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

AUGUST 2011 IMMIGRATION UPDATE

Posted on August 1, 2011 by Cyrus Mehta

Headlines

1. **Company Held Liable for Back Wages of H-1B Employee Who Never Worked** - The failure to prove every element of a bona fide termination left an employer who petitioned for an H-1B worker's admission liable for the entire period of authorized employment.

2. **Labor Dept. Weighs In on Staggered Dates of Need** **-** Can an employer file a single application for temporary employment certification for staggered dates of need? The answer is no.

3. **EAD Processing Delays Cause Hardship, Ombudsman Says** - When processing for EADs is delayed, individuals and employers experience adverse consequences; the Department of Homeland Security's Ombudsman has made related recommendations.

4. **State Dept. Announces New Requirement for Passport Applications** - The full names of an applicant's parent(s) must be listed on all certified birth certificates for them to be considered primary evidence of U.S. citizenship for all passport applicants, regardless of age.

5. **USCIS Changes Timeframes for RFEs** **-** Among other things, the maximum response time for an RFE may not exceed 12 weeks (84 days).

6. **USCIS Submits Revision of Basic Pilot Verification MOU to OMB for Review** - Comments will be accepted until September 12, 2011.

7. **DOS Determines Employment Preference Numerical Limit for FY 2011** - The worldwide employment-based preference numerical limit for fiscal year (FY) 2011 is 140,000.

8. **DOS Announces Visa Issuance Agreement Between U.S. and Russian**

Federation - The new agreement concerns the issuance of nonimmigrant business, tourist, private, and humanitarian visas to the Russian Federation, and business and tourist visas to the U.S., as well as short-term official travel visas to both countries.

9. DOL Orders Prince George's County Public Schools To Pay $4.2 Million in Back Wages - An investigation by the Department of Labor found Maryland's Prince George's County Public Schools system in violation of the H-1B program.

10. USCIS Releases EB-5 Investor Statistics - U.S. Citizenship and Immigration Services (USCIS) released data on EB-5 filings and regional centers (RCs) for FY 2010 and the first two quarters of FY 2011.

11. ABIL Webinar Series: U.S. Investment Visas and Green Cards for Foreign Nationals - The intended audience for the July 6 webinar includes individual investors; potential and actual EB-5 regional centers; attorneys and advisors; real estate developers; and companies seeking capital for development projects.

12. Firm In The News

Details:

1. Company Held Liable for Back Wages of H-1B Employee Who Never Worked

Ganze & Company, an accounting firm in Napa Valley, California, filed a labor condition application (LCA) to hire Kevin Limanseto as an H-1B employee but subsequently decided not to employ him. However, Ganze never informed the government of that change, and Mr. Limanseto complained to the Department of Labor that he had never been paid. Administrative Law Judge William Dorsey noted:

Informing the immigration authorities that the employment has been terminated is the *quid pro quo* to be relieved of one of the duties the employer promises to fulfill when it signs the labor condition application: the duty to pay the required wage rate. Until it does, the employer remains on the hook for the H-1B worker's wages and benefits. For the price of a postage stamp, the Employer often can absolve itself of further liability.

In this case, Ganze did not report that Mr. Limanseto was not employed until more than two years later. In addition, Ganze did not pay Mr. Limanseto's trip

home, which is another element of a bona fide termination. The failure to prove every element of a bona fide termination leaves an employer who petitioned for an H-1B worker's admission liable for the entire period of authorized employment, ALJ Dorsey noted. Therefore, he found that Ganze was liable for wages for the entire period of the LCA, plus interest, among other things. The total amount for which Ganze is liable exceeds $156,000.

The decision, *Matter of Limanseto*, 2011-LCA-00005, is available at http://www.oalj.dol.gov/Decisions/ALJ/LCA/2011/LIMANSETO_KEVIN_v_GANZE_and_COMPANY_2011LCA00005_(JUN_30_2011)_124211_CADEC_SD.PDF.

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2. Labor Dept. Weighs In on Staggered Dates of Need

The Department of Labor's Office of Foreign Labor Certification recently responded to the question, "Can an employer file a single Application for Temporary Employment Certification for staggered dates of need?" The answer is no.

