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US IMMIGRATION & NATIONALITY LAW

JANUARY 2010 IMMIGRATION UPDATE

Posted on January 1, 2010 by Cyrus Mehta

Headlines:

- **1.** **FY 2010 H-1B Cap Reached** - December 21, 2009, is the "final receipt date" for new H-1B specialty occupation petitions requesting an employment start date in FY 2010.
- **2.** **Self-Check Verification In the Works, USCIS Head Says; 'Verification Initiative for Business Enterprise' Discussed** - The recent pace of filings suggests that H-1B numbers may be exhausted for this fiscal year very soon.
- **3.** **Visa Bulletin Issues Projections for FY 2010 Cut-Off Dates** - The Visa Bulletin for January 2010 includes projections for cut-off dates that will be reached by the end of fiscal year 2010.
- **4.** **H-1C Nonimmigrant Nurse Classification Expires** - The H-1C nonimmigrant nurse category expired on December 21, 2009.
- **5.** **USCIS Changes Address of Filing Location for Naturalization Applications** - USCIS announced revised addresses for naturalization applications filed at USCIS Lockbox facilities in Phoenix and Dallas.
- **6.** **Did USCIS Immediately Deny Your Adjustment of Status Application Following a Change of Employment?** - USCIS's ombudsman asks that those who think their cases may have been denied erroneously to forward the ombudsman a case problem.
- **7.** **USCIS Ombudsman Discusses Pending Derivative I-485s Due to File Separation** - If a family member's derivative adjustment of status application has been pending in excess of 30 days from the approval date of the principal applicant's I-485, the ombudsman will review e-mailed documentation.
- **8.** **State Dept. Withdraws Proposed Rule on Secondary School Students Under Exchange Visitor Program** - The Department withdrew

the proposed rule because it was submitted before the OMB completed its review.

- **9.** **State Dept. To Deploy Web-Based Nonimmigrant Visa Application Worldwide** - The DS-160 will be expanded in phases, with the goal of worldwide usage for all nonimmigrant visa applications, except K visas, by April 30, 2010.
- **10.** **State Dept. Announces Centralization of Prevailing Wage Determinations** - The National Prevailing Wage and Helpdesk Center will receive and process prevailing wage determination requests for use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and permanent labor certification programs.
- **11.** **State Dept. Proposes Increase in Nonimmigrant Visa Application, BCC Fees** - The Department of State published a proposed rule on December 14, 2009, to increase nonimmigrant visa application processing and BCC fees.
- **12.** **CBP Launches H-2 Temporary Worker Exit Program in Arizona** - Only H-2A and B temporary workers who enter the U.S. on a new work authorization will be required to register their final departure from the U.S. when their authorized period of stay expires.
- **13.** **CBP Announces 'FAST' Commercial Frequent Traveler Program Change** - All old FAST cards will be deactivated on January 5, 2010.
- **14.** **ETA Announces Change in Address for Certain Temporary Labor Certification Filings** - The Chicago National Processing Center has moved.
- **15.** **CNMI Update: Advance Parole, Biometrics/Interviews, Transitional Workers, P.O. Box Recommendation** - Among other things, USCIS reminds noncitizens living in the CNMI to apply for advance parole before traveling abroad if they do not otherwise have U.S. lawful permanent resident status or an appropriate U.S. visa.

Details...

1. FY 2010 H-1B Cap Reached

U.S. Citizenship and Immigration Services (USCIS) announced on December 22, 2009, that it has received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2010. December 21, 2009, is the "final receipt date" for new H-1B specialty occupation petitions requesting an employment

start date in FY 2010. Regulations now provide that H-1B petitions received by USCIS on or before December 19 (because of the weekend) have been submitted "under the cap," but H-1B petitions received by USCIS on or after December 22, 2009, will be rejected.

USCIS has also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the advanced degree exemption. Properly filed cases will be considered received on the date that USCIS physically receives the petition, not the date that the petition was postmarked. USCIS will reject cap-subject petitions for new H-1B specialty occupation workers seeking an employment start date in FY 2010 that arrive after December 21, 2009.

USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on December 21, 2009. USCIS will reject, and return the fee, for all cap-subject petitions not randomly selected.

Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted toward the congressionally mandated FY 2010 H-1B cap. Therefore, USCIS will continue to process petitions filed to:

- extend the amount of time a current H-1B worker may remain in the U.S.
- change the terms of employment for current H-1B workers
- allow current H-1B workers to change employers
- allow current H-1B workers to work concurrently in a second H-1B position

Now that the FY 2010 cap has been reached, the earliest an employer can file a new H-1B petition will be April 1, 2010, with an employment start date of October 1, 2010.

The notice is available at http://www.uscis.gov/.

For more details on the H-1B count, see http://www.uscis.gov/h-1b_count. For information on the temporary acceptance of H-1B petitions without Department-certified LCAs, see http://www.uscis.gov/USCIS/Laws. For a Q&A on the same topic, see http://www.foreignlaborcert.doleta.gov.

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2. Self-Check Verification In the Works, USCIS Head Says; 'Verification

Initiative for Business Enterprise' Discussed

U.S. Citizenship and Immigration Services Director Alejandro Mayorkas announced at a press conference on December 10, 2009, that the agency plans to incorporate a self-check option in the E-Verify system some time in 2010. The capability is intended to allow workers to verify their employment authorization before applying for a job. Eight days are allowed currently to address a "tentative nonconfirmation"; Mr. Mayorkas said the new capability will give workers time to correct any errors before they apply for a job, without having to meet an eight-day deadline.

Mr. Mayorkas also noted that the Verification Initiative for Business Enterprise (VIBE) Web-based program is expected to be launched in spring 2010. In a letter sent to Sen. Charles Grassley on November 10, 2009, outlining the VIBE program and discussing other issues, Mr. Mayorkas said that VIBE will use "commercially available data from to validate and verify information submitted by organizations that petition to employ alien worker." Mr. Mayorkas said his agency believes VIBE "will provide adjudicators with a tool to accurately verify the financial viability and current level of business operations for employment-based petitions.

Others aren't so sure that this program gives off such a good vibe. For a commentary, see http://blogs.ilw.com/angelopaparelli.

Mr. Mayorkas' letter to Sen. Grassley is available at http://www.nationofimmigrators.com.

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3. Visa Bulletin Issues Projections for FY 2010 Cut-Off Dates

The Department of State's Visa Bulletin for January 2010 includes the following projections for cut-off dates that will be reached by the end of fiscal year 2010. The Department cautioned that the date ranges are only estimates and are subject to fluctuations in demand during the coming months. It is possible that some annual limits could be reached before the end of the fiscal year, the Department said:

> Employment First:
>
> It is unlikely that there will be any cut-off dates in the employment first preference categories, which are now Current.

Employment Second:
China: July through October 2005
India: February through early March 2005
(If Section 202(a)(5) were to apply:
China and India: October through December 2005)

Employment Third:
Worldwide: April through August 2005
China: June through September 2003
India: January through February 2002
Mexico: January through June 2004
Philippines: April through August 2005

Additional details, including an explanation of INA section 202(a)(5) and other aspects of how cut-off decisions are made, are available in the Visa Bulletin for January 2010 at http://travel.state.gov/visa/frvi/bulletin/bulletin_4597.html.

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4. H-1C Nonimmigrant Nurse Classification Expires

The H-1C nonimmigrant nurse category expired on December 21, 2009. The classification authorized the admission of up to 500 nurses annually to work in eligible health care facilities. After the original 1999 statutory authorization of the program expired in 2005, Congress reauthorized it for three years beginning December 20, 2006, in the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005. The statutory authority for the program has not been extended.

U.S. Citizenship and Immigration Services noted that this expiration does not affect the ability of H-1C nurses currently in status to continue employment during their authorized period of stay, the authority of USCIS to adjudicate a petition properly filed on or before December 21, 2009, or the eligibility of the beneficiary of an approved H-1C petition to be admitted to the U.S. as an H-1C nonimmigrant.

