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US IMMIGRATION & NATIONALITY LAW

MARCH 2010 IMMIGRATI0N UPDATE

Posted on March 1, 2010 by Cyrus Mehta

Headlines:

- **1.** **Senators John Kerry (D-Mass.) and Richard Lugar (R-Ind.) introduce Start Up Visa Act of 2010. –** Allows an immigrant entrepreneur to receive a two-year conditional resident status if he or she can show that a qualified US investor is willing to dedicate a minimum of $250,000, to the immigrant's start up venture.
- **2.** **State Dept. Proposes Fee Changes for Consular Services** - Among other things, the application fee for an employment-based immigrant visa processed on the basis of an I-140 petition will increase to $720.
- **3.** **USCIS To Issue Revised Approval Notices for Certain I-129s and I-539s** - Certain Notices of Approval were issued between January 20 and 27, 2010, with incorrect or missing information.
- **4.** **Labor Dept. Publishes H-2A Final Rule** - The final rule affects various aspects of the temporary agricultural employment of H-2A workers.
- **5.** **USCIS Changes Filing Location for Employment Authorization Application** - USCIS has revised filing instructions and addresses for the I-765.
- **6.** **USCIS Revises Permanent Residence Application, Changes Filing Locations** - USCIS has posted a revised I-485 and changed the filing locations.
- **7.** **ETA Announces 2010 Adverse Effect Wage Rates and Maximum Meal and Travel Charges for H-2A Agricultural Worker Employers** - The H-2A AEWR is based on USDA data.
- **8.** **ICE Updates List of SEVP-Approved Schools** - ICE has released the latest updated list of Student and Exchange Visitor Program approved schools.
- **9.** **USCIS Issues Guidance on H Nonimmigrants in the CNMI and Guam**

- H-1B and H-2B workers in the CNMI and Guam are exempt from the caps.

- **10. ABIL GLOBAL: News from Australia, Mexico, Canada** - This article presents updates on the latest reforms and revisions to immigration laws and regulations.

Details...

1. Senators John Kerry (D-Mass.) and Richard Lugar (R-Ind.) introduce Start Up Visa Act of 2010.

On February 24, 2010, Senators John Kerry (D-Mass.) and Richard Lugar (R-Ind.) introduced the Start Up Visa Act of 2010. If this bill is passed, it will allow an entrepreneur to receive a two-year conditional residence status if he or she can show that a qualified US investor is willing to dedicate a minimum of $250,000 to the immigrant's start up venture. The Start Up Visa Act of 2010 would amend immigration law to create an EB-6 category for immigrant entrepreneurs and draw upon visa numbers from the existing EB-5 category, which is presently underused and permits foreign nationals to invest at least one million dollars (with some downward and upward variations) and create ten jobs to obtain a green card. Once an entrepreneur after receiving conditional residence status proves that he or she has secured at least five full-time jobs in the US, attracted one million dollars in additional investment capital or generated one million dollars in revenues, then he or she would receive permanents legal status. A press release on the bill can be found on Senator Lugar's website, http://www.lugar.senate.gov/press/record.cfm?id=322460.

More than 160 venture capitalists from across the US have endorsed the Start Up Visa Act of 2010. While CDMA supports the bill, it is hoped that the USCIS does not interpret the bill, if passed into law, so narrowly, which would result in arbitrary denials along with backlogs in getting a green card.

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2. State Dept. Proposes Fee Changes for Consular Services

The Department of State has proposed changes and increases to its schedule of fees for consular services, to take effect "as soon as practicable following the expiration of the 30-day public comment period" and after the Department has considered any public comments received. Written comments must be received within 30 days from February 9, 2010.

Among other things, the proposed rule establishes a tiered application processing fee for immigrant visas depending on the category, instead of the current $355 fee for all immigrant visas. The application fee for an employment-based visa processed on the basis of an I-140 petition will be $720. Other immigrant visa applications (including for diversity visa applicants, I-360 self-petitioners, special immigrant visa applicants and all others) will have a fee of $305. Certain qualifying Iraqi and Afghan special immigrant visa applicants are statutorily exempt from paying a processing fee. The application fee for a family-based visa processed on the basis of an I-130, I-600, or I-800 petition will be $330. The Department is also increasing the immigrant visa security surcharge from $45 to $74.

