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

NOVEMBER 2010 IMMIGRATION UPDATE

Posted on November 1, 2010 by Cyrus Mehta

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- **2.** **District Court Finds NY Education Law Limiting Pharmacist Licenses to U.S. Citizens, LPRs Unconstitutional** - A New York education law was found unconstitutional because it violated the plaintiffs' rights under the Equal Protection Clause of the U.S. Constitution and encroached on federal immigration authority.
- **3.** **USCIS Designates Two AAO Decisions As Binding Precedent** - The first decision holds that an employment-based petition must be "valid" initially if it is to "remain valid with respect to a new job," and the second clarifies the definition of employment by an "American firm or corporation."
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- **6.** **USCIS Releases Q&A on H-1B and L-1 Fee Increases** - Among other

things, USCIS noted that all employees in the U.S., regardless of whether they are paid through a U.S. or foreign payroll, will count toward the percentage calculation.

- **7.** **USCIS Seeks Comments on E-Verify Self-Check** - Self-Check will allow workers to enter data into the E-Verify system to ensure that information relating to their eligibility to work in the U.S. is correct.
- **8.** **ICE Breaks Immigration Enforcement, Employer Sanctions Records** - Since January 2009, ICE has audited more than 3,200 employers.
- **9.** **USCIS Tells TPS Re-Registrants From El Salvador, Honduras, and Nicaragua That EADs May Be Late** - EADs may not be issued until November; USCIS says existing EADs and the relevant Federal Register notice may serve as proof in the meantime.
- **10.** **DOS Addresses Diversity Visa Lottery Applications for Persons With Limited Internet Access** - At a daily briefing, DOS answered a question about how people in areas with limited Internet access can apply for the Diversity Visa Lottery program.
- **11.** **USCIS Hosting Open Houses for Stakeholders, Public** - USCIS is hosting open houses in October and November 2010 nationwide.
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- **13.** **ABIL Global (www.abil.com): India Changes Work-Related Visa Rules** - In an effort to protect India's non-technical workers and attract highly skilled foreign workers, the Indian Ministry of Home Affairs has issued an order and released a new FAQ.
- **14.** **ABIL Global (www.abil.com): Canadian Regulatory Changes Will Affect Canadian Employers, Temporary Foreign Workers**- Various changes to Canada's Immigration and Refugee Protection Regulations will take effect on April 1, 2011, affecting both Canadian employers and their temporary foreign workers.

Details...

1. WHD Plans Nationwide Audit of Independent Contractor Misclassifications

The Department of Labor's Wage and Hour Division (WHD) reportedly plans a nationwide audit this fall of misclassifications of employees as independent

contractors, and U.S. Immigration and Customs Enforcement sent notices of inspection to employers nationwide in September 2010. WHD and ICE are working together on the independent contractor issue, and some analysts believe that WHD may be providing leads to ICE on potential Fair Labor Standards Act violators.

It is unclear which industries are targeted, but it is expected that they may include agriculture, construction, distribution, food processing, hospitality, janitorial services, landscaping, manufacturing, restaurants, and sanitation, according to the Society for Human Resource Management.

CDMA recommends preparing for audits in advance and contacting us for guidance on how to classify workers as employees or independent contractors, and how to conduct an internal audit to correct errors or omissions in I-9 work authorization verification forms and other relevant documentation.

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2. District Court Finds NY Education Law Limiting Pharmacist Licenses to U.S. Citizens, LPRs Unconstitutional

The U.S. District Court for New York ruled in a consolidated case on September 29, 2010, that a New York education law was unconstitutional because it violated the plaintiffs' rights under the Equal Protection Clause of the U.S. Constitution and encroached on federal immigration authority.

The plaintiffs were 26 otherwise qualified pharmacists with temporary authorization to work in the U.S. Twenty-two of them had obtained H-1B visas. Most had applied for permanent residence and all had remained in the U.S. in compliance with federal immigration laws while their cases were pending. New York Education Law ¤ 6805(1)(6) provides that "o qualify for a pharmacistXs license, an applicant shall...be a United States citizen or an alien lawfully admitted for permanent residence in the United States." The law excludes, among others, those who have received federal authorization to work in the U.S. temporarily.