The notice is available at http://www.uscis.gov/.

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5. USCIS Changes Address of Filing Location for Naturalization Applications

U.S. Citizenship and Immigration Services (USCIS) announced on December 17, 2009, revised addresses for applicants filing an Application for Naturalization (Form N-400) at USCIS Lockbox facilities in Phoenix and Dallas. The filing address change took effect immediately.

Applicants who previously filed their applications at the Lewisville Post Office (P.O.) Box will now file their applications at a P.O. Box in Dallas. In addition, USCIS noted a change to the USCIS Phoenix Lockbox address. Starting immediately, applicants filing an N-400 at the USCIS Dallas or Phoenix Lockbox must submit the application and all supporting documents and fees to the new addresses, based on where they live. The new addresses are available at the link below.

The U.S. Postal Service forwarded mail from the Lewisville Post Office to the new post office in Dallas until December 31, 2009. After that date, USCIS noted, the Postal Service will forward the mail through normal channels, "which will likely delay receipt at the Dallas Lockbox facility."

Applicants filing an N-400 under military provisions (Section 328 or 329), should file their application at the Nebraska Service Center, P.O. Box 87426, Lincoln, NE 68501-7426, regardless of where the applicant lives. This includes current military spouses regardless of geographic location or jurisdiction.

Those filing an N-400 at a USCIS Lockbox facility may elect to receive an e-mail and/or text message notification that the application has been accepted. The applicant must complete an E-Notification of Application/Petition Acceptance (Form G-1145), and attach it to the first page of the application.

The N-400 form instructions have been updated to reflect the new filing locations. The new addresses are available at http://www.uscis.gov/.

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6. Did USCIS Immediately Deny Your Adjustment of Status Application Following a Change of Employment?

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

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

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

USCIS's ombudsman asks that those who think their cases may have been denied erroneously to forward the ombudsman a case problem using Department of Homeland Security Form 7001 (http://www.dhs.gov/files/programs/editorial_0497.shtm) with the subject line, "AC21 Evidence of Immediate Denial." The complainant should include a copy of the denial notice, detailed information on the reasons for the immediate denial and, if appropriate, evidence that a Motion to Reopen or Reconsider was submitted. If the ombudsman's office considers the case to be an erroneous denial, it will forward the case directly to USCIS for further review.

For more information, see http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm#2.

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7. USCIS Ombudsman Discusses Pending Derivative I-485s Due to File Separation

U.S. Citizenship and Immigration Services (USCIS) sometimes approves a Form I-485 (Application to Register Permanent Residence or Adjust Status) for a principal applicant, but the derivative family members' (spouse or minor children) I-485 applications remain pending. While in some cases this may be due to missing evidence, security clearance difficulties, or some other legitimate reason, the file may just be separated from the principal's, the USCIS ombudsman noted recently.

If a family member's derivative adjustment of status application has been pending in excess of 30 days from the approval date of the principal applicant's

I-485, the ombudsman asks that the following be e-mailed to cisombudsman.publicaffairs@dhs.gov:

- DHS Form 7001;
- A copy of the principal applicant's I-485 approval notice;
- A copy of the I-485 receipt notice for the derivative;
- A copy of the approved immigrant visa petition notice (if employment-based); and
- Any other evidence that is pertinent to the case.

The subject line of the e-mail should include: "Unapproved Derivative I-485."

The ombudsman said it will look into such cases "and review how we may be of assistance."

The notice is available at http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm#1.

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8. State Dept. Withdraws Proposed Rule on Secondary School Students Under Exchange Visitor Program

On December 23, 2009, the State Department published a proposed rule on secondary school students under the Exchange Visitor Program. The Department revised existing regulations "to provide greater specificity and clarity to sponsors of the Secondary School Student category with respect to the execution of sponsor oversight responsibilities under the exchange visitor program." The Department subsequently withdrew the rule in its entirety on December 29, 2009, because it was submitted before the Office of Management and Budget completed its review.