Those who apply for immigrant visas on the basis of having been selected by the diversity visa lottery will pay $440 instead of $375, based on an estimated 81,000 applications to be processed in fiscal year 2010.

Also, the proposed rule increases the adult passport application fee from $55 to $70. Certain consular services performed for no fee have been included in the fee schedule "so that members of the public will be aware of significant consular services provided by the Department for which they will not be charged." Nonimmigrant visa fees, including those for machine-readable visas and border crossing cards, were included in a separate rule published on December 14, 2009.

The proposed rule, which was published on February 9, 2010, is available at http://edocket.access.gpo.gov/2010/pdf/2010-2816.pdf.

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3. USCIS To Issue Revised Approval Notices for Certain I-129s and I-539s

U.S. Citizenship and Immigration Services (USCIS) issued an alert about certain Notices of Approval (Forms I-797) issued between January 20 and 27, 2010, with incorrect or missing information. The form types affected are the Petition for a Nonimmigrant Worker (Form I-129) and the Application to Extend/Change Nonimmigrant Status (Form I-539).

USCIS has started mailing new approval notices with corrected information to affected I-129 petitioners and I-539 applicants. Petitioners and applicants who received incomplete or incorrect approval notices should not attempt to use them. USCIS estimates that approximately 500 incorrect I-797s were issued.

Examples of errors on the approval notices of affected petitioners and applicants include:

- For the I-129, petitioners who requested multiple unnamed beneficiaries were issued an approval notice that lists only one unnamed beneficiary.
- For the I-539, some applicants were issued an approval notice with no validity dates listed.

Those who know or believe that their Notice of Approval was issued with incorrect or missing information but have not yet received a revised Notice of Approval should contact USCIS at the appropriate e-mail address listed in the USCIS alert, available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/.

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4. Labor Dept. Publishes H-2A Final Rule

The Department of Labor's (DOL) Employment and Training Administration and Wage and Hour Division have published a final rule effective March 15, 2010, affecting various aspects of the temporary agricultural employment of H-2A workers.

In response to the proposed rule, the DOL received comments from a broad range of constituencies for the H-2A program, including individual farmers, farm workers, farm associations, farm worker advocate groups, agents, law firms, farm labor bureaus, State Workforce Agencies (SWAs), state government officials, members of Congress and committees, and various interested members of the public. Many of the comments challenged the DOL's decision to engage in new rulemaking for the H-2A program. The DOL responded that it has inherent authority to change its regulations, and has justified doing so in the final rule.

Among other things, in the definition of corresponding employment, the DOL had proposed that all workers employed by H-2A employers doing work performed by H-2A workers be considered engaged in corresponding employment. The final rule adopts the language of the proposed rule. One change from the related 1987 rule is the addition of the phrase "or in any agricultural work performed by the H-2A workers." The DOL said it added this language to address the adverse impact on U.S. workers when an H-2A

employer engages H-2A workers in agricultural work outside the scope of work found in the approved job order, including work impermissibly performed outside the area of intended employment. The DOL explained that "omestic workers should not be disadvantaged when an employer violates the terms and conditions of the H-2A job order." The final rule does not require that every worker on a farm be paid the H-2A required wage. It does require, however, that workers employed by an H-2A employer who perform the same agricultural work as the employer's H-2A workers be paid at least the H-2A required wage for that work.

Also, the rule adds one factor to the circumstances that may be considered in determining whether an employer is a successor in interest. The change, as noted in the proposed rule, clarifies that whether the former management or persons with an ownership interest in the prior firm retain a management interest in the successor firm may be considered in the successor determination.

The final rule also makes various adjustments to the definition of agricultural labor or services. For example, it removes a provision that permitted certain nonagricultural work when no H-2B workers were employed to perform the same work in the same location. Such nonagricultural work may include activities like handling, planting, drying, packing, processing, freezing, grading, storing, or delivering agricultural or horticultural commodities. A commenter had expressed disappointment about the removal of that provision, stating that it was a major change and would adversely affect packing houses that might not be able to obtain H-2B workers due to the annual cap, and noting that H-2B workers often work alongside H-2A workers and their jobs are clearly in the stream of agriculture. The DOL said the provision was problematic because it allowed a farmer to employ both H-2A and H-2B workers to perform identical work, so long as the H-2A workers and H-2B workers were employed in different locations. But Congress clearly intended to create two separate programs, the DOL noted: one for H-2A agricultural work and another for H-2B nonagricultural work.