Among other things, the court said:

The theory is that courts must be wary of state laws that exploit aliens' political powerlessness by denying them the fruits of their societal contributions. Here, the State does not explain why this theory would apply any less to nonimmigrants, who also work, pay taxes, contribute to society, and have no

political voice while they remain in this country. At one point, the State seems to suggest that non-LPR classifications should not receive strict scrutiny because non-LPRs have a different "constitutional status" by virtue of their weaker ties to the country....But what does it mean to say that nonimmigrants have a different "constitutional status" than LPRs, or that nonimmigrants "need not" be protected to the same extent as LPRs? The Supreme Court has already established that all aliens, even undocumented aliens, have rights under the equal protection clause.

The court pointed out that New York purported to ameliorate the dangers posed by transient or judgment-proof pharmacists through ¤ 6805(1)(6), which was aimed at only a tiny subclass of pharmacists, instead of imposing generally applicable insurance or similar malpractice-related requirements upon the entire profession. The state also did not put forth any evidence that transience among New York pharmacists threatened public health or that nonimmigrant pharmacists, as a class, were considerably more transient than LPR and U.S. citizen pharmacists. As a consequence, the court said, the law did nothing to reduce the dangers of transience among citizen and LPR pharmacists while at the same time excluding longtime nonimmigrant residents, many of whom will become LPRs as soon as their pending green card applications are processed. "The question is not close; under any form of heightened scrutiny, ¤ 6805(1)(6) fails," the court concluded.

The decision is available at http://engnishimura.com/files/PhamacistLawUnconstitutional.pdf.

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3. USCIS Designates Two AAO Decisions As Binding Precedent

U.S. Citizenship and Immigration Services (USCIS) announced on October 20, 2010, that it has issued two decisions from the Administrative Appeals Office (AAO) as binding precedent for the agency.

The first decision, *Matter of Al Wazzan*, affirms USCIS's denial of an application to adjust status to permanent residence and holds that an employment-based petition must be "valid" initially if it is to "remain valid with respect to a new job." The second decision, *Matter of Chawathe*, reverses USCIS's denial of an application to preserve residence for naturalization purposes and clarifies the definition of employment by an "American firm or corporation."

Matter of Al Wazzan states that to be considered "valid," a petition must have been filed for a person who is entitled to the requested classification and a USCIS officer must have approved the petition. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days, even though the law states that an employment-based immigrant visa petition remains valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remains unadjudicated for 180 days.

Matter of Chawathe states that for purposes of establishing the requisite continuous residence in naturalization proceedings, a publicly held corporation may be deemed an "American firm or corporation" if the applicant establishes that the corporation is both incorporated in the U.S. and trades its stock exclusively on U.S. stock exchange markets. The decision also states that when an applicant's employer is a publicly held corporation incorporated in the U.S. and trading its stock exclusively on U.S. stock markets, the applicant need not demonstrate the nationality of the corporation by establishing the nationality of those persons who own more than 51 percent of the stock of that firm. The decision further states that even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant has satisfied the standard of proof. If the director can articulate a material doubt, he or she may request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, may deny the application or petition, the decision states.

Matter of Al Wazzan is available at http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf, and *Matter of Chawathe* is available at http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf.

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4. State Dept. Seeks OMB Approval, Comments on Exchange Visitor Program Annual Reports

The Department of State (DOS) has sent for Office of Management and Budget (OMB) approval a notice and request for comments on annual reports required from designated exchange visitor program sponsors to assist DOS in overseeing and administering the J-1 visa program. The reports provide statistical data on the number of exchange participants an organization has

sponsored per category of exchange, a summary of the activities in which exchange visitors were engaged, and an evaluation of the program's effectiveness. Program sponsors include government agencies, academic institutions, and private sector not-for-profit and for-profit entities. The estimated number of respondents annually is 1,460.

Annual reports are completed through the Student and Exchange Visitor Information System (SEVIS), printed and signed by a sponsor official, and sent to DOS by mail or fax. DOS said it is working with the Department of Homeland Security (DHS) to expand SEVIS functions and enable the collection of electronic signatures. Annual reports will be submitted to DOS electronically "as soon as the mechanism for doing so is approved and in place," the agency said. DHS announced a delay in implementing SEVIS II in April 2010. Phase one, the creation of customer accounts and the migration of school and sponsor records, was planned to start in March 2010, and phase two, full operating capability, was planned to deploy in October. DHS said a final decision on the schedule has not been reached, but confirmed that SEVIS II will not be deployed this year.

