have not resolved all ambiguities.

These new stipulations will have a significant impact on foreign nationals wanting to visit India on short-term assignments. Per the announcement, these individuals will now require an employment visa as opposed to a short-term business visa. Further, the issuance of a business or employment visa will continue to depend upon the discretion of the consular officer. The change in the visa category would definitely have tax and social security ramifications for the foreign nationals and their employers during their stay in India. Additionally, these changes may also generate corporate tax ramifications in rare cases, depending on the nature of the individual's activities in India.

Companies seeking to assign foreign nationals to India on a short-term basis should assess their projects to identify and comply with visa requirements. Companies should also review these short-term projects for compliance with the tax (individual and corporate) structure in India. In the interim, companies seeking to assign foreign nationals should conform to the new regime. It is expected that the outcome of a business or employment visa, which will be based on evidence submitted at the time of application, will be subject to severe scrutiny to determine the caliber of the applicant and the nature of the

job in India.

Please visit http://cyrusmehta.blogspot.com/ to view a longer version of this article.

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13. New Publications and Items of Interest

Temporary worker visas. Immigration Works USA has issued a policy brief, "Reduced Access: New Regulations Aimed at Temporary Worker Visas." The report notes that this has been a difficult year for businesses that rely on foreign workers. Both Congress and the new administration imposed restrictions on several widely used visa categories. The Department of Homeland Security made employers the target of a new immigration enforcement strategy likely to result in dramatically increased criminal prosecutions. As the downturn drags on, the report notes, the public is increasingly skeptical that employers need immigrant workers, and additional threats loom on the horizon: legislation pending in the Senate could reduce employers' access to highly skilled workers, and lawmakers in the House of Representatives are working on a bill that could do the same for seasonal workers. The report looks at new developments for H-2A agricultural workers, H-2B seasonal workers, worksite enforcement and I-9 audits, and H-1B and L-1 professionals. An appendix includes a memo on worksite enforcement from U.S. Immigration and Customs Enforcement. The report is available at http://www.immigrationworksusa.org/.

USCIS H-1B compliance site visit instructions. This document is intended to assist U.S. Citizenship and Immigration Service site inspectors when conducting a site audit of a business for H-1B compliance. See http://www.aila.org/.

Immigration in the labor market. The Migration Policy Institute (MPI) recently launched its Labor Markets Initiative, a comprehensive, policy-focused review of the role of immigration in the labor market. The initiative will produce detailed policy recommendations on how the United States should rethink its immigration policy in light of what is known about the economic impact of immigration, bearing in mind growing income inequality, concerns about the effect of globalization on U.S. competitiveness, the competition for highly skilled migrants, and demographic and technological change. The initiative is guided by a group of leading experts in labor economics, welfare policy, and

immigration. See http://www.migrationpolicy.org/.

Various reports. New reports from MPI:

"Immigrants and Health Care Reform: What's Really At Stake?" (http://www.migrationpolicy.org/pubs/he