The final rule further removes references to incidental work from the definition of agricultural labor or services, in an effort to tighten up what kinds of work may be performed. For example, the final rule deletes a provision providing a blanket 20 percent tolerance for work outside the scope of the application. The DOL explained that it does not intend to debar an employer whose H-2A

workers perform an insubstantial amount of agricultural work not listed in the application. The DOL said that it may take into account unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting) when considering the employer's explanation, so long as the activities are within the scope of H-2A agriculture, have been occasional or sporadic, and the total time spent is not substantial. Further, the DOL noted, the debarment regulations require that a violation be substantial, and that a number of factors must be considered in making that determination, including an employer's previous history of violations; the number of workers affected; the gravity of the violation; the employer's explanation, if any; its good faith; and its commitment to future compliance. Under these criteria, the DOL said, the good-faith assignment of a worker to work not listed in the application for a small amount of time would not result in debarment.

The final rule, which also includes a long discussion of wage rates and adds the agreed-upon collectively bargained wage rate to the list of required wage rates, is available at http://edocket.access.gpo.gov/2010/pdf/2010-2731.pdf. A related fact sheet is available at http://www.dol.gov/opa/media/press/eta/eta20100198-fs.htm, and a news release is available at http://www.dol.gov/opa/media/press/eta/eta20100198.htm.

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5. USCIS Changes Filing Location for Employment Authorization Application

U.S. Citizenship and Immigration Services (USCIS) has revised filing instructions and addresses for the Application for Employment Authorization (Form I-765). The change of filing location is part of an overall effort to transition the intake of some benefit forms from Service Centers to USCIS Lockbox facilities, USCIS noted.

Applicants must now submit the I-765 to one of the USCIS Lockbox facilities or the USCIS Vermont Service Center, based on the classification under which they are filing. Detailed guidance can be found in the updated I-765 instructions. The Service Centers will forward incorrectly filed applications to the USCIS Phoenix and Dallas Lockbox facilities until March 26, 2010. After that date, applications incorrectly filed at USCIS Service Centers will be returned to the applicant, with a note to send the application to the correct location.

When filing the I-765 at one of the USCIS Lockbox facilities, the applicant may elect to receive an e-mail and/or text message notifying him or her 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.

Form I-765 may be electronically filed (e-filed) with USCIS when submitted under certain categories.

The USCIS notice is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6. The form is available at http://www.uscis.gov/files/form/I-765.pdf. For instructions, see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f6141765 and http://www.uscis.gov/files/form/i-765instr.pdf.

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6. USCIS Revises Permanent Residence Application, Changes Filing Locations

U.S. Citizenship and Immigration Services (USCIS) announced on February 25, 2010, that it has posted a revised Application to Register Permanent Residence or Adjust Status (Form I-485) and changed the filing locations.

Beginning February 25, 2010, most applicants must submit the I-485 to a USCIS Lockbox facility, depending on the eligibility category under which they are filing, as provided in the form instructions. USCIS Service Centers will forward all I-485 applications to the appropriate Lockbox facility until March 29, 2010. USCIS will accept previous versions of the I-485 until March 29, 2010. After that date, USCIS will only accept the I-485 dated "12/03/09." After the transition period, the Service Centers will return any incorrectly filed I-485 with instructions to send the application to the correct location.

USCIS said that applicants should not concurrently file an I-485 with an Immigrant Petition for Alien Worker (Form I-140) at a USCIS Lockbox facility. Applicants should refer to the I-140 filing instructions for information on how to file forms concurrently.

When filing the I-765 at one of the USCIS Lockbox facilities, the applicant may elect to receive an e-mail and/or text message notifying him or her 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 revised form is available at http://www.uscis.gov/files/form/i-485.pdf. The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614. Instructions and related links are available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f.

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7. ETA Announces 2010 Adverse Effect Wage Rates and Maximum Meal and Travel Charges for H-2A Agricultural Worker Employers

The Department of Labor's Employment and Training Administration (ETA) has announced the new 2010 Adverse Effect Wage Rates (AEWRs) and the 2010 maximum allowable meal and travel subsistence charges applicable, effective March 15, 2010, to employers seeking to employ H-2A nonimmigrant workers to perform agricultural labor in the United States on a temporary or seasonal basis. The AEWR serves as the floor for the agricultural wage rates under the H-2A program.

