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US IMMIGRATION & NATIONALITY LAW

DECEMBER 2009 IMMIGRATION UPDATE

Posted on December 1, 2009 by Cyrus Mehta

Headlines:

- **1.** **ICE Workplace Audits Stepped Up** - ICE has stepped up audits of companies' hiring records to determine compliance with employment eligibility verification laws.
- **2.** **USCIS Reminds Applicants for Travel Documents To Apply Early** - USCIS issued a fact sheet outlining eligibility requirements, the consequences of traveling without advance parole for affected persons, and the possible consequences of using advance parole after being unlawfully present in the U.S. or to return to the country of claimed persecution.
- **3.** **USCIS Updates H-1B FY 2010 Cap Count** - The recent pace of filings suggests that H-1B numbers may be exhausted for the fiscal year by the end of December.
- **4.** **State Dept. Cautions Waiver Travelers To Disclose Visa Delays as Denials** - Certain travelers are advised to indicate that they have been refused a visa under INA § 221(g) when completing their ESTA registrations.
- **5.** **USCIS Issues Guidance on I-140 Issues and Labor Certifications** - The guidance notes, among other things, that government agencies have multiple immigration avenues for offers of permanent employment to professors or researchers.
- **6.** **USCIS Temporarily Accepts Incorrectly Denied LCAs for Certain H-1B Cases** - USCIS announced that it would temporarily accept certain H-1B petitions filed without LCAs that have been certified by the DOL for a 120-day period, through March 4, 2010.
- **7.** **Labor Dept. Announces Expiration of H-1C Nursing Program** - The H-1C program will sunset on December 21, 2009.

- **8.** **DOL Extends H-2A Transition Period** - The application filing procedures under the extended transition period apply to all employers with dates of need before June 1, 2010.
- **9.** **USCIS Releases Fact Sheet on 'Public Charge' Determinations** - The agency noted, among other things, that receiving public benefits does not automatically make an individual a public charge.
- **10.** **December Visa Bulletin Notes Reinstatement of Certain Religious Workers and Investor Pilot Program Categories** - The two categories have been extended through September 30, 2012.
- **11.** **SEVP Announces New Mailing Address, Phone Number** - The Student and Exchange Visitor Program office has a new mailing address.
- **12.** **NEXUS Frequent Border Crossing Enrollment Center Moves** - The center has moved from International Falls, Minnesota, to Fort Frances, Ontario, Canada.
- **13.** **Northern Mariana Islands Transition to U.S. Immigration Law, Guam Also Affected** - Although U.S. immigration law now applies to the Marianas, they will undergo a transition period with temporary measures ending December 31, 2014, to allow for an orderly transition.

Details...

1. ICE Workplace Audits Stepped Up

U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton announced on November 19, 2009, the issuance of Notices of Inspection (NOIs) to approximately 1,000 employers across the U.S. associated with critical infrastructure, alerting business owners that ICE will audit their hiring records to determine compliance with employment eligibility verification laws.

The businesses served with audit notices were selected for inspection, ICE said, "as a result of investigative leads and intelligence and because of the business' connection to public safety and national security -- for example, privately owned critical infrastructure and key resources." The names and locations of the businesses were not released "due to the ongoing, law enforcement sensitive nature of these audits."

Audits involve a comprehensive review of Forms I-9 (Employment Eligibility Verification). Audits may result in civil penalties and lay the groundwork for criminal prosecution of employers who knowingly violate the law. ICE identified

I-9 audits as "the most important administrative tool in building criminal cases and bringing employers into compliance with the law."

Statistics resulting from 654 audits announced in July included:

- ICE agents reviewed more than 85,000 Form I-9s and identified more than 14,000 suspect documents, which was approximately 16 percent of the total number reviewed.
- As of November 19, 2009, 61 NIFs have been issued, resulting in $2,310,255 in fines. In addition, 267 cases are being considered for NIFs.
- ICE closed 326 cases after businesses were found to be in compliance with employment laws or after businesses were served with a Warning Notice in expectation of future compliance.

The Alliance of Business Immigration Lawyers (ABIL) notes that some clients are reporting receipt of subpoenas for wage and related records. Relying on inexperienced counsel and self-audits is no longer sufficient. Contact your ABIL member for guidance in particular cases, including conducting proactive pre-audits.