The Department explained that an application must contain a single date of need for all workers under that application. Under the H-2A program, a date of need is defined as the first date the employer requires the services of H-2A and U.S workers as indicated in the Application for Temporary Employment Certification. The date is not an indication of the first date of need for some workers, but for all the workers who are the subject of the application. The Department said it expects that the filing of an application indicates that the employer has full-time work available for all positions it is requesting for that single start date and that all information reflects the employer's true need. Changing the date of need for some or all workers invalidates the validity of the labor market test, the Department said, and thereby eliminates the basis for granting the labor certification. In such a case, a different date was not advertised to U.S. workers, particularly those who, if they had been apprised of the later date, could have made themselves available for the job opportunity and therefore made the approval of the certification unnecessary. Where the employer has staggered dates of need, the employer must file a separate application for each date of need.

The Department's response is available at

http://www.foreignlaborcert.doleta.gov/pdf/2011_7_22_FAQ.pdf.

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3. EAD Processing Delays Cause Hardship, Ombudsman Says

The Department of Homeland Security's Ombudsman noted on July 11, 2011, that U.S. Citizenship and Immigration Services (USCIS) in some cases fails to meet its regulatory requirement to process applications for employment authorization in 90 days, and USCIS generally does not issue interim employment authorization documents (EADs). When processing for EADs is delayed, individuals and employers experience adverse consequences. Applicants experience financial hardship due to job interruption and termination, business operations stall due to loss of employee services, families face suspension of health benefits, and individuals have difficulty renewing driver's licenses. EAD processing delays are exacerbated by the lack of immediate resolution through USCIS' designated venues.

The Ombudsman recommended that USCIS take the following actions to improve EADs processing:

1. Establish methods at local offices to facilitate immediate resolution;
2. Establish a uniform processing time goal of 45 days for adjudication and 60 days for issuance of an EAD;
3. Improve monitoring and ensure real-time visibility through an automated system for tracking processing times;
4. Follow established internal procedures for issuing interim EADs in cases where background checks are pending; and
5. Issue replacement EADs with validity dates beginning on the date the old EAD expires.

USCIS currently directs applicants experiencing EAD delays to contact the National Customer Service Center (NCSC) or the local district office, the Ombudsman noted. However, neither venue has the ability to provide direct assistance. USCIS representatives or officers assist individuals with delayed I-765s by submitting service requests or sending e-mails to the National Benefits Center (NBC) or service centers. The Ombudsman noted that USCIS is reviewing the procedures in place and may provide field offices with updated guidance on how to assist individuals with EAD applications pending past 90 days.

While both service requests and e-mails alert the applicable office of a delay, it may take up to 10 or more days for an I-765 to be adjudicated and an EAD to be delivered, the Ombudsman said. Additionally, while customers receive responses to service requests in five days for expedite requests, and 15 days for all other requests, the responses are often "generic and unhelpful," the Ombudsman noted. Sometimes the responses state that an applicant's case is "under review" but do not provide a timeline for issuance of the EAD. Other responses merely state that a decision will be issued in 30 or 60 days, when the application already has been pending past 90 days. "Such responses fail to address the problem because they do not assist the customer in rapidly obtaining an interim or final EAD. The failure to communicate useful information to customers often results in repeated telephone and in-person inquiries causing inefficiencies for USCIS," the Ombudsman said.

USCIS' website also lists alternative contact information, such as e-mail addresses, for service centers and the USCIS Headquarters Office of Service Center Operations. However, before people e-mail those addresses, USCIS advises them to wait 30 days for a response from the NCSC and 21 days for a response from the service centers, "when even one day of delay may lead to financial loss for EAD applicants and business disruption for employers," the Ombudsman said.

The Ombudsman termed a "best practice" the Vermont Service Center's five-day processing time goal for background checks conducted in connection with adjudication of an I-765. Adjudicators e-mail cases to the Background Check Unit (BCU), identifying the form type and marking it as an expedite request in the subject line. The BCU monitors the inbox to ensure that cases are promptly referred to adjudicators and resolved within the specified timeline. With this process, the Ombudsman said, USCIS is able to resolve minor concerns immediately while carefully reviewing cases that involve national security, egregious public safety issues, criminal convictions, or immigration fraud.