The ETA noted that the H-2A AEWR is based on USDA data compiled through its Farm Labor Survey (FLS) Reports.

The ETA's announcement, which includes a state-by-state table of AEWRs for 2010, is available at http://edocket.access.gpo.gov/2010/pdf/2010-3078.pdf.

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8. ICE Updates List of SEVP-Approved Schools

U.S. Immigration and Customs Enforcement has released the latest updated list of Student and Exchange Visitor Program approved schools, available at http://www.ice.gov/doclib/sevis/pdf/ApprovedSchools.pdf.

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9. USCIS Issues Guidance on H Nonimmigrants in the CNMI and Guam

U.S. Citizenship and Immigration Services (USCIS) has provided guidance for processing and adjudicating the Petition for a Nonimmigrant Worker (Form I-129) filed on behalf of H-1B specialty occupation and H-2B temporary

nonagricultural workers in the Commonwealth of the Northern Mariana Islands (CNMI) and Guam. The memo notes that H-1B and H-2B workers in the CNMI and Guam are exempt from the numerical limitations, or caps, for these categories. To qualify for this exemption under the H-1B classification, the prospective employer's petition must include a labor condition application (LCA) listing employment or services in the CNMI and/or Guam only. To qualify under the H-2B classification, the petition must include a temporary labor certification (TLC) listing labor or services in the CNMI and/or Guam only.

The memo is available at http://www.uscis.gov/USCIS/Laws/Memoranda/2010/February/cnmi-guam-h-cap-exemption.pdf. A related Q&A is available at http://www.uscis.gov/portal/site/uscis.

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10. ABIL GLOBAL, www.abil.com: News from Australia, Mexico, Canada

Australia. The Australian government has announced it is reforming the permanent skilled migration program to ensure that it is more responsive to the needs of industry and employers and better addresses the nation's future skill needs.

The reforms will deliver a demand- rather than supply-driven skilled migration program that meets the needs of the economy in sectors and regions where there are shortages of highly skilled workers, such as healthcare, engineering, and mining. The major reforms to the skilled migration program include:

1. 20,000 would-be migrants will have their applications cancelled and receive a refund

All offshore General Skilled Migration applications filed before September 1, 2007, will have their applications withdrawn. These are people who applied overseas under easier standards, including less rigorous English language skill and work experience requirements. An estimated 20,000 people fall into this category.

The Department of Immigration and Citizenship (DIAC) will refund their visa application charges at an estimated cost of A$14million.

2. The list of occupations in demand will be tightened so that only highly skilled migrants will be eligible to apply for independent skilled migration visas

The wide-ranging Migration Occupations in Demand List (MODL) dating from September 2009 will be revoked immediately. The list is outdated and contains 106 occupations, many of which are less-skilled and no longer in demand.

A new and more targeted Skilled Occupations List (SOL) will be developed by the independent body, Skills Australia, and reviewed annually. It will be introduced mid-year and will focus on high-value professions and trades.

The Critical Skills List introduced at the beginning of 2009, which identified occupations in critical demand at the height of the global financial crisis, will also be phased out.

3. The points test used to assess migrants will be reviewed to ensure that it selects the best and brightest

Potential migrants gain points based on their qualifications, skills and experience, and proficiency in English. The current points test puts an overseas student with a short-term vocational qualification gained in Australia ahead of a Harvard-educated environmental scientist.

A review of the points test used to assess General Skilled Migration applicants will consider issues including whether some occupations should warrant more points than others, whether sufficient points are awarded for work experience and excellence in English, and whether there should be points for qualifications obtained from overseas universities.

The review will be reported to the government later this year.

4. Certain occupations may be capped to ensure that skill needs are met across the board

Amendments to the Migration Act will be introduced this year to give the Minister the power to set the maximum number of visas that may be granted to applicants in any one occupation. This will ensure that the Skilled Migration Program is not dominated by a handful of occupations.