The ICE announcement is at http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm.

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2. USCIS Reminds Applicants for Travel Documents To Apply Early

U.S. Citizenship and Immigration Services has reminded applicants for advance parole (permission to reenter the U.S. after traveling abroad) to apply early. USCIS said that travelers must obtain advance parole if they have been granted temporary protected status or have a pending application for (1) adjustment of status to lawful permanent residence; (2) relief under § 203 of the Nicaraguan Adjustment and Central American Relief Act; (3) asylum; or (4) legalization.

The agency issued a fact sheet outlining eligibility requirements, the consequences of traveling without advance parole for affected persons, and the possible consequences of using advance parole after being unlawfully present in the U.S. or to return to the country of claimed persecution.

The fact sheet is available at http://www.uscis.gov/USCIS/2009Final.pdf.

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3. USCIS Updates H-1B FY 2010 Cap Count

As of November 20, 2009, approximately 56,900 H-1B cap-subject petitions had been filed, U.S. Citizenship and Immigration Services (USCIS) announced. USCIS has approved sufficient H-1B petitions for those with advanced degrees to meet the exemption of 20,000 from the fiscal year 2010 cap. Any H-1B petitions filed on behalf of a worker with an advanced degree will now count toward the general H-1B cap of 65,000.

USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions has been received to reach the statutory limit, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn.

The recent pace of filings suggests that H-1B numbers may be exhausted for the fiscal year by the end of December. After that, employers will be left with limited alternatives for hiring skilled foreign nationals when U.S. workers are unavailable until filings for the next fiscal year can be made.

For details, see http://www.uscis.gov/h-1b_count.

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4. State Dept. Cautions Waiver Travelers To Disclose Visa Delays as Denials

The Department of State has taken the position that those who have applied for a visa that cannot be granted due to a need for further security clearances, or additional documents or information, have been effectively "denied" a visa and must disclose this when completing their ESTA (Electronic System for Travel Authorization) application should they later wish to use the Visa Waiver Program as a visitor while their visa application remains pending. The Alliance of Business Immigration Lawyers warns that this situation can be confusing because the applicants may have been told simply that their applications require further processing rather than that they have been denied, but then they may be refused admission later for misrepresentation if they do not disclose the denial. Such travelers are advised to indicate that they have been refused a visa under INA § 221(g) when completing their ESTA registrations. Those who have completed an ESTA registration without revealing the denial are advised to re-register and indicate the specifics. This is a fluid situation, and the Department's position is controversial. Consult your immigration attorney for more specific guidance in particular cases.

Information on the ESTA system is available at https://esta.cbp.dhs.gov/B4CB86. The new Department of State position was made in consultation with U.S. Customs and Border Protection (CBP), which announced it to the American Immigration Lawyers Association's (AILA) CBP liaison committee. A public announcement by CBP is awaited.

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5. USCIS Issues Guidance on I-140 Issues and Labor Certifications

U.S. Citizenship and Immigration Services recently provided guidance on (1) determinations of whether a particular employer falls within the definition of INA § 203(b)(1)(B), thus allowing USCIS to grant, if otherwise approvable, a first preference (EB-1) green card petition filed by that employer on behalf of an outstanding professor or researcher in connection with an offer of employment; (2) procedures for determining whether a labor certification has been filed with a Form I-140 (Immigrant Petition for Alien Worker) during its validity period; and (3) various issues relating to labor certification applications approved by the Department of Labor and filed in support of I-140 petitions.

Among other things, the guidance clarifies that government agencies do not qualify as "private" employers for outstanding professors and researchers, and generally do not fit within the definition of § 203(b)(1)(B) unless the government agency is shown to be a U.S. university or institution of higher learning. The guidance notes that government agencies that do not fit the definition under § 203(b)(1)(B) may have other available immigration avenues to offer permanent employment to professors or researchers. For example, the guidance notes, assuming all of the eligibility requirements for that visa preference category have been met, a government agency may request an "alien of extraordinary ability" green card classification under INA § 203(b)(1)(A).

