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US IMMIGRATION & NATIONALITY LAW

MARCH 2012 IMMIGRATION UPDATE

Posted on March 5, 2012 by Cyrus Mehta

Headlines:

1. **FY 2013 H-1B Filing Season Rapidly Approaches** - Beginning on April 2, 2012 (because April 1 is a Sunday), employers may file cap-subject H-1B petitions for fiscal year (FY) 2013, for employment starting on October 1, 2012, or later.

2. **Witnesses Discuss Controversial DHS OIG Report at House Hearing** -The report, which indicates that adjudicators are pressured to approve applications quickly with insufficient scrutiny, was based on testimonials and not empirical data; some say the data tell a different story.

3. **March Visa Bulletin Continues Advances for India, China EB-2 Category** - The category has advanced well over a year in just a few months.

4. **EB-5 Investor Lawsuit Could Threaten Construction of South Dakota Beef Facility** - A new lawsuit could threaten construction of a Northern Beef Packers cattle processing facility in South Dakota.

5. **House Judiciary Committee Approves Bill Adding Israel to Nonimmigrant Investor Visa Eligibility List** - The bill would allow Israelis to apply for E-2 visas if similarly situated U.S. nationals are eligible for such visas in Israel.

6. **DOL Publishes Final Rule on Labor Certifications for H-2B Temporary Nonagricultural Employment** - The final rule revises the process by which employers obtain a temporary labor certification to employ a nonimmigrant worker in H-2B status.

7. **U.S. Embassy in London Discusses Visa Availability for Olympics, Expansion of Visa Reissuance Program for H-1, H-4 Applicants** - Visa services will be limited during July and August for all nonimmigrant visa

categories; the embassy encourages applications during the spring and early summer.

8. **USCIS Launches 'Entrepreneurs in Residence' Initiative at Silicon Valley Summit** - A tactical team will identify ways to enhance USCIS policies, practices, and training across a range of existing nonimmigrant visa categories used by entrepreneurs.

9. **DS-230 Expires for Certain Applicants, Online Forms Launched** - The online forms eventually will be implemented worldwide and required for all immigrant visa applications.

10. **Over One Million Employers Use E-Verify; USCIS Announces Expansion of Self-Check** - Employers are now using E-Verify at more than one million worksites. Also, USCIS announced that Self Check is now available in all 50 states; Washington, DC; Guam; Puerto Rico; the U.S. Virgin Islands; and the Commonwealth of the Northern Mariana Islands.

11. **DOL Announces Comprehensive Final Rule on H-2B Labor Certification Program** - The final rule, effective April 23, creates a national registry for all H-2B job postings, increases the recruitment period for U.S. workers, and requires the rehiring of former employees when available.

12. **Passenger Pre-Screening Initiative Expands to Additional Airports** - More than 336,000 passengers have been screened through TSA Pre™ lanes.

13. **USCIS Ombudsman Recommends Improving Adjudication Quality for Extraordinary Ability and Other Employment-Based Adjudications** - Recent concerns have focused on the subjective nature of final merits determinations.

14. **ABIL Global (www.abil.com): Professional Immigration in France: Update and Outlook** - The government instructed French labor authorities to apply greater scrutiny in adjudicating work permits and to interpret the regulations restrictively. On a more positive note, France has implemented the European Union Blue Card to attract skilled workers from third countries and facilitate mobility and permanent residence.

15. **ABIL Global (www.abil.com): Updates on Canada, Japan, Russia, United Kingdom** - Citizenship and Immigration Canada will require Labor Market Opinions for temporary foreign IT workers who previously qualified for the exemption. Effective July 9, 2012, there will be a new Residency Management

System for all foreign nationals residing in Japan. Six new positions have been added to Russia's quota-exempt position list since last year. The United Kingdom is urging travelers for the Olympic Games to begin securing any necessary visas. The UK also has split the border agency into two agencies, one for administration and the other for border control.

16. Firm In The News...

Details

1. FY 2013 H-1B Filing Season Rapidly Approaches

Beginning on Monday, April 2, 2012 (because April 1 is a Sunday), employers may file cap-subject H-1B petitions for fiscal year (FY) 2013, for employment starting on October 1, 2012, or later.