5. Development of state and territory-specific migration plans

Individual state and territory migration plans will be developed so they can prioritize skilled migrants of their own choosing. This recognizes that each state and territory has different skill requirements. For example, Western Australia may have a shortage of mining engineers while Victoria may have a requirement for more architects. Under the new priority processing

arrangements, migrants nominated by a state and territory government under their State Migration Plan will be processed ahead of applications for independent skilled migration.

The Minister for Immigration and Citizenship, Senator Chris Evans, has said the new arrangements will give first priority to skilled migrants who have a job to go to with an Australian employer. For those who do not have an Australian employer willing to sponsor them, the bar is being raised.

The government has acknowledged that the changes will affect some overseas students currently in Australia intending to apply for permanent residence. International students who hold a vocational, higher education or postgraduate student visa will still be able to apply for a permanent visa if their occupation is on the new SOL. If their occupation is not on the new SOL, they will have until December 31, 2012, to apply for a temporary Skilled Graduate 485 visa on completion of their studies, which will enable them to spend up to 18 months in Australia to acquire work experience and seek sponsorship from an employer.

The changes will not affect international students coming to Australia to gain a legitimate qualification and then return home.

Mexico. On January 29, 2010, Mexico's National Migration Institute published its Manual of Criteria and Migration Procedures ("Manual de Criterios y Trámites Migratorios del Instituto Nacional de Migración" or "Manual"). The Manual will be enforced as of May 1, 2010, throughout the 32 delegations of the National Migration Institute across the country.

The intention of the National Migration Institute is to clarify, streamline, and simplify processing requirements for each immigration category. Applications currently being processed and those filed before May 1, 2010, will be analyzed and processed based on current policies, practices, and procedures.

Some of the most relevant aspects of the Manual include:

- All migratory forms for tourists, business visitors, and technical visitors with lucrative activities, who intend to stay in Mexico for up to 180 days, will be replaced by a single "FMM" (Forma Migratoria Múltiple) form. The FMM will serve as evidence of the foreign national's immigration status while in Mexico;

- The business visitor criteria are clearly defined. The new FMM form has an option for choosing the purpose of the visit as business (negocios), for which once the foreign national enters Mexico, the immigration officer will grant a 180-day stay.
- There are three options that the immigration officer might mark that will grant the foreign national 180 days: (a) Business (Visitante Persona de Negocios), (b) Visitor with Lucrative Activities (Visitante con Actividades Lucrativas), and (c) Visitor with Non-Lucrative Activities (Visitante con Actividades No Lucrativas). Any of these allow the foreign national to visit Mexico for business, either for working purposes or only for meetings.
- If the purpose of the business visit will extend the stay beyond 180 days, the foreign national will have to file for a change of immigration status to obtain the correspondent FM3.
- The ABTC (Asia-Pacific Economic Cooperation business travel card) criteria are clearly defined.

- In the following weeks, the National Migration Institute will publish the formats of the new migration cards that will replace the FM2 and FM3 booklets. Changes of activity, domicile, marital status, and similar information will no longer have to be annotated on the migratory document, thereby allowing the foreign national the ability to travel in and out of the country while a change of status/conditions application is in process without having to request an exit and re-entry permit.
- Consular posts will no longer issue FM2 or FM3 booklets. Instead, the consular post will place a visa sticker on the foreign national's passport, upon receipt of the petition's approval from the National Migration Institute. The sticker will allow entry into Mexico within 365 days of issuance. Upon entry, the foreign national must obtain the new FM2 or FM3 migration card within 30 days.

Canada. Canada welcomes approximately 250,000 new immigrants each year, which represents the highest per capita immigration in the world.

The majority of those who immigrate to Canada apply to do so under Canada's Federal Skilled Worker Class Program or under one of the Provincial Nominee Programs (including the province of Quebec's program) for those chosen/selected by one of Canada's provinces or territories.

Canada's Federal Skilled Worker Class Program is a points-based system. Points

are awarded for education, language abilities (English and French), work experience, age, arranged employment, and adaptability.

Until 2008, any applicant who was awarded the minimum required 67 points would have been accepted so long as they and their family members had no significant medical, criminal, or security problems. Since 2008, Canada has imposed an additional requirement of having at least one year of full-time work experience in one of 38 occupations (financial managers, computer and information systems managers, accountants, physicians, and others) for those not already working in Canada or those who do not have an &quot