The guidance also discusses the 180-day validity period for approved labor certifications that have an ending validity date that falls on a Saturday, Sunday, or federal holiday. USCIS said that it will accept the filing of I-140 petitions on the next business day where the supporting labor certification validity period ends on a Saturday, Sunday, or federal holiday.

The guidance is available at http://www.uscis.gov/20Signed.pdf.

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6. USCIS Temporarily Accepts Incorrectly Denied LCAs for Certain H-1B Cases

In August and September 2009, the U.S. Citizenship and Immigration Services (USCIS) ombudsman received complaints about 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 the DOL, when 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 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 because of the loss of status.

The ombudsman said that USCIS has the authority to mitigate these effects. The ombudsman recommended that USCIS: (1) reinstate its previous practice of temporarily accepting an H-1B petition (Form I-129) supported by proof of timely filing of an LCA application with the 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 USCIS would excuse late H-1B filings where the petitioner has documented an LCA submission to DOL that was improperly rejected.

On November 5, 2009, USCIS announced that it would temporarily accept H-1B petitions filed without LCAs that have been certified by the DOL for a 120-day period, through March 4, 2010. USCIS noted, however, that it will only accept such H-1B petitions if they are filed at least seven calendar days after the LCAs were filed with the DOL and include evidence of these filings. The only acceptable evidence of filing is a copy of the DOL's e-mail giving notice of receipt of the LCA.

Petitioners who seek to take advantage of this temporary flexibility in the normal filing procedures for H-1B petitions must wait until they receive a request for evidence (RFE) before they submit the DOL-certified LCA to USCIS in support of the H-1B petition, USCIS said. The agency will give petitioners 30 calendar days within which they must send in a DOL certified LCA in response to the RFE. USCIS will only approve H-1B petitions that include certified LCAs.

See http://www.uscis.gov/Petitions.pdf.

The ombudsman's report, "Temporary Acceptance of Labor Condition Applications (LCAs) for Certain H-1B Filings," was released on October 23, 2009, and is available at http://www.dhs.gov/xlibrary/assets/cisomb_recommendation_43_LCAs_October_2009.pdf.

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7. Labor Dept. Announces Expiration of H-1C Nursing Program

The Department of Labor (DOL) has announced that the H-1C program, established under the Nursing Relief for Disadvantaged Areas Reauthorization Act, will sunset on December 21, 2009. Congress has not reinstated the program and, absent further legislative action, will no longer accept H-1C attestations from hospitals. The DOL said that questions about the H-1C program should be addressed to tlc.chicago@dol.gov. For more, see http://www.foreignlaborcert.doleta.gov/news.cfm.

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8. DOL Extends H-2A Transition Period

The Department of Labor has published an interim final rule extending the transition period application filing procedures implemented under the December 2008 H-2A final rule. The application filing procedures under the extended transition period apply to all employers with dates of need before June 1, 2010. The interim rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-27496.pdf.

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9. USCIS Releases Fact Sheet on 'Public Charge' Determinations

U.S. Citizenship and Immigration Services has released a fact sheet on public charge determinations. The agency noted that although an individual who is likely at any time to become a public charge is inadmissible to the U.S. and ineligible to become a legal permanent resident, receiving public benefits does not automatically make an individual a public charge. The fact sheet outlines benefits that *could* make a noncitizen inadmissible as a public charge if other criteria are met, and also lists benefits that are for special purposes rather than income maintenance and therefore not subject to public charge consideration,

such as Medicaid, Food Stamps, the Children's Health Insurance Program, foster care and adoption assistance, job training programs, and emergency disaster relief.

The fact sheet is available at http://www.uscis.gov/USCIS/sheet_11_06_09.pdf.

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10. December Visa Bulletin Notes Reinstatement of Certain Religious Workers and Investor Pilot Program Categories

The Department of State's Visa Bulletin for December 2009 notes that legislation in October extended the employment fourth preference "Certain Religious Workers" and employment fifth preference "Investor Pilot Program" green card categories for three years, through September 30, 2012.

Other employment-based categories generally have not budged since November's Bulletin, with the exception of the India third preference and "Other Workers" categories, which both advanced one month, to May 1, 2001.

The December 2009 Visa Bulletin is available at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4587.html.