The notice is at http://edocket.access.gpo.gov/2009/pdf/E9-30837.pdf.

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9. State Dept. To Deploy Web-Based Nonimmigrant Visa Application Worldwide

The Department of State's Bureau of Consular Affairs recently announced that it plans to deploy a fully Web-based Form DS-160 (Nonimmigrant Visa Application) worldwide. The Visa Office said that the DS-160, the first component or module of the Consular Electronic Application Center (CEAC), "has been used with great success at 24 posts so far" and will be expanded in

phases, with the goal of worldwide usage for all nonimmigrant visa applications, except K visas, by April 30, 2010. TheDS-160 will replace the Electronic Visa Application Form (EVAF).

The Visa Office noted that although the target completion date is still five months away, it faces a technical challenge in meeting this deployment goal, involving development and testing of new foreign language translations. Sixty-four hours of development time are required to deploy a new translation of the DS-160 at a cost of $8,000 per language, which the Visa Office noted limits how quickly the DS-160 can be deployed to posts where English is not widely spoken. On October 29, Consular Affairs approved translation of 22 languages. The Visa Office said it will monitor this process carefully and will request additional funding and resources if necessary to avoid implementation delays.

The Visa Office strongly encouraged consular posts to consider developing an outreach plan to advise applicants and other stakeholders of the CEAC implementation. Posts listed in the Visa Office's cable have been identified as priority posts to implement the DS-160 by March 1, 2010. The cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4601.html. Additional information on the DS-160, including frequently asked questions, is available at http://www.travel.state.gov/visa/frvi/forms/forms_1342.html.

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10. State Dept. Announces Centralization of Prevailing Wage Determinations

As of January 1, 2010, the Department of State's Office of Foreign Labor Certification's National Prevailing Wage and Helpdesk Center (NPWHC) in Washington, DC, will receive and process prevailing wage determination requests for use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and permanent labor certification programs. The notice also includes information about processing CNMI prevailing wage determinations. The NPWHC will only process prevailing wage determination requests received by mail in hard copy. The Department said it is developing an electronic means for the submission of such requests.

The notice is available at http://www.foreignlaborcert.doleta.gov/pdf/E928963_120409.pdf.

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11. State Dept. Proposes Increase in Nonimmigrant Visa Application, BCC Fees

The Department of State published a proposed rule on December 14, 2009, to increase nonimmigrant visa application processing and Border Crossing Card (BCC) fees. Under the proposed rule:

- Applicants for all visas that are not petition-based, including B-1/B-2 tourist and business visitor visas and student/exchange visitor visas, would pay $140
- Applicants for petition-based visas (H, L, O, P, Q, R) would pay $150
- Applicants for treaty traders and investors (E) would pay $390
- Applicants for K visas would pay $350
- Applicants for nonpetition-based machine-readable visas (except E category) and BCC applications, with the exception of certain Mexican citizen minors' BCCs, would pay $140

The press release is available at http://www.travel.state.gov/news/press/press_4603.html. The proposed rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-29722.pdf.

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12. CBP Launches H-2 Temporary Worker Exit Program in Arizona

U.S. Customs and Border Protection (CBP) launched a pilot program on December 8, 2009, for exiting H-2A and B temporary workers. The program will be tested at San Luis and Douglas land ports of entry in Arizona and the pilot phase is expected to last about a year. H-2A (agricultural) and H-2B (nonagricultural) visas are issued to temporary seasonal workers.

CBP's goal is to ensure that temporary workers comply with the requirement to leave the U.S. when their work authorization expires. To verify their final departure, H-2A and B workers will be required to scan their visas and their fingerprints and return their I-94 Arrival-Departure Record at an exit kiosk located at the port of departure. The kiosk will provide instructions in English and Spanish. Under the pilot program, travelers admitted under the H-2A and B classifications at San Luis or Douglas ports of entry must depart through one of the two designated ports.