The Ombudsman's report is available at http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-documents-07182011.pdf.

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4. State Dept. Announces New Requirement for Passport Applications

The Department of State announced that the full names of an applicant's parent(s) must be listed on all certified birth certificates for them to be considered primary evidence of U.S. citizenship for all passport applicants, regardless of age. Certified birth certificates missing this information will not be acceptable as evidence of citizenship. This does not affect applications that were submitted or accepted before April 1, 2011.

The announcement is available at http://travel.state.gov/passport/passport_5401.html. Links to vital records offices state-by-state are available at http://www.cdc.gov/nchs/w2w.htm.

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5. USCIS Changes Timeframes for RFEs

U.S. Citizenship and Immigration Services (USCIS) previously gave agency officers the flexibility to determine individual response times for requests for evidence (RFEs) tailored to the circumstances of each case. USCIS released an interim policy memorandum on July 13, 2011, changing the standard timeframes for applicants or petitioners to respond to RFEs because, the agency said, "this delegated flexibility has led to inconsistencies in the RFE process."

USCIS is amending the standard timeframes listed in Appendix 10-9 of the *Adjudicator's Field Manual* (AFM) to include:

- A standard timeframe of 30 days for the Application to Extend/Change Nonimmigrant Status (Form I-539); and
- A standard timeframe of 84 days for all other form types, regardless of whether the request is for initial or additional evidence, or whether the evidence is available in the United States or is obtained from overseas sources.

The maximum response time for an RFE may not exceed 12 weeks (84 days), the memo states. However, when an RFE is served by mail, USCIS officers should include additional mailing time for the RFE to reach the applicant/petitioner and for the response to reach USCIS. The standard mailing time established by regulation is three days. As a matter of policy, USCIS has determined that the mailing time should be longer when the applicant or petitioner is residing outside the U.S. USCIS amended the AFM accordingly to include appropriate mailing times in addition to standard response times.

The memo does not apply to asylum applications or applications for relief under Section 203 of the Nicaraguan Adjustment and Central American Relief Act.

The memo is available at http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/change-timeframes-rfe.pdf.

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6. USCIS Submits Revision of Basic Pilot Verification MOU to OMB for Review

U.S. Citizenship and Immigration Services (USCIS) submitted for Office of Management and Budget review the memorandum of understanding (MOU) to participate in the Basic Pilot Employment Eligibility Program. USCIS is encouraging comments, which will be accepted until September 12, 2011.

USCIS estimates that 125,015 respondents will complete the MOU, and that 521,134 employers will register to participate in the program.

For more information on the revision and where to send comments, see http://www.gpo.gov/fdsys/pkg/FR-2011-07-13/pdf/2011-17546.pdf.

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7. DOS Determines Employment Preference Numerical Limit for FY 2011

The Department of State (DOS) has determined the worldwide employment-based preference numerical limit for fiscal year (FY) 2011: 140,000. The per-country limit is fixed at 7 percent of the employment annual limit. For FY 2011, the per-country limit is 25,620. The dependent area annual limit is 2 percent, or 7,320.

The worldwide family-sponsored preference limit for FY 2011 is 226,000. See the DOS's Visa Bulletin for August 2011 for details at http://www.travel.state.gov/visa/bulletin/bulletin_5518.html.

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8. DOS Announces Visa Issuance Agreement Between U.S. and Russian Federation

On July 13, 2011, U.S. Secretary of State Hillary Rodham Clinton and Russian Foreign Minister Sergey Lavrov announced an agreement on the issuance of nonimmigrant business, tourist, private, and humanitarian visas to the Russian Federation, and on business and tourist visas to the U.S., as well as short-term official travel visas to both countries.

The agreement will facilitate travel between the two countries and, DOS said, "benefits the largest segments of our traveling Americans and Russians P business travelers and tourists, traveling both as individuals and in groups, by granting as a rule, on a reciprocal basis, multiple-entry visas valid for 36 months." The agreement also reduces the documentation required.

The new visa validity periods "will allow for expanded contacts and promote greater mutual understanding between our societies," DOS said. This agreement will go into effect after an exchange of diplomatic notes in Moscow.