Comments or requests for additional information may be sent to the offices listed in the OMB notice, which is available at http://edocket.access.gpo.gov/2010/pdf/2010-26381.pdf. For details on the SEVIS II delay, see http://www.ice.gov/sevis/sevisii/sevisii_update_032010.htm.

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5. ETA Publishes Proposed Rule on Wage Methodology for H-2B Temporary Non-Agricultural Employment

The Department of Labor's Employment and Training Administration has proposed to amend its regulations governing certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and related enforcement. The proposed rule, published on October 5, 2010, would revise the methodology by which the Department calculates the H-2B prevailing wage.

The proposed rule would establish that the prevailing wage will be the highest of: (1) wages established under an agreed-upon collective bargaining agreement (CBA); (2) a wage rate established under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA) for that occupation in the area of intended employment; and (3) the arithmetic mean wage rate established by

Occupational Employment Statistics (OES) for that occupation in the area of intended employment. The employer would be required to pay its workers at least the highest of the prevailing wage as determined by the National Processing Center (NPC) (currently the National Prevailing Wage Center), the federal minimum wage, the state minimum wage, or the local minimum wage.

The proposed rule also would eliminate the use of the current four-tiered wage structure that differentiates wage tiers by level of experience, education, and supervision required to perform the job duties. The Department proposes instead a single OES wage level for H-2B job opportunities based on the arithmetic mean of the OES wage data for the job opportunities in the area of intended employment.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *ComitLJ de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, et al.*, invalidated the Department's use of skill levels in establishing prevailing wages and the Department's reliance on OES data in lieu of DBA and SCA rates. The court order required the Department to complete a new rulemaking regarding the calculation of prevailing wage rates in the H-2B program within 120 days.

The Department noted that the types of jobs found in the H-2B program involve few if any skill differentials necessitating tiered wage levels. The Department said that multiple wage rates, particularly in a program in which most job opportunities have few or no skill requirements, "stratify wages and inappropriately allow employers to force much of the wage-earning workforce into a lower wage." H-2B workers, most of whom fill jobs with low skill levels, are more likely to be classified at the low end of the wage tiers, ultimately adversely affecting the wages of U.S. workers in those same jobs, the Department noted, citing H-2B disclosure data from the last 10 years demonstrating that many jobs for which employers seek H-2B workers (e.g., housekeepers, landscape workers) "clearly require minimal skill to perform, have few special skill or experience requirements, and do not generally have career ladders." These jobs typically have resulted in a Level 1 (the lowest wage level) determination for the H-2B employer because the jobs themselves do not require the employer to seek workers with higher skill levels, the Department pointed out. The result is a wage determination lower than the average wage paid for many jobs under the same classification as those filled under the H-2B program. "By allowing jobs to be filled by H-2B workers at these lower wages, a tiered wage system can have a depressive effect on wages of similar domestic

workers, ultimately adversely affecting the wages of U.S. workers in those same jobs." The Department said it "cannot continue to allow such wage depression where its mandate is to ensure that the wages of U.S. workers suffer no adverse impact."

Finally, the H-2B regulations currently allow the use of an employer-provided survey to determine the prevailing wage when that survey meets certain methodological requirements, even if the survey produces a lower wage than the OES wage. The proposed rule would eliminate the use of private wage surveys in the H-2B program. The Department said it has concluded that "the review of such surveys is an inefficient and unnecessary expenditure of government resources. While private surveys can provide useful information, the cost of reviewing the surveys outweighs their utility."

The Department anticipates further rulemaking that will address other aspects of the H-2B temporary worker program. (The proposed rule notes that temporary labor certification is currently not required for H-2B employment on Guam, for which certification from the governor of Guam is required.)

Comments are due by November 4, 2010, and should be submitted using one of the methods set forth in the proposed rule, which is available at http://edocket.access.gpo.gov/2010/pdf/2010-25142.pdf. See also http://www.foreignlaborcert.doleta.gov/.

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6. USCIS Releases Q&A on H-1B and L-1 Fee Increases

U.S. Citizenship and Immigration Services released a frequently asked questions (FAQ) sheet on October 7, 2010, that discusses the new additional fees of $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions. The additional fee applies to H-1B or L-1 petitioners that employ 50 or more employees in the United States with more than 50 percent of their employees in the U.S. in H-1B, L-1A, or L-1B nonimmigrant status. USCIS noted that all employees in the U.S., regardless of whether they are paid through a U.S. or foreign payroll, will count toward the percentage calculation.

