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

AUGUST 2010 IMMIGRATION UPDATE

Posted on July 30, 2010 by Cyrus Mehta

Headlines:

- **1.** **Preliminary Injunction Blocks Key Provisions of Arizona Immigration Statute** - A key portion of the new statute may conflict with a Supreme Court ruling that states cannot create their own immigration systems, a federal judge states; the New York City Bar calls the statute unconstitutional.
- **2.** **ICE I-9 Final Rule Allows for Electronic Signatures, Scanning, Storage** - Employers and recruiters or referrers for a fee who are required to complete and retain the Employment Eligibility Verification Form may now sign the form electronically and retain it in an electronic format.
- **3.** **USCIS Clarifies 'O' Validity Period When Gap Exists in Itinerary, Promises 2-Week Turnaround for O and P Visas** - The memo notes that there is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event; USCIS dramatically lowered the expected turnaround time for O and P visas.
- **4.** **USCIS Extends Initial Registration Period for Haitian TPS, Extends TPS Designation for El Salvador** - The new notices extend the Haitian TPS registration period through January 18, 2011, and extends El Salvador's TPS designation through March 9, 2012.
- **5.** **American Immigration Lawyers Association Sues DHS, USCIS Over H-1B Transparency** - The FOIA litigation centers on the government's H-1B visa review and processing procedures.
- **6.** **USCIS Proposes New Standardized Fee Waiver Form** - USCIS has proposed for the first time a standardized fee waiver form, and seeks public comments.
- **7.** **U.S. Expands Appointment Scheduling for Nonimmigrant Visa**

Applicants in China - Nonimmigrant visa applicants may now schedule interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live.

- **8.** State Dep't Explains Biometric Visa Program's Fingerscan, Photo Requirements - Fingerscans and photos are generally required, with certain exceptions.
- **9.** Labor Dep't Launches National H-2A Electronic Job Registry - The Employment and Training Administration launched a new National Electronic Job Registry for H-2A job orders on July 8, 2010.
- **10.** Decisions Not to Hire Persons Based on Need for Visa Sponsorship or Employer Submission OK, Justice Dep't Says - Only certain classes of individuals are protected from citizenship status discrimination under the law, including U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents, refugees, and asylees.
- **11.** CBP Invites Comments on SENTRI and FAST Commercial Driver Applications - U.S. Customs and Border Protection (CBP) has invited the public and other Federal agencies to comment on an information collection requirement concerning CBP's Trusted Traveler Programs.
- **12.** ABIL Global (www.abil.com): Temporary Business Visas in Peru - This type of visa and migratory status allows a foreign citizen to carry out activities in Peru common to a businessperson, not a worker.

Details...

1. Preliminary Injunction Blocks Key Provisions of Arizona Immigration Statute

Following the Department of Justice's challenge to Arizona's recently passed immigration law, S.B. 1070, U.S. District Judge Susan Bolton of Phoenix, Arizona, issued a preliminary injunction against key provisions of the new statute. While not striking down the entire law, she blocked the provisions (1) requiring that an officer attempt to determine the immigration status of a person stopped, detained, or arrested if there is a "reasonable suspicion" that the person is unlawfully present, and requiring verification of the immigration status of any person arrested before release; (2) creating a crime for the failure to apply for or carry alien registration papers; (3) creating a crime for an unauthorized alien to solicit, apply for, or perform work; and (4) authorizing the warrantless arrest

of a person where there is probable cause to believe the person has committed a public offense that makes him or her removable from the U.S.

Meanwhile, the New York City Bar Association issued a report concluding that the new law is unconstitutional under the Supremacy Clause and the First, Fourth, and Fourteenth Amendments.

The NYC Bar report notes that 10 states are currently contemplating similar legislation, including Utah, Georgia, Colorado, Maryland, Ohio, North Carolina, Texas, Missouri, Oklahoma, and Nebraska. The NYC Bar said that the substantive content of these state statutes, as manifested by S.B. 1070, "promotes racial profiling while infringing upon the exclusive role of the federal government to regulate immigration." The NYC Bar noted that the Arizona statute "adopts a adopts a parallel immigration enforcement program to the one maintained by the federal government through the pretext of conflating civil and criminal provisions of the Immigration and Nationality Act." At the same time, the NYC Bar said, "the statute fails on due process and Fourth Amendment grounds, in that it offers insufficient guidance to officials administering it as to when 'reasonable suspicions' of unlawful presence exist, and will target the foreign-born."