The DOS announcement is available at http://www.state.gov/r/pa/prs/ps/2011/07/168346.htm.

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9. DOL Orders Prince George's County Public Schools To Pay $4.2 Million in Back Wages

An investigation by the Department of Labor's (DOL) Wage and Hour Division found Maryland's Prince George's County Public Schools (PGCPS) system in violation of the H-1B temporary foreign worker visa program.

DOL investigators found that PGCPS illegally reduced the wages of 1,044 foreign teachers hired under the H-1B program by requiring them to use their own money to pay a $500 anti-fraud fee to the Department of Homeland Security, as well as a $1,000 attorney's fee and a $3,500 placement fee. DOL held that under federal law, the school district should have paid those fees.

"All employers, including school systems, are required to follow the law. That includes the legal duty to pay every teacher hired the full wages he or she is owed," said Nancy J. Leppink, acting administrator of the Wage and Hour Division.

Due to the willful nature of some of the violations, PGCPS also was assessed $100,000 in civil money penalties and was debarred for two years from filing new petitions, requests for extensions, or requests for permanent residence for

foreign workers under any employment-based visa program. DOL noted that "iolations are willful when an employer knew or acted in reckless disregard whether its actions were impermissible."

Some H-1B employers may be unaware of which fees they must pay and which fees an H-1B worker may pay. Consult your ABIL attorney for guidance on this issue.

The DOL's news release is available at http://www.dol.gov/opa/media/press/whd/whd20110357.htm.

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10. USCIS Releases EB-5 Investor Statistics

U.S. Citizenship and Immigration Services (USCIS) released data on EB-5 filings and regional centers (RCs) for fiscal year (FY) 2010 and the first two quarters of FY 2011.

The agency noted that as of June 30, 2011, there are 147 approved regional centers (RCs) operating in 39 states, including the District of Columbia and Guam. Most (90 to 95 percent) of the individual Form I-526 (Immigrant Petition by Alien Entrepreneur) petitions filed each year are filed by those who are investing in RC-affiliated commercial enterprises. There are 83 initial RC proposals pending at USCIS, and nine RC proposals seeking to amend approved RCs.

USCIS figures continue to show a steep increase in the number of RC filings and EB-5 visa approvals. The agency reported 146 initial RC proposal filings in the first and second quarters of FY 2011, compared to 110 initial filings in all of FY 2010. In the first and second quarters of FY 2011, the agency approved 25 initial RC proposals and denied 11, an approval rate of 69 percent. This was a big increase from FY 2010, when USCIS approved 36 and denied 30 during the entire fiscal year.

USCIS also reported significant increases in individual I-526s and I-829s (Petition by Entrepreneur to Remove Conditions). In the first and second quarters of FY 2011, USCIS received 1,601 I-526 petitions, compared to 1,955 for all of FY 2010. The increase in the number of I-829 petitions was even more dramatic, with 1,150 received in the first and second quarters. By comparison, USCIS received 768 I-829 petitions in all of FY 2010.

In the first and second quarters of FY 2011, the agency approved 407 I-526 petitions and denied 96, while in all of FY 2010 USCIS approved 1369 and denied 165. USCIS approved 166 I-829 petitions and denied 26 in the first and second quarters, compared to approving 274 and denying 56 for all of FY 2010.

USCIS also reported that although the target processing time for I-526 petitions is 5 months, actual processing times are reaching 5.5 months; however, some in the field have said it is closer to 7 months. USCIS's target processing time for both initial and amended RC proposals is 4 months; the agency reported current processing times of 4.5 months for initial RC filings but only 1 month for amended filings. For I-829 filings, the agency reports that it is beating its target processing time of 6 months; USCIS said current processing time for I-829 filings is 1 month. USCIS said it strives to finalize EB-5 cases within 30 days after responses to requests for evidence (RFEs) are received.

USCIS is on track to approve a record number of EB-5 visas. Its preliminary estimate is that 2,129 EB-5 visas were issued in the first and second quarters of 2011, compared to 1,885 in all of FY 2010. The previous record was 4,218 EB-5 visas issued in FY 2009.

