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

FEBRUARY 2010 IMMIGRATION UPDATE

Posted on February 2, 2010 by Cyrus Mehta

Headlines:

- **1.** **USCIS Releases Tips on Filing I-140 Immigrant Petition for Alien Worker** - USCIS released a Q&A on ways to ensure that an Immigrant Petition for Alien Worker will not be rejected.
- **2.** **USCIS Issues Controversial Memo on Determining Employer-Employee Relationships for Adjudication of H-1B Petitions** - The memo states that a lack of guidance clearly defining what constitutes a valid employer-employee relationship has raised problems.
- **3.** **USCIS Is Reissuing Advance Parole Documents To Correct Date** - is USCIS is reissuing Advance Parole documents because some were mailed to applicants with an incorrect issue date; all advance parole documents continue to be valid because the expiration dates remain accurate.
- **4.** **SSA Fails To Verify 19 Percent of New Hires** - The SSA also improperly E-Verified volunteers who should not have been screened under federal guidelines, and inappropriately screened some candidates in advance of hire.
- **5.** **DHS Grants TPS to Haitians Following Catastrophic Earthquake** - The Obama administration announced that it is granting temporary protected status to Haitians who were in the U.S. as of January 12, 2010.
- **6.** **USCIS Announces Restructuring of Fraud Detection, Customer Service, Domestic Operations** - USCIS has created or restructured several directorates.
- **7.** **DHS Adds 11 Countries to Designated List for Participation in H-2A, H-2B Programs** - DHS has designated 39 countries whose nationals are eligible to participate in the H-2A and H-2B nonimmigrant programs.
- **8.** **DOL Releases List of Important E-Mail Addresses** - The e-mail addresses pertain to PERM system, labor condition application and

prevailing wage, and H-2A/H-2B issues.

- **9.** **ICE Updates List of SEVP-Approved Schools** - ICE released an updated list of schools approved under the Student and Exchange Visitor Program.
- **10.** **AAO Processing Times Released** - The chart shows Administrative Appeals Office processing times by case type.
- **11.** **USCIS Issues Q&A on Filing Instructions for E-2 CNMI Investors** - The E-2 CNMI investor rule has not been finalized, so USCIS is not yet accepting petitions.
- **12.** **USCIS Grants One-Time Accommodation for H-2A Sheepherders** - USCIS will allow H-2A sheepherders more time to fully transition to the three-year limitation of stay requirements under the agency's final rule.

Details...

1. USCIS Releases Tips on Filing I-140 Immigrant Petition for Alien Worker

On January 21, 2010, U.S. Citizenship and Immigration Services (USCIS) released a Q&A on ways to ensure that an Immigrant Petition for Alien Worker (Form I-140) will not be rejected. Some tips include:

- Use the most current edition of the form, although older editions may be accepted.
- Make sure you follow the instructions carefully regarding which location to file your I-140 petition.
- Select only one visa preference category in Part 2 of the I-140. (USCIS will reject the I-140 petition if Part 2 is left blank or if more than one visa preference category is selected in Part 2.)
- Respond to all questions and provide information in all of the "answer" and "check" boxes. Write "none" or "n/a" in an answer box if a question does not apply to you.
- Print or type information using black ink only. Do not "highlight" or "background shade" your entries.
- Make sure the petitioner signs the I-140.
- Include the correct fee specified in the form instructions. If you file the petition with other related applications for the beneficiary, attach the fee to the petition by paper clip or staple, and indicate the name of the applicant on the payment document (i.e., in the memo field).
- Submit one check per application. If more than one petition or application is filed using a single check, and any of the forms are found to be

improperly filed, all forms will be rejected.
- Submit Form G-28, Notice of Entry of Appearance as Attorney or Representative, if applicable (with original signatures of both the representative and the applicant or petitioner).
- For petitions that are filed electronically, send the supporting documentation to the address identified in the directions for e-filing Do not submit any other paper-filed applications or petitions with the supporting documentation for the electronically filed I-140.

Other questions and answers include what to do if an incorrect visa category is selected in Part 2; what to do if the petitioner wants to request consideration of multiple visa categories on behalf of a worker; how to file an I-140 that requires a Department of Labor-approved labor certification; and how to organize the evidence with the I-140 petition.

The memo also includes tips for various types of I-140s, such as aliens of extraordinary ability; outstanding professors or researchers; multinational executives or managers; aliens of exceptional ability; members of the professions holding an advanced degree; and national interest waivers.