The report urged states to resist emulating Arizona's statute, and noted that "ailure to enact comprehensive immigration reform is providing the fuel for states to overreach in this area of exclusive federal regulation."

The preliminary injunction is available at http://images.bimedia.net/documents/SB1070-order.pdf. A report on Judge Bolton's opinion is available at http://www.latimes.com/news/nationworld/nation/la-na-arizona-immigration-20100
723,0,3498774.story. The New York City Bar report is available at http://www.nycbar.org/pdf/report/uploads/20071951-ReportonArizonaImmigratio
nLawSB1070.pdf.

CDMAXs recent links on ArizonaXs Immigration Law are: A PRELIMINARY LOOK AT SOME OF THE CONSTITUTIONAL AND PRACTICAL PROBLEMS WITH ARIZONAXS NEW IMMIGRATION LAW by David Isaacson http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus201042724527&Month=&From=Menu&Page=5&Year=All; NO ROOM AT THE INN: S.B. 1070 AND

THE CONSTITUTIONAL RIGHT OF INTERSTATE TRAVEL by Gary Endelman and Cyrus D. Mehta http://cyrusmehta.blogspot.com/2010/07/no-room-at-inn-sb-1070-and.html; and UNITED STATES v. ARIZONA: CONSTITUTION WINS OVER THE TYRANNY OF THE MAJORITY by Cyrus D. Mehta http://cyrusmehta.blogspot.com/2010/07/united-states-v-arizona-us-consitution.html

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2. ICE I-9 Final Rule Allows for Electronic Signatures, Scanning, Storage

U.S. Immigration and Customs Enforcement (ICE) has issued a final rule, effective August 23, 2010, providing that employers and recruiters or referrers for a fee who are required to complete and retain the Employment Eligibility Verification Form (I-9) may sign the form electronically and retain it in an electronic format. The final rule makes minor changes to an interim final rule promulgated in 2006.

The final rule's supplementary information notes that the completed I-9 form is not filed with the Department of Homeland Security (DHS) but is retained by the employer, who must make it available for inspection upon a request by ICE investigators or other authorized federal officials. Employers must keep the I-9 in their own files for three years after the date of hire of the employee or one year after the date that employment is terminated, whichever is later. Recruiters or referrers for a fee must keep each I-9 for three years after the date of hire. Failure to properly complete and retain each I-9 may subject the employer or recruiter or referrer for a fee to civil money penalties.

Among other things, the final rule clarifies that:

- Employers must complete the I-9 within three business (not calendar) days;
- Employers may use paper, electronic systems, or a combination of paper and electronic systems;
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- Employers need not retain audit trails recording each time an I-9 is electronically viewed, but only when the I-9 is created, completed, updated, modified, altered, or corrected; and
- Employers may provide or transmit a confirmation of an I-9 transaction,

but are not required to do so unless the employee requests a copy.

The final rule, which includes "performance standards" for electronic filing processes and systems, is available at http://edocket.access.gpo.gov/2010/pdf/2010-17806.pdf.

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3. USCIS Clarifies 'O' Validity Period When Gap Exists in Itinerary

There have been several recent developments with respect to O and P visas:

On July 20, 2010, U.S. Citizenship and Immigration Services (USCIS) issued clarifying guidance on the "O" nonimmigrant visa petition with regard to determining the appropriate validity period of an approvable petition when a gap exists between two or more events reflected in the itinerary.

The memo explains that the validity dates for the O-1 visa classification are defined by the specific period of time required to perform or participate in a specific event. When reviewing an O-1 petition, the length of time between the scheduled events, also known as a gap, has sometimes been viewed as a gauge to determine whether an itinerary represented one continuous "event" or separate events requiring separate petitions.

In certain cases where there has been a significant gap between events, adjudicators have sometimes concluded that a single petition was filed for separate events rather than a continuous event. In such cases, the petition may have been approved only for a validity period equal to the length of time needed to accomplish what appeared to be the initial specific event rather than the continuous event as represented by the petition.

The memo notes that there is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event. "The regulations speak in terms of tours and multiple appearances as meeting the 'event' definition." The statutory and regulatory background provides flexibility on the length of validity period that may be granted, the memo states:

"The statute and regulations allow for an approval of an O-1 petition for a period necessary to accomplish the event or activity, not to exceed 3 years. Adjudicators should evaluate the totality of the evidence submitted to determine if the activities described in the itinerary are related in such a way

that they would be considered an 'event' for purposes of the validity period. When the validity period requested is established though the submission of appropriate evidence, Service Centers should approve a petition for the length of the validity period requested where the law and regulations permit."