On November 22, 2011, U.S. Citizenship and Immigration Services (USCIS) received a sufficient number of petitions to reach the statutory cap for FY 2012. USCIS also received more than 20,000 H-1B petitions on behalf of persons exempt from the cap under the advanced degree exemption as of October 19, 2011. With the improving economy, they could run out faster this year. The Alliance of Business Immigration Lawyers (ABIL) recommends that employers file early and allow time for the labor condition application process. Contact your ABIL attorney now for guidance and help with the process.

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2. Witnesses Discuss Controversial DHS OIG Report at House Hearing

The House of RepresentativesX Subcommittee on Immigration held a hearing on February 15, 2012, "Safeguarding the Integrity of the Immigration Benefits Adjudication Process," at which witnesses discussed a new report by the Department of Homeland Security's (DHS) Office of Inspector General (OIG). Judiciary Committee Chairman Lamar Smith (R-Tex.) opened the hearing. Witnesses included Alejandro Mayorkas, Director, USCIS; Charles K. Edwards, Acting Inspector General, Department of Homeland Security (DHS); Mark Whetstone, President, National Citizenship and Immigration Services Council and American Federation of Government Employees, AFL-CIO; and Bo Cooper, Partner, Berry Appleman and Leiden LLP.

Chairman Smith noted that DHS's Inspector General responded with a report in January 2012 based on a request from Sen. Chuck Grassley (R-Iowa) about

whether "senior leaders are putting pressure on employees to approve more visa applications, even if the applications might be fraudulent or the applicant is ineligible." The OIG report, Rep. Smith noted, states that "nearly 25 percent of immigration service officers who responded to the IG survey 'have been pressured to approve questionable applications.' " He said, "This rubberstamp process leaves an ink trail of fraud and abuse."

Inspector General's report. In response to Sen. Grassley's request, the Inspector General interviewed 147 managers and staff, received 256 responses to an online survey, and reviewed USCIS policies related to the effort to detect benefit fraud. The report was based on testimonials, not empirical data. The report recommended process improvements, such as instituting more training and collaboration to improve the fraud referral process; developing additional quality assurance or supervisory review procedures to strengthen identification of names and aliases of those seeking an immigration benefit; performing nationwide onsite outreach efforts to discuss the performance management system with Immigration Service Officers (ISOs); developing standards to permit more time for an ISO's review of case files; revising policy on requests for evidence (RFEs) to clarify the role that the requests play in the adjudication process; and developing a policy to "establish limitations for managers and attorneys when they intervene in the adjudication of specific cases." The report stated that "special treatment of complainants fosters a sense among ISOs that USCIS inappropriately grants benefits in certain cases."

The report noted that "here may be a basis for clarifying adjudication policy for O visa petitions. A low approval rate is not one of them." The Inspector General found that O visa petitions are granted at a high rate. "Quality assurance information we examined demonstrates that excessive O visa approvals are more likely than denials." The report stated, "From January 2008 through March 2011, the California and Vermont service centers approved 40,719 of 44,386 O visa petitions (91.7%). This approval rate exceeds the approval rate for many other nonimmigrant worker petitions. During the same time period, the two centers approved 78.5% of H-1B (specialty occupations) and 76.1% of L-1B (specialized knowledge worker) petitions."

The Inspector General's report noted, however, that: (1) the testimonial evidence shared by interviewees may not represent views shared by other employees; (2) USCIS has taken action to diminish threats to the immigration benefits system; (3) general employee concerns about the impact of production

pressure in the quality of ISO decisions "do not mean that systemic problems compromise the ability of USCIS to detect fraud and security threats; (4) "o ISOs presented us with cases where benefits were granted to those who pose terrorist or national security threats"; and (5) "ven those employees who criticized management expressed confidence that USCIS would never compromise national security on a given case."

The report concluded, however, that "ven with the additional security checks and process improvements USCIS has made in the past several years, national security and fraud concerns may require more thorough review of immigration applications and petitions." The OIG noted that "dditional documentation, or further insight gained through more interview questions, would ensure that ISOs have greater confidence before making a decision." Also, the report suggests that "Congress may wish to raise the standard of proof for some or all USCIS benefit issuance decisions."