The fee increase applies to covered petitions postmarked August 14, 2010, or later. For petitions filed by courier service, the fee applies to packets picked up by the courier on August 14 or later.

Among other things, the FAQ notes that until the Petition for Nonimmigrant

Worker (Form I-129) and the Nonimmigrant Petition Based on Blanket L Petition (Form I-129S) are revised, the agency recommends that all H-1B, L-1A, and L-1B petitioners include, as part of the filing packet, the new fee or a statement or other evidence outlining why this new fee does not apply. USCIS requests that petitioners include a notation indicating whether or not the fee is required in bold capital letters at the top of the cover letter. The fee, statement, notation, or other evidence should be provided with each petition submitted.

Where the fee or documentation is not submitted with the filing, or where questions remain, USCIS may issue a Request for Evidence (RFE) to determine whether the additional fee applies to the petition. Because an RFE will be issued for the fee, rather than a rejection for the omission of the fee, USCIS will maintain the original filing date as the receipt date. Petitioners should wait to respond to the RFE before sending in the additional fee or an explanation of why the new fee does not apply, USCIS said. Once the revised I-129 and 1-129S are in place, USCIS will reject covered petitions submitted without the new fee. USCIS said it will release those revised forms "as soon as possible."

The FAQ is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a68794687538b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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7. USCIS Seeks Comments on E-Verify Self-Check

U.S. Citizenship and Immigration Services seeks comments on a new E-Verify self-check program. Self-Check will allow workers to enter data into the E-Verify system to ensure that information relating to their eligibility to work in the U.S. is correct. The notice, including instructions on how to submit comments, is available at http://edocket.access.gpo.gov/2010/pdf/2010-24626.pdf.

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8. ICE Breaks Immigration Enforcement, Employer Sanctions Records

On October 6, 2010, Department of Homeland Security Secretary Janet Napolitano and U.S. Immigration and Customs Enforcement (ICE) Director John Morton announced record-breaking immigration enforcement statistics achieved under the Obama administration, including the highest-ever numbers

of convicted criminal removals and overall removals in fiscal year 2010.

Secretary Napolitano said, "Our approach has yielded historic results, removing more convicted criminal aliens than ever before and issuing more financial sanctions on employers who knowingly and repeatedly violate immigration law than during the entire previous administration." Among other things, ICE removed more than 392,000 undocumented persons nationwide in 2010; half were convicted criminals. Since January 2009, ICE has audited more than 3,200 employers, debarred 225 companies and individuals, and imposed approximately $50 million in financial sanctions. Debarment excludes persons or entities from government business for up to 3 years for prescribed violations.

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95a921e7bcc7b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. The list of open house dates and locations is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f87f9d6fd9c7b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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9. USCIS Tells TPS Re-Registrants From El Salvador, Honduras, and Nicaragua That EADs May Be Late

U.S. Citizenship and Immigration Services has announced that new employment authorization documents (EADs) for those from El Salvador, Honduras, and Nicaragua who have successfully re-registered for temporary protected status (TPS) may not be issued until "early November 2010." While awaiting their EADs, USCIS said they may provide their existing EAD as proof of employment authorization. They may also provide their employer with a copy of their country's most recent Federal Register notice announcing the TPS six-month extension and the automatic extension of EADs.

The Federal Register notices they may provide as proof include the July 9, 2010, notice for El Salvador (http://edocket.access.gpo.gov/2010/2010-16431.htm), and the May 5, 2010, notices for Honduras

(http://edocket.access.gpo.gov/2010/2010-10620.htm) and Nicaragua (http://edocket.access.gpo.gov/2010/2010-10619.htm).

The announcement, dated October 7, 2010, is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cfdc94687538b210VgnVCM100000082ca60aRCRD&vgnextchannel=390d3e4d77d73210VgnVCM100000082ca60aRCRD. A fact sheet about documentation employers may accept and TPS beneficiaries may present as evidence of employment eligibility is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f876090684988210VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD.

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10. DOS Addresses Diversity Visa Lottery Applications for Persons With Limited Internet Access

At the Department of State's daily press briefing on October 5, 2010, the following answer was provided to the question of how people in areas with limited Internet access can apply for the Diversity Visa Lottery program:

Lottery applicants may prepare and submit their own entries, or have others, who have Internet access, submit them on their behalf. Regardless of whether an entry is submitted by the individual directly, or assistance is provided by an attorney, friend, relative, etc., only one entry may be submitted in the name of each person, and the entrant remains responsible for ensuring that information in the entry is correct and complete.