The memo is available at http://www.uscis.gov/USCIS/Laws/Memoranda/2010/July/guidance-O-petition-gap_memo-07-20-10.pdf.

In other news, USCIS promised during a public meeting with stakeholders on July 20, 2010, that processing times for regularly filed O and P visas for performers and athletes will not exceed 14 days. In some previous cases, adjudications reportedly have taken up to four months, and delays have led to last-minute scrambles and missed performances. Although arts groups say more needs to be done, many were hopeful about this recent development. The Performing Arts Alliance said it was "extremely pleased with this week's breakthrough."

For more, see http://www.nytimes.com/2010/07/23/arts/music/23visa.html and http://www.tcg.org/advocacy/alert.cfm.

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4. USCIS Extends Initial Registration Period for Haitian TPS, Extends TPS Designation for El Salvador

On January 21, 2010, the Department of Homeland Security (DHS) designated Haiti under the temporary protected status (TPS) program for a period of 18 months. DHS initially established a 180-day registration period from January 21, 2010, through July 20, 2010. A new notice extends the TPS registration period through January 18, 2011.

Also, USCIS extended the designation of El Salvador for TPS for 18 months, from its current expiration date of September 9, 2010, through March 9, 2012. The notice also sets forth procedures necessary for nationals of El Salvador (or those having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with USCIS. Re-registration is limited to persons who previously registered for TPS under the designation of El Salvador and whose applications have been granted or remain pending. Certain nationals of El Salvador (or those having no nationality who last habitually resided in El

Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

New EADs with a March 9, 2012, expiration date will be issued to eligible Salvadoran TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, USCIS said it recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on September 9, 2010. Accordingly, the notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for six months, through March 9, 2011, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

The 60-day re-registration period for eligible Salvadorans begins July 9, 2010, and will remain in effect until September 7, 2010.

The Haitian notice is available at http://edocket.access.gpo.gov/2010/pdf/2010-17116.pdf. The Salvadoran notice is available at http://edocket.access.gpo.gov/2010/pdf/2010-16431.pdf. A Q&A is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543 f6d1a/?vgnextoid=9fc4a93adb7b9210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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5. American Immigration Lawyers Association Sues DHS, USCIS Over H-1B Transparency

The American Immigration Council's Legal Action Center (LAC) filed a lawsuit on July 20, 2010, against the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) on behalf of the American Immigration Lawyers Association (AILA), seeking the public release of records on agency policies and procedures for the H-1B visa program.

AILA had pursued disclosure of the documents through two Freedom of Information Act (FOIA) requests, both of which were denied. In its complaint filed in the U.S. District Court for the District of Columbia, AILA seeks the court's intervention to compel the government to release the requested records.

The FOIA litigation centers on the government's H-1B visa review and processing procedures. The H-1B program, administered by USCIS, allows U.S. businesses to temporarily employ foreign workers, such as scientists, engineers, and computer programmers, in occupations that require theoretical or technical expertise in specialized fields. Since 2008, the LAC noted, USCIS has implemented new, more stringent procedures for review and processing and has dramatically increased the frequency of unannounced H-1B worksite inspections, which are expected to reach 25,000 in 2010. Yet "USCIS has kept secret the rules and guidelines related to the review process," the LAC said. "The dearth of publicly available information on the government's heightened scrutiny of H-1B applications makes it particularly difficult for businesses to anticipate and meet agency expectations during the application process."

"It is in the public and the agency's interest to release the documents sought by AILA," said Mary Kenney, an attorney at the American Immigration Council's Legal Action Center. "The documents will help employers and foreign workers who seek immigration benefits comply with the law. Further, the agency violated FOIA when it issued wholesale denials of AILA's FOIA requests." AILA is also represented in the litigation by Steptoe & Johnson LLP.

The announcement is available at http://www.aila.org/content/default.aspx?docid=32657.

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6. USCIS Proposes New Standardized Fee Waiver Form

U.S. Citizenship and Immigration Services (USCIS) has proposed for the first time a standardized fee waiver form. USCIS seeks public comments on the proposed new Form I-912, Request for Individual Fee Waiver.

Details and instructions for responding to the request for comments are available at http://edocket.access.gpo.gov/2010/pdf/2010-17114.pdf. The proposed form is available at http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000006
480b1a9c1. More information is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543
f6d1a/?vgnextoid=0fb5ac6b49cd9210VgnVCM100000082ca60aRCRD&vgne

xtchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. A related fact sheet is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543 f6d1a/?vgnextoid=2e15ac6b49cd9210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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7. U.S. Expands Appointment Scheduling for Nonimmigrant Visa Applicants in China

Nonimmigrant visa applicants may now schedule interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang. The U.S. Embassy in Beijing noted that although the basic application process is the same, specific times and application procedures at each visa issuing office may vary. Before applying for a visa, applicants should check each post's Web site for procedures specific to that post. In 2009, the U.S. Embassy in Beijing noted, almost half a million people received nonimmigrant visas in China.