Director Mayorkas' testimony. Director Mayorkas said that early in his tenure at USCIS, having come to the agency in August 2009, he decided that USCIS must enhance the emphasis on quality in its adjudicative approach, meaning that "immigration benefit decisions are informed, adhere to the law and the facts, are made in a timely manner, and further the integrity and goals of the immigration system." He said he realigned the agency's structure to institutionalize a culture of quality and created the Fraud Detection and National Security Directorate (FDNS), previously an office within a directorate. Mr. Mayorkas outlined various anti-fraud and national security efforts his agency has taken. He said that if any supervisors are instructing employees to "be fast at the expense of quality," that should be raised to top leadership.

Mr. Whetstone's testimony. Mr. Whetstone said that USCIS headquarters has heard for years staff recommendations to allow its adjudicators more time to review files, but little has happened. He said that quantity-based production standards continue to be perceived as having a major impact on adjudicators, noting that several officers reported working through lunch and rest breaks to reach quota levels necessary to attain a satisfactory rating. He said that production pressure has never been reduced. Mr. Whetstone also noted a lack of sufficient anti-fraud training.

Mr. Cooper's testimony. Mr. Cooper noted that he was an attorney for the former Immigration and Naturalization Service for over a decade, and served as

the agency's General Counsel from 1999 to 2003. He also works closely with Compete America, a coalition of corporations, universities, research institutions, and trade associations that advocates for reform of U.S. immigration policies on high-skilled foreign professionals. He took issue with several of the Inspector General's conclusions and recommendations, stating in written testimony that they "lack foundation," are contrary to what actually happens, and "would be deeply problematic if they were to gain acceptance and inform policy choices." He said that the report's conclusions "rest in key respects on a deficient base of information," noting the lack of data and the report's reliance on a limited number of interviews and surveys. He said that the limited interviews and surveys could be seen as a starting point but that instead of being considered preliminary feedback, the report draws "very serious conclusions."

Mr. Cooper said that USCIS has released official data since the report came out. He noted that recent analysis shows that the data refute concerns "that USCIS may be institutionally biased toward unjustified approvals and that the agency observes policies that would suppress RFE issuance." The data tell the opposite story, he said: "Particularly with respect to the key nonimmigrant categories for foreign professionals, denial rates and RFE rates have risen very sharply in recent years."

The "most startling example," Mr. Cooper said, appears in the L-1 program, which is used by multinational corporations to transfer managers, executives, and specialists into the United States. Noting that such visas "are an essential component of a huge range of productive economic activity in this country," he said that L-1 visas are critical to attracting foreign investment that supports the creation of jobs for U.S. workers and are critical when U.S. companies acquire companies based oversees and need to have the acquired company's specialists come to the United States to integrate their expertise and processes. L-1 visas are also critical to companies who need to bring specialists from their overseas affiliates into their research centers and operations in the United States, he noted. "Without predictable, reliable access to these visas, employers find themselves having to move jobs and projects to other countries."

The data for employees with specialized knowledge in the L-1B program "shows a steep rise in denials and requests for evidence beginning in 2008," he said, noting that the denial rate for L-1B petitions more than tripled in 2008 and is now at nearly quadruple the pre-2008 rate, at 27 percent in 2011. The RFE rate

change is even starker, he said. From 2005 to 2011, the rate soared from 9 percent to 63 percent of L-1B cases.

He also noted that in the L-1A program for managers and executives being transferred within multinational corporations, the RFE rate rose from 10 percent in 2005 to 51 percent in 2011. Denial rates rose 75 percent over five years, from 8 percent in 2007 to 14 percent in 2011. In the H-1B program for professionals in specialty occupations, the denial rate increased from 11 percent in 2007 to 17 percent in 2011. Over a quarter of all H-1B filings generated an RFE in 2011.

Seen in the light of this data, Mr. Cooper said "there is no basis for the concern expressed in the OIG report that USCIS has an institutional bias in favor of approvals or against RFEs." In fact, he said, the data show the opposite trend. Noting that USCIS said in its response to the OIG report that it is reviewing its RFE policy and aims to issue new RFE guidance this year, Mr. Cooper recommended that the new policy reflect "the needs of today's business environment and the innovation economy," and that it be monitored carefully once put into practice.