There were over 16 million applications entered into the system last year.

The question and answer are available at http://www.state.gov/r/pa/prs/ps/2010/10/149027.htm.

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11. USCIS Hosting Open Houses for Stakeholders, Public

U.S. Citizenship and Immigration Services (USCIS) is hosting open houses in October and November 2010 nationwide. The agency is inviting community stakeholders and the general public to the open houses at its offices across the

country to meet USCIS personnel and learn more about the agency's programs. The effort "is designed to enhance USCIS's presence in the community and strengthen its partnership with stakeholders," the agency said. In addition to meeting local USCIS staff, attendees will tour USCIS offices and witness mock naturalization interviews.

USCIS Director Alejandro Mayorkas kicked off the series of open houses October 4 at the USCIS Field Office in Baltimore, Maryland.

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95a921e7bcc7b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. The list of open house dates and locations is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f87f9d6fd9c7b210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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12. USCIS Opens New Office in Holtsville, Long Island

U.S. Citizenship and Immigration Services (USCIS) recently announced the opening of a new full-service field office in Holtsville, Long Island, New York. The office has the capacity to serve approximately 400 residents of Nassau, Suffolk, and Queens Counties per day, including fingerprinting.

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=22a20d1fd9bab210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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13. ABIL Global (www.abil.com): India Changes Work-Related Visa Rules

In an effort to protect India's lesser skilled workers and attract highly skilled foreign workers, the Indian Ministry of Home Affairs (MHA) has issued an order and released a new FAQ (frequently asked questions) document stating that employment visas are intended for foreigners desiring to come to India to work

if the applicant is a highly skilled and/or qualified professional engaged or appointed by a company, organization, or industry undertaking in India on a contract or employment basis.

Employment visas will not be granted for positions for which qualified Indians are available, the FAQ states. Also, employment visas will not be granted for "routine, ordinary or secretarial/clerical jobs." The foreign national must seek to visit India for employment in a company, firm, or organization registered in India or for employment in a foreign company, firm, or organization engaged in the "execution of some project in India." Further, the FAQ states, the foreign national being sponsored for an employment visa in any sector should draw a salary above US $25,000 per year, with the exception of ethnic cooks, language teachers (other than English) and translators, and staff working for the "concerned Embassy/High Commission in India."

The MHA also has announced the elimination of the prior maximum of 1% of the total workforce, or up to 20, for each Indian company that sponsors foreign workers.

The employment visa must be issued from the country of origin or country of domicile of the foreigner, provided the period of permanent residence of the applicant in that country is more than 2 years.

Documentation pertaining to the proposed employment, such as registration of the company under the Companies Act, proof of registration of the firm in the State Industries Department or the Export Promotion Council concerned, or any recognized promotional body in the field of industry and trade, will be reviewed to decide the category of visa that may be issued.

The name of the sponsoring employer or organization must be clearly stipulated in the visa sticker.

The following categories of foreign nationals are also eligible for employment visas provided they meet the basic conditions for an employment visa:

(i) Foreign nationals coming to India as consultants on a contract for whom the Indian company pays a fixed remuneration (this may not be in the form of a monthly salary).

(ii) Foreign artists engaged to conduct regular performances for the duration of an employment contract given by hotels, clubs, or other

organizations.

(iii) Foreign nationals coming to India to take up employment as coaches of national or state-level teams or reputed sports clubs.

(iv) Foreign sportsmen who are given contracts for a specified period by Indian clubs or organizations.

(v) Self-employed foreign nationals coming to India for providing engineering, medical, accounting, legal or other such highly skilled services in their capacity as independent consultants, provided the provision of such services by foreign nationals is permitted under law.

(vi) Foreign language teachers and interpreters.

(vii) Foreign specialist chefs.

(viii) Foreign engineers or technicians coming to India to install and commission equipment, machines, or tools under the terms of a contract for the supply of such equipment, machines, or tools.

(ix) Foreign nationals deputed for providing technical support or services, or transfer of know-how or services, for which the Indian company pays fees or royalties to the foreign company.