The notice is available at http://beijing.usembassy-china.org.cn/visa_interview_appointment_availability.html. Information about making an appointment is available at http://beijing.usembassy-china.org.cn/niv_appointment.html.

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8. State Dep't Explains Biometric Visa Program's Fingerscan, Photo Requirements

The Department of State has published a notice in the Federal Register that explains when fingerscans and other biometric identifiers are required, and notes exceptions to the general requirements.

The notice explains that the Enhanced Border Security and Visa Entry Reform Act of 2002 has required, since October 26, 2004, that all visas issued by the Department of State (DOS) must be machine-readable and tamper-resistant and use biometric identifiers. DOS determined, in consultation with the Departments of Homeland Security (DHS) and Justice (DOJ), that fingerprints

and a photo image should be required as biometric identifiers. When the biometric visa program began, available technology allowed for the efficient capture and comparisons of only two fingerscans. As a result of technological improvements, DOS instituted a 10-fingerscan standard.

DOS's Biometric Visa Program is a partner program to DHS's US-VISIT program in effect at U.S. ports of entry that uses the same biometric identifiers. The DOS notice explains that fingerscans and photos of visa applicants are sent to DHS databases. When a person to whom a visa has been issued arrives at a port of entry, his or her photo is retrieved from a database and projected on the computer screen of the U.S. Customs and Border Protection officer, who compares the person's fingerscans to the fingerscans in the database.

Certain exemptions to the fingerscans under the Biometric Visa Program have been coordinated with DHS to coincide with the exemptions to fingerscans under US-VISIT. Under the Biometric Visa Program, applicants for diplomatic or official visas, for visas to represent their governments at recognized international organizations such as the United Nations or for visas to serve as employees of such organizations, for NATO visas, or for government officials on official transit through the U.S. are exempt from the fingerscans. The aforementioned are represented by these visa categories: A-1, A-2, G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, NATO-6 and C-3 (except for attendants, servants, or personal employees of accredited officials).

In addition, the notice states, persons under age 14 and persons age 80 or above are generally exempt from the fingerscans, unless the person is applying for a visa at a consular post in Mexico and in Yemen. In Mexico, fingerscans are required for applicants beginning at age 7 and above under the program for issuance of biometric Border Crossing Cards (commonly known as "laser visas''), which began in 1998. DOS recently expanded that policy to include visa applicants in Yemen, and may further expand it to include additional countries in the future. DOS retains the authority to require fingerscans of children under age 14 or adults age 80 or above in all other countries.

All visa applicants must submit a photograph with the visa application, the notice explains, except at consular posts in Mexico where most nonimmigrant visa applicants have a live-capture photo taken at the post. All persons, regardless of whether they submit fingerscans, are reviewed against the Department's facial recognition database.

The notice, published on July 8, 2010, is available at http://edocket.access.gpo.gov/2010/pdf/2010-16671.pdf.

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9. Labor Dep't Launches National H-2A Electronic Job Registry

The Department of Labor's Employment and Training Administration (ETA) launched a new National Electronic Job Registry for H-2A job orders on July 8, 2010. Under a final rule published in February 2010, the agency must post all job orders filed in connection with H-2A applications until the end of 50 percent of the contract period. This requirement, the notice explains, is intended to "improve the transparency of agricultural jobs available to U.S. workers and provide an unprecedented level of public access to one of the most frequently requested types of records maintained by the Department."

The job order information is searchable by common data points such as case number, employer name, area of intended employment, work contract period, job title, and primary crop or agricultural activity. All search results are displayed in a table format with sortable column headers. The public is able to view a summary of the job order as well as download a copy of the entire job order and all attachments in Adobe PDF format.

The Office of Foreign Labor Certification (OFLC) noted that since March 15, 2010, it has received more than 620 H-2A applications requesting nearly 11,000 workers. Approximately 450 active H-2A job orders are available to the public.

Public access to the job registry is available through the OFLC iCERT Visa Portal System at http://icert.doleta.gov/. Questions related to job orders placed on the H-2A job registry may be e-mailed to H-2Ajobregistry.chicago@dol.gov. This H-2A job registry Help Desk e-mailbox is monitored from 8:30 a.m. to 5 p.m. Central Time, Monday through Friday. Members of the public may also call the job registry Help Desk at (312) 886-8000 (not toll-free).