U.S. Chamber of Commerce letter. The U.S. Chamber of Commerce submitted a letter for the hearing record that said the OIG report's conclusions were not statistically valid and were inconsistent with the experiences of the Chamber's members in dealing with USCIS. The Chamber challenged "the notion that a few employees at the agency responsible for adjudicating benefits for the nation's immigrants can, or should, drive changes in the burden of proof or other legal criteria impacting all foreign nationals and their sponsoring employers entitled to benefits under our immigration laws." The Chamber echoed Mr. Cooper's concerns that the OIG report draws conclusions that are too broad in relation to the interview and survey results upon which they are based. The letter includes examples of companies' experiences of visa denials and RFEs that delayed or prevented the companies from moving forward with new product development or hiring for U.S.-based manufacturing and other jobs.

The Chamber's letter also notes that "companies have not been able to manage their intracompany transfers of specialized knowledge staff with any predictability." The letter identified four critical issues companies recently identified during a January discussion hosted by the Chamber on L-1B law and policy. that result in increased L-1B delays, denials, and inconsistency: (1) an

improper focus on numbers of similarly situated staff; (2) an improper focus on the O-1 standard of accomplishment; (3) failure to recognize legitimate business requirements; and (4) improper *de novo* review of extensions. The Chamber noted that these "four agency misconceptions" have led to "an unfounded narrowing of the definition of specialized knowledge."

Chairman Smith's opening statement and witness testimony

The U.S. Chamber of Commerce's letter

The National Foundation for American Policy's February 2012 brief, from which Mr. Cooper and the Chamber drew data analyses

The OIG report, "The Effects of USCIS Adjudication Procedures and Policies on Fraud Detection by Immigration Services Officers," includes USCIS's response to the OIG's recommendations.

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3. March Visa Bulletin Continues Advances for India, China EB-2 Category

The March 2012 Visa Bulletin shows that the priority date for the India and China employment-based second preference (EB-2) categories is May 1, 2010, which is a four-month advance over the February cut-off date of January 1, 2010. In January, the date was January 1, 2009, so the category has advanced well over a year in just a few months. The Department of State's Visa Office explained:

The China and India Employment Second preference cut-off date has been advanced at a rapid rate in recent months. As previously noted, this action was intended to generate significant levels of new filings for adjustment of status at U.S. Citizenship and Immigration Services (USCIS) offices. USCIS has reported that the rate of new filings is currently far below that which they had anticipated, prompting an even more aggressive movement of the cut-off date for January and possibly beyond. While this action greatly increases the potential for an eventual retrogression of the cut-off at some point during the year, it also provides the best opportunity to utilize all numbers available under the annual limit.

The March bulletin.

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4. EB-5 Investor Lawsuit Could Threaten Construction of South Dakota Beef Facility

A new lawsuit could threaten construction of a Northern Beef Packers (NBP) cattle processing facility in South Dakota. NBP decided not to pay a $50,000-per-investor commission (with potentially up to double that as a "success fee") for recruiting EB-5 investors to Henry Global Consulting Group because it did not bring in as many investors as it had agreed to recruit. According to reports, Henry Global then persuaded several investors to sue the regional center. The lawsuit alleges that investors did not receive crucial facts about the project and were not included in key decisions as agreed upon.

This is just the latest in a long series of problems for the project. Almost six years after developers purchased the site, the project has been delayed continually by lawsuits, liens, and tax problems.

The complaint

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5. House Judiciary Committee Approves Bill Adding Israel to Nonimmigrant Investor Visa Eligibility List

On February 28, 2012, the U.S. House of Representatives' Committee on the Judiciary approved legislation that would add Israel to the E-2 nonimmigrant visa eligibility list of countries. The bill would allow Israelis to apply for E-2 visas if similarly situated U.S. nationals are eligible for such visas in Israel. Rep. Howard Berman (D-Cal.), said the legislation would bring Israeli business and innovations in "security and defense technologies, medicine, agriculture, high-tech, and clean energy" to the United States.