Among other things, the memo discusses how a successor employer can establish a successor-in-interest relationship with a predecessor employer in order to use that employer's approved labor certification when filing an I-140 on behalf of the beneficiary named on the labor certification; and tips on "porting" to a different employer if a beneficiary's I-140 is still pending.

The memo is available at http://www.uscis.gov/portal.

Back to Top

2. USCIS Issues Controversial Memo on Determining Employer-Employee Relationships for Adjudication of H-1B Petitions

Donald Neufeld, Associate Director for U.S. Citizenship and Immigration Services (USCIS) Operations, released a memorandum on January 8, 2010, that provides guidance concerning the requirement that an H-1B petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

The memo states that a lack of guidance clearly defining what constitutes a valid employer-employee relationship has "raised problems," particularly with

independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. Mr. Neufeld notes that the placement of a beneficiary/employee at a worksite that is not operated by the petitioner/employer (third-party placement), common in some industries, "generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

Among other things, petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business and is expected to become a part of that business's regular operations, the memo notes. "The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists," the memo warns.

Further, the memo notes, USCIS must ensure that the employer is in compliance with Department of Labor regulations requiring that a petitioner file a labor condition application (LCA) specific to each location where the beneficiary will be working.

The memo includes a discussion of the "right to control" when, where, and how the beneficiary performs the job, which the memo distinguishes from "actual control." The memo states that the employer-employee relationship hinges on the right to control the beneficiary, and outlines 11 factors USCIS will consider to make such determinations. The memo also provides examples of valid and invalid employer-employee relationships; exceptions; documentation to establish the employer-employee relationship; and requests for evidence.

The memo, which has stirred controversy (see, e.g., AILA Leadership blog, http://cyrusmehta.blogspot.com/ and http://www.nationofimmigrators.com), is available at http://www.uscis.gov. A related Q&A is available at http://www.uscis.gov/.

Back to Top

3. USCIS Is Reissuing Advance Parole Documents To Correct Date

U.S. Citizenship and Immigration Services (USCIS) announced on January 27, 2010, that it is reissuing Advance Parole (Form I-512) documents because some documents were mailed to applicants with an incorrect issue date of January 5,

1990. All affected documents have been identified and USCIS will automatically reissue those documents.

USCIS said all advance parole documents continue to be valid because the expiration dates remain accurate. Therefore it is not necessary for applicants to contact USCIS regarding their pending applications unless their application is outside the normal processing time of 90 days.

Those who need to travel urgently and have received a document with an invalid issue date may travel using the incorrectly dated document, USCIS said. U.S. Customs & Border Protection (CBP) has been alerted, and travelers may be questioned about the issuance date. USCIS advises printing the notice to share with CBP if necessary. The notice is available at http://www.uscis.gov.

Back to Top

4. SSA Fails To Verify 19 Percent of New Hires

In a recent 18-month period, the Social Security Administration (SSA) failed to verify the Social Security Numbers of 19 percent, or 1,767 of 9,311 new SSA employees, as required. In other cases examined by the SSA's Office of the Inspector General, the SSA improperly E-Verified volunteers who should not have been screened under federal guidelines, and inappropriately screened some candidates in advance of hire.

SSA agreed with the Inspector General's recommendations, including verifying the 1,767 workers and issuing guidance to remind staff to: (1) verify all new hires; (2) conduct verification queries within three business days after a new employee has reported for duty and both sections of the I-9 employment eligibility verification form have been completed; and (3) prohibit the verification of existing SSA employees, job candidates, and volunteers.

The Inspector General's report is available at http://www.ssa.gov.

Back to Top

5. DHS Grants TPS to Haitians Following Catastrophic Earthquake

Following the catastrophic earthquake in Haiti, the Obama administration announced that it is granting temporary protected status (TPS) to Haitians who were in the U.S. as of January 12, 2010. The designation will allow eligible Haitian nationals in the U.S. to continue living and working in the country for the next 18 months. Secretary of Homeland Security Janet Napolitano noted

that "hose who attempt to travel to the United States after January 12, 2010, will not be eligible for TPS and will be repatriated."

In a related field guidance memo issued on January 15, Secretary Napolitano said that U.S. Citizenship and Immigration Services "will implement procedures to adjudicate favorably, where possible, applications for change or extension of nonimmigrant status following the expiration of an applicant's period of admission; grant an additional period of parole or advance parole in appropriate cases; and authorize 'F' nonimmigrant students' requests for off-campus employment work authorization." She said USCIS will also "expedite the processing of advance parole applications and relative petitions for minor children from affected areas," and will "grant employment authorization where appropriate."