The notice, which was published on July 1, 2010, and includes additional details about how the registry will be updated, is available at http://edocket.access.gpo.gov/2010/pdf/2010-16011.pdf. A fact sheet is available at http://www.foreignlaborcert.doleta.gov/pdf/H2A_JobRegistry_Factsheet.pdf.

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10. Decisions Not to Hire Persons Based on Need for Visa Sponsorship or Employer Submission OK, Justice Dep't Says

Katherine A. Baldwin, Deputy Special Counsel for the Department of Justice's Civil Rights Division, noted in a recent letter that in general, decisions not to hire individuals based solely on their need for visa sponsorship or their need for a written employer submission to U.S. Citizenship and Immigration Services, either currently or in the future, would not be actionable under the antidiscrimination provisions of U.S. immigration law. She noted that only certain classes of individuals are protected from citizenship status discrimination under the law, including U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents, refugees, and asylees.

The letter, sent on June 29, 2010, to Angelo Paparelli, partner in the Business Immigration Group of Seyfarth Shaw LLP, is available at http://www.nationofimmigrators.com/wp-content/uploads/2010/07/OSC%20Reply%20on%20Proper%20Question%20on%20Job%20Application.pdf.

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11. CBP Invites Comments on SENTRI and FAST Commercial Driver Applications

U.S. Customs and Border Protection (CBP) has invited the public and other Federal agencies to comment on an information collection requirement concerning CBP's Trusted Traveler Programs, including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows expedited entry at specified southwest land border ports of entry, and the Free and Secure Trade program (FAST), which provides expedited border processing for known, low-risk commercial drivers.

The purpose of the Trusted Traveler programs, the notice explains, is to provide prescreened travelers expedited entry into the U.S. The benefit to the traveler is less time spent in line waiting to be processed by CBP.

Applicants may apply for these programs using paper forms available at http://www.cbp.gov/ or through the Global On-line Enrollment System (GOES) at https://goes-app.cbp.dhs.gov/.

The notice, published on July 6, 2010, is available at

http://edocket.access.gpo.gov/2010/pdf/2010-16314.pdf.

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12. ABIL Global (http://www.abil.com/): Temporary Business Visas in Peru

To visit Peru to carry out business activities, some aspects of the consular temporary business visa must be taken into account. The temporary business visa enables foreign citizens to perform activities typical of a businessperson in Peru.

The Peruvian "Aliens Law" defines "Business" migratory status as:

> **Business:** Those who come to the country with no intention to reside and in order to perform business, legal or similar arrangements. They are permitted to sign contracts or settlements. They cannot perform remunerated or profit-making activities or earn any income from a Peruvian source, except for fees as directors of companies domiciled in Peru or fees as lecturers or international consultants by virtue of a service agreement. Such service agreement shall not exceed thirty (30) consecutive or accumulated calendar days, within a period of twelve (12) months.

The maximum period of authorized stay for a consular temporary business visa is 183 calendar days, non-extendable internally in Peru.

The consular temporary business visa must be obtained in a Peruvian consulate abroad, complying with the requirements established by the pertinent consulate; i.e., the consulate where the foreign citizen resides or, in absence of a consulate in the city of residence, one nearby.

This type of visa and migratory status allows a foreign citizen to carry out activities in Peru common to a businessperson, not a worker. A temporary business visa does not authorize rendering subordinate services as an *employee (worker)* of a local company or as an *appointed worker* of a company abroad.

Permitted activities with a business visa include:

- Performing business arrangements
- Performing legal or similar arrangements
- Attending business meetings or discussions with Peruvian affiliates or related companies
- Attending sales calls to potential Peruvian clients, provided the alien represents a commercial entity outside Peru

- Observing operations of a Peruvian affiliate or client
- Attending "fact-finding" meetings with a Peruvian affiliate or clients
- Attending seminars
- Signing documents, contracts, or settlements
- Acting as an international lecturer or consultant
- Acting as a director of a company domiciled in Peru
- Collecting data or information regarding investments and similar activities
- Supervising business or investments
- A business visa does not allow the holder to perform labor activities in Peru or to earn income from a Peruvian source. Training or acting in an advisory capacity does not qualify as a business, legal, or similar arrangement.

In sum, if any foreign company is considering sending some of its employees to carry out business activities in Peru as businesspersons, they must enter Peru on a consular temporary business visa according to Peru's Aliens Law.

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