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11. SEVP Announces New Mailing Address, Phone Number

The Student and Exchange Visitor Program office has a new mailing address. All correspondence should be mailed to: Student and Exchange Visitor Program, Attn: (Branch Name or Job Title), SEVP MS 5600, DHS/ICE, 500 12th Street, SW; Washington, DC 20598-5600. The new main telephone number is (703) 603-3400. E-mail addresses have not changed, so inquiries may be sent to SEVP via its previous e-mail address or via SEVIS.Source@dhs.gov. Also, the ICE Web site (http://www.ice.gov) layout has been updated, including the SEVP pages.

For a "faster resolution and response," SEVP recommends the following:

- For *I-901 fee questions, payment issues, transfer fee issues, and chargeback issues,* visit the I-901 section of the SEVP Web site (http://www.ice.gov/sevis/i901/index.htm), then e-mail fmjfee.SEVIS@dhs.gov.
- For *I-515A issues,* visit the I-515A Tool Kit on the SEVP Web site (http://www.ice.gov/doclib/sevis/pdf/I515A%20tool%20kit.pdf) for quick

tips, or e-mail SEVIS.I-515@dhs.gov to ask about documents.

The announcement is available at http://www.ice.gov/sevis/.

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12. NEXUS Frequent Border Crossing Enrollment Center Moves

U.S. Customs and Border Protection announced that the enrollment center for U.S. Customs and Border Protection's frequent border crossing program (NEXUS) moved on November 30, 2009, from International Falls, Minnesota, to Fort Frances, Ontario, Canada.

The NEXUS Enrollment Center is now located at 301 Scott Street, Fort Frances, Ontario, Canada P9A 1H1. The hours of operation are Monday and Wednesday, 9 a.m. to 4 p.m., and Thursday, 11 a.m. to 7 p.m.

The NEXUS program allows pre-screened, low-risk travelers to be processed with less delay by U.S. and Canadian officials at designated highway lanes at high-volume border crossing locations. Approved applicants are issued a photo identification/proximity card. Participants present their NEXUS card and make a declaration. They are then released, unless chosen for a more stringent inspection.

Both the U.S. and Canada must approve an individual's application. Denial of an application by either country will prevent an individual from participating in the NEXUS program. NEXUS is a binational program and applicants need to complete only a single application form, which can be filled out online, mailed, or faxed.

Qualified applicants are required to come to a NEXUS Enrollment Center for an interview. Interviews can be scheduled online using the Global Online Enrollment system located on the NEXUS Web site (http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/).

The announcement is available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/11242009_9.xml.

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13. Northern Mariana Islands Transition to U.S. Immigration Law, Guam Also Affected

On November 28, 2009, the Commonwealth of the Northern Mariana Islands

(CNMI) transitioned to U.S. immigration law under the Consolidated Natural Resources Act of 2008 (CNRA). Although U.S. immigration law now applies to the CNMI, it will undergo a transition period with temporary measures ending December 31, 2014, to allow for an orderly transition and give individuals time to identify an appropriate visa classification, U.S. Immigration and Customs Enforcement (ICE) announced.

Recognizing that some unique situations would result as the CNMI transitions to U.S. immigration law, ICE said that the Department of Homeland Security may grant parole to applicants for admission on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

Parole authority will be used in two specific situations in the CNMI: eligible Chinese and Russian nationals visiting for business or pleasure will be eligible for U.S. Customs and Border Protection (CBP)-administered parole into the CNMI on a case-by-case basis, and certain affected people, including CNMI permanent residents and various categories of immediate relatives, will be eligible for parole on a case-by-case basis.

The CNRA also contains two provisions that affect the U.S. Territory of Guam: elimination of the current Guam Visa Waiver Program and creation of a new Guam-CNMI Visa Waiver Program, under which eligible nationals of program countries and geographic areas may be authorized to visit Guam and/or the CNMI for up to 45 days; and elimination of the statutory cap on the number of H nonimmigrant worker petitions that can be filed by employers in Guam and the CNMI.

CBP has begun inspecting all passengers arriving at CNMI airports on flights from outside the U.S. CNMI authorities will continue to conduct customs inspections.

Additional information is available at http://www.ice.gov/pi/nr/0911/091127washingtondc.htm and http://www.ice.gov/doclib/pi/news/factsheets/cnmi_fact_sheet.pdf.

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