The field guidance memo, which outlines actions a USCIS officer may take when an applicant is a Haitian national or a habitual resident of Haiti, is available at http://www.uscis.gov. The announcement, along with information about USCIS's Haiti relief effort, is available at http://www.uscis.gov. Details on TPS application and eligibility requirements for Haitians are available at http://www.uscis.gov. Department of State information about queries related to U.S. citizens in Haiti and related issues is available at http://travel.state.gov/travel.

Back to Top

6. USCIS Announces Restructuring of Fraud Detection, Customer Service, Domestic Operations

U.S. Citizenship and Immigration Services announced on January 11, 2010, that it has realigned its organizational structure "to achieve greater efficiency and to more ably accomplish our mission." The realignment reflects the prioritization of certain critical agency responsibilities, USCIS said. The three most significant changes are:

- The creation of a Fraud Detection and National Security Directorate.
- The creation of a new Customer Service Directorate.
- The division of the existing Domestic Operations Directorate into two separate directorates: Service Center Operations and Field Operations.

The announcement is available at http://www.uscis.gov. A USCIS organizational chart is available at http://www.uscis.gov.

Back to Top

7. DHS Adds 11 Countries to Designated List for Participation in H-2A, H-2B Programs

The Department of Homeland Security (DHS) has designated 39 countries whose nationals are eligible to participate in the H-2A and H-2B nonimmigrant programs. DHS said that the 28 countries designated in its December 2008 notices continue to meet the standards and therefore should remain on the list. With the concurrence of the Department of State, DHS has added 11 countries to the list for the first time, including Croatia, Ecuador, Ethiopia, Ireland, Lithuania, the Netherlands, Nicaragua, Norway, Serbia, Slovakia, and Uruguay. The other 28 countries are Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine, and the United Kingdom.

The notice is available at http://edocket.access.gpo.

Back to Top

8. DOL Releases List of Important E-Mail Addresses

The Department of Labor recently released a list of important e-mail addresses pertaining to the PERM system, labor condition applications and prevailing wages, and H-2A/H-2B issues. The list is available at http://www.aila.org.

Back to Top

9. ICE Updates List of SEVP-Approved Schools

On January 20, 2010, U.S. Immigration and Customs Enforcement released an updated list of schools approved under the Student and Exchange Visitor Program. The list is available at http://www.ice.gov.

Back to Top

10. AAO Processing Times Released

The American Immigration Lawyers Association has released a chart showing Administrative Appeals Office (AAO) processing times by case type, as of January 4, 2010. The chart is available at http://www.aila.org.

Back to Top

11. USCIS Issues Q&A on Filing Instructions for E-2 CNMI Investors

The Consolidated Natural Resources Act of 2008 (CNRA) extends certain provisions of U.S. immigration law to the Commonwealth of the Northern Mariana Islands (CNMI) for the first time. The transition period for this change began on November 28, 2009. Under the CNRA, U.S. Citizenship and Immigration Services (USCIS) is establishing an E-2 CNMI investor classification, to allow foreign nationals who were admitted as long-term investors under the CNMI immigration laws to remain in the CNMI through the transition period.

The E-2 CNMI investor rule has not been finalized, so USCIS is not yet accepting petitions. The program will be in effect only during the transition period, scheduled to expire on December 31, 2014. The E-2 CNMI investor classification and related visas will expire that day, although USCIS noted that the Department of Homeland Security may extend the transition period.

A related Q&A on filing instructions is available at http://www.uscis.gov.

Back to Top

12. USCIS Grants One-Time Accommodation for H-2A Sheepherders

U.S. Citizenship and Immigration Services (USCIS) announced that it will allow H-2A sheepherders more time to fully transition to the three-year limitation of stay requirements under the agency's final rule that became effective on January 17, 2009. USCIS said it is making the one-time accommodation in deference to the industry's previous exemption from the three-year limitation. This exemption does not impact other H-2A categories. The time spent as an H-2A worker performing labor or services as a sheepherder before the effective date of the final rule will not be counted toward the three-year maximum period of stay, USCIS said. Instead, the agency is "starting the clock" on January 17, 2009, for sheepherders who were lawfully present in the U.S. in H-2A classification on that date.

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

Back to Top