The next EB-5 "stakeholder engagement" meeting will be held on September 15, 2011, at 1 p.m. This engagement will be an opportunity for USCIS to share information on the EB-5 program and address stakeholders' related topics of interest. USCIS is specifically interested in receiving topics related to the Form I-912A, Supplement to Form I-924. The deadline to submit agenda items is August 15, 2011. An open forum for questions and answers (non-case-specific) will be provided at the engagement. See http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=13c5f5873e661310VgnVCM100000082ca60aRCRD&vgnextchannel=e0b081c52aa38210VgnVCM100000082ca60aRCRD for details on registering to attend the engagement either in person or by telephone, and instructions on submitting agenda items.

USCIS's presentation from the most recent engagement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=948723cbea6bf210VgnVCM100000082ca60aRCRD&vgnextchannel

=6
1ca6ec2ac3ee210VgnVCM100000082ca60aRCRD.

11. ABIL Webinar Series: U.S. Investment Visas and Green Cards for Foreign Nationals

Many foreign entrepreneurs want to start businesses or invest in the United States. Other wealthy individuals want green cards to live in the United States, but may be hesitant because of real or perceived immigration obstacles. Real estate developers and companies seeking capital for development projects are increasingly looking for EB-5 capital from foreign investors. Several visa options exist, but each has advantages, disadvantages, and limits.

A three-part webinar series, presented by the Alliance of Business Immigration Lawyers (ABIL) and co-sponsored by Invest In the USA, the association of EB-5 regional centers, helps guide individual investors and others, as well as U.S. companies that want to attract foreign investors and wealthy individuals. The intended audience includes individual investors; potential and actual EB-5 regional centers; attorneys and advisors; real estate developers; and companies seeking capital for development projects. Each 90-minute webinar in the series explains immigration options and offers practical real-world strategies:

- Session 1: Visa options for individual investors: E and L nonimmigrant visas; EB-5 green cards through direct investments or regional centers, was held on April 13. (A recording of the webinar is available for purchase.) Moderated by Bernard P. Wolfsdorf. Presenters: Kehrela Hodkinson, Mark Ivener, and Stephen Yale-Loehr.
- Session 2: EB-5 regional center applications and project pre-approval petitions, was held July 6 at 3 p.m. (ET). (A recording of the webinar is available for purchase.) Moderated by Laura Danielson. Presenters: Bryan Funai, H. Ronald Klasko, and Steve Trow.
- Session 3: How to successfully navigate the back end of the EB-5 process for both individual investors and regional centers, to be held August 16 at 3 p.m. (ET). Moderated by Steve Clark. Presenters: H. Ronald Klasko, Robert Loughran, and Stephen Yale-Loehr.

All participants will receive a file with the PowerPoint presentation, relevant articles, and resources before each session, as well as a recording of the

webinar. The cost is $89 for an individual session or $249 for all three sessions, live or recorded. For more information, see http://www.abil.com/news_detail.cfm?NEWS_ID=96. To register, go to: https://securec9.ezhostingserver.com/abil-com/abil_webinar_signup.cfm. For more information, contact Lauren Anderson at lauren@abil.com or visit http://abil.com.

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12. Firm In The News

Cyrus Mehta's blog on whether the Supreme Court decision in Turner v. Rogers could support a right to appointed counsel in removal proceedings was cited in Professor NoferiXs Op-Ed in the New York Law Journal on July 2, 2011 http://www.brooklaw.edu/newsandevents/news/2011/~/media/B11BE2DA655F42BF B24B61E2DA7A0C83.ashx

Cyrus Mehta was quoted in Business Standard article TStricter US visa norm continues to plague Indian IT companies,У http://www.business-standard.com/india/news/stricter-us-visa-norm-continues-to-plague-indian-it-companies/443436/

David Isaacson was quoted in WNYC article by Ailsa Chang, TAccuser in Strauss-Kahn Case May Face Her Own Legal TroublesУ: http://www.wnyc.org/blogs/wnyc-news-blog/2011/jul/07/alleged-victim-strauss-kahn-may-face-her-own-legal-troubles/. Mr. Mehta also recently released a new blog entry, "Immigration Lessons from the Fall and Rise of Strauss-Kahn, Part II," available at http://cyrusmehta.blogspot.com/2011/07/immigration-lessons-from-fall-and-rise.html.

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