Regarding the duration of the employment visa, the rules have different validity dates depending on the employment arrangement. These are summarized as follows:

1. i) A foreign technician/expert coming to India under a bilateral agreement between the Indian government and the foreign government, or pursuant to a collaboration agreement that has been approved by the Indian government, may be granted a multiple employment visa for the duration of the agreement, or for a period of five years, whichever is less.

   (ii) Highly skilled foreign personnel being employed in the IT software and IT-enabled sectors may receive a multiple entry employment visa for up to three years or for the term of assignment, whichever is less.

Applicants who are not covered under any of these two arrangements may obtain a multiple entry employment visa for up to two years or the term of assignment, whichever is less.

Finally, the rules provide for extensions beyond the initial visa validity period,

up to a total period of five years from the date of issue of the initial employment visa, on a year-to-year basis, subject to the individual's good conduct, production of necessary documents in support of continued employment, filing of income tax returns and to there being no adverse security inputs relating to the foreign national. The period of extension shall not exceed five years from the date of issue of the initial employment visa.

The FAQ, which contains additional details on business and work-related visas issued by India, is available at http://www.mha.nic.in/pdfs/work_visa_faq.pdf.

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14. **ABIL Global (www.abil.com): Canadian Regulatory Changes Will Affect Canadian Employers, Temporary Foreign Workers**

Various changes to Canada's Immigration and Refugee Protection Regulations will take effect on April 1, 2011, affecting both Canadian employers and their temporary foreign workers. These changes are intended to:

- Reduce the opportunity for exploitation of temporary foreign workers by employers and third-party agents;
- Ensure greater employer accountability mechanisms, including a denial of service provision, thereby encouraging greater adherence by employers to the terms and conditions of their job offers with respect to wages, working conditions and occupations; and
- Clarify that employment facilitated through the Temporary Foreign Worker Program is meant to be temporary in nature.

The changes include:

Rigorous assessment of the genuineness of the employment offer. The amendments establish specific factors to assess the genuineness of an employer's offer of employment to a foreign worker both in Labour Market Opinion (LMO) cases and in LMO-exempt cases. These factors include:

- Whether the offer is made by an employer that is actively engaged in the business with respect to which the offer is made;
- Whether the offer is consistent with reasonable employment needs of the employer;
- Whether the terms of the offer are terms that the employer is reasonably able to fulfill; and

- The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

Ban on employers for noncompliance with a previous LMO. The amendments will render an employer ineligible to seek a work permit on behalf of a foreign worker unless, during the period beginning two years before the initial request for an LMO is made to Service Canada or, in the case of an LMO-exempt work permit, beginning two years before the work permit application is received by Citizenship and Immigration Canada (CIC) or the Canada Border Services Agency (CBSA):

- The employer provided each of its foreign workers with wages, working conditions and employment consistent with the wages, working conditions and occupation set out in the employer's offer of employment; or the failure to do so was justified.

Justifications include:

- A change in federal or provincial law;
- A change in the provisions of a collective agreement;
- The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;
- An error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;
- An unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or
- Circumstances similar to those set out above.

The assessment is undertaken when a new LMO is requested or, in the case of an LMO-exempt work permit application, when the work permit application is

received by CIC/CBSA. Employers must review all LMO applications to ensure compliance during the two-year period preceding April 2011. An internal immigration audit is recommended.

List of banned employers posted on CIC Web site. The amendments authorize CIC to maintain a list of banned employers on its Web site, listing the names and addresses of each employer and the date that the determination was made. Service Canada will not issue an LMO and CIC/CBSA will not issue a work permit for any employer on the list.

Four-year cap for most temporary foreign workers. The amendments provide for a cumulative four-year cap for most foreign workers. However, exemptions from the four-year cap exist in the following situations:

- The foreign worker intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents. Therefore, work permits based on LMO exemptions, such as significant benefit to Canada and intra-company transferees, along with other LMO exemptions, will be exempt from the four-year cap.
- The foreign worker intends to perform work pursuant to an international agreement between Canada and one or more countries. Work permits issued under international agreements such as the North American Free Trade Agreement, the General Agreement on Trade in Services, the Canada-Chile Free Trade Agreement, or the Peru Free Trade Agreement will be exempt from the four-year cap.
- A foreign worker who has reached the four-year cap is not necessarily required to leave Canada. However, the foreign worker would not be eligible for a work permit even under another category. He or she may be permitted to apply for status under a non-work category such as that of a visitor or student.

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