CBP noted that frequent border crossers or commuters do not need to register every departure, but only their final departure from the U.S. Only H-2A and B

temporary workers who enter the U.S. on a new work authorization will be required to register their final departure from the U.S. when their authorized period of stay expires.

More than 205,000 H-2 temporary workers entered the U.S. in fiscal year 2009, CBP said. Of those, more than 147,000 were H-2A workers and more than 58,000 were H-2B workers.

CBP's announcement is available at http://www.cbp.gov/xp.

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13. CBP Announces 'FAST' Commercial Frequent Traveler Program Change

U.S. Customs and Border Protection announced on December 4, 2009, that members of its Free and Secure Trade (FAST) program will not be able to use their old FAST cards in passenger lanes, effective January 5, 2010. CBP has been issuing new cards with enhanced security features for current FAST members since March 16. All members are asked to activate their new cards using a global online enrollment system and to destroy their old ones. Anyone who has not received their new card should go immediately to their local enrollment center to pick up a new card or have one issued. CBP says it will take about two weeks to receive a new card. All old FAST cards will be deactivated on January 5, 2010. CBP said that officers "will allow a one-time entry into the U.S. to travelers with old FAST cards, but will seize the card from the traveler and refer the member to the Enrollment Center."

The FAST program has more than 92,000 members, and is available to commercial drivers crossing both the northern and southern borders.

The CBP announcement is available at http://www.cbp.gov/.

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14. ETA Announces Change in Address for Certain Temporary Labor Certification Filings

The Chicago National Processing Center (NPC) is responsible for adjudicating all employer applications for temporary labor certification under the H-1B, H-1B1, E-3, H-2A, H-2B, H-1C, and D-1 programs. The NPC address has changed as of December 4, 2009. For three weeks after that date, the Chicago NPC will receive via courier all written correspondence submitted to its former address. "This is to ensure a smooth transition and allow all interested parties to commence

using the new address," the Department of Labor's Employment and Training Administration (ETA) said in a notice announcing the change. On January 6, 2010, the courier will cease to operate and all submissions to the former address of the Chicago NPC will be returned to the sender.

The new address is:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
536 South Clark Street
Chicago, IL 60605-1509
telephone: (312) 886-8000; facsimile: (312) 353-3352.

The following address is to be used for all invoices/fees submitted in connection with the H-2A and H-1C programs:

U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center
P.O. Box A3804
Chicago, IL 60690-A3804.

The ETA's notice is available at http://edocket.access.gpo.gov/2009/pdf/E9-28954.pdf.

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15. CNMI Update: Advance Parole, Biometrics/Interviews, Transitional Workers, P.O. Box Recommendation

U.S. Citizenship and Immigration Services (USCIS) reminds noncitizens living in the Commonwealth of the Northern Mariana Islands (CNMI) to apply for advance parole before traveling abroad if they do not otherwise have U.S. lawful permanent resident status or an "appropriate" U.S. visa (not a visa for "B" visitor admission or under the Visa Waiver Program only). Advance parole allows people lawfully living and working in the CNMI to continue to do so when they return from foreign travel. It will also allow processing of a pending application for adjustment of status to that of lawful permanent resident to continue.

USCIS also notes that those living and/or working or studying in the CNMI under CNMI permits should request parole before seeking to travel to Guam and other parts of the U.S. People who entered before November 28, 2009, are present without admission or parole. Although they are entitled to lawfully remain and work in the CNMI to the extent they were authorized to do so under former CNMI law as of November 28, 2009, for up to two years after that date, they will need a grant of parole to continue to live, work, and/or study in the CNMI during this period after travel to another U.S. destination.

USCIS advises applicants for immigration benefits in the CNMI who live in Rota or Tinian that appointments for biometrics and interviews have been combined into one. USCIS did this to minimize the expense people face in traveling to Saipan twice for separate biometrics appointment and interview. If an applicant in Rota or Tinian who is awaiting an interview receives a notice of a biometrics appointment, he or she can ignore that notice and have the fingerprints and photograph taken the day of the interview.

Meanwhile, in response to a preliminary injunction by the U.S. District Court for the Dis