Last May, the Senate introduced a companion bill but has not yet moved it through the Senate Judiciary Committee.

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6. DOL Publishes Final Rule on Labor Certifications for H-2B Temporary Nonagricultural Employment

The Wage and Hour Division (WHD) of the Department of Labor's (DOL) Employment and Training Administration published a final rule effective April 23, 2012, revising the process by which employers obtain a temporary labor certification from the DOL for use in petitioning the Department of Homeland

Security (DHS) to employ a nonimmigrant worker in H-2B status. WHD chose to revert to a compliance-based rather than the current attestation-based certification process. The regulations are also intended to provide increased worker protections for both U.S. and foreign workers.

The final rule creates a national registry for all H-2B job postings and increases the recruitment period for U.S. workers. The rule also requires the rehiring of former employees when available. In addition, the rule extends H-2B program benefits, such as transportation costs and wages, to U.S. workers performing substantially the same work as H-2B workers.

WHD received a large number of comments from the ski industry requesting an exemption from the regulations. Many of the commenters believed that because ski instructors require skills or experience, under the new rules they would be ineligible for the H-2B program. Generally, job positions certified under the H-2B program are low-skilled, WHD explained, requiring little or no experience. "We do recognize, however, that there are some occupations and categories under the H-2B program that may require experience and/or training. Employer applicants demonstrating a true need for a level of experience, training or certification in their application have never been prohibited in the H-2B program, given the breadth of the definition of H-2B under the INA," WHD noted. The agency said it has determined that an exemption for the ski industry "is not appropriate as the commenters presented no valid argument as to why exemption is necessary. There is nothing about the workers they seek to hire that prevents them from participating in the H-2B program. Ski resorts are fixed-site locations that run on a seasonal basis with standard operating procedures."

The final rule was published in the February 21 edition of the *Federal Register.* The H-2B program is limited by law to a cap of 66,000 visas per year.

The final rule

The announcement

Fact sheets and other information

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7. U.S. Embassy in London Discusses Visa Availability for Olympics, Expansion of Visa Reissuance Program for H-1, H-4 Applicants

The U.S. Embassy in London recently released a notification of limited nonimmigrant visa services during the Olympics and an expansion of the Visa Reissuance Program to include H-1 and H-4 visa applicants.

The embassy noted that visa services will be limited during July and August for all nonimmigrant visa categories. The embassy encourages applicants "to apply for visas during the spring and early summer as appointment availability cannot be guaranteed." Appointments are scheduled through the Operator Assisted Information Service.

Also, the embassy noted that travelers planning on entering the United States visa-free under the Visa Waiver Program by air or sea carrier who do not have travel authorization approval under the Electronic System for Travel Authorization (ESTA) are encouraged to register now for summer travel. If registration is denied, visas will be required.

The embassy also said that the Visa Reissuance Program has been expanded to include H-1 visa applicants and their derivatives who are renewing a visa of the same classification that has expired in the last 12 months. Other qualifying criteria apply and can be found at http://london.usembassy.gov/visa-reissuance.html. The Program continues to be available to O, P, J and C-1/D visa applicants. Applicants must be physically present in the United Kingdom to use the Visa Reissuance Program, and a consular officer reserves the right to request that an applicant appear in person for an interview after reviewing his or her application.

Callers within the United Kingdom should dial 09042-450-100. Calls to this line are charged at J1.23 per minute plus network extras. Callers from the United States should dial 1-866-382-3589. U.S. callers are charged a fixed rate of $16 payable by credit card (Visa, MasterCard, or American Express only).

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8. USCIS Launches 'Entrepreneurs in Residence' Initiative at Silicon Valley Summit

On February 22, 2012, U.S. Citizenship and Immigration Services (USCIS) Director Alejandro Mayorkas met with more than 150 of Silicon Valley's entrepreneurs, academics, and government officials at NASA Research Park in Moffett Field, California, to launch the "Entrepreneurs in Residence" (EIR) initiative and gather information.

USCIS said that the panel discussions and breakout sessions held at the summit would inform the work of a newly formed EIR tactical team, which will "work collaboratively over the next several months to ensure that immigration pathways for foreign entrepreneurs are clear and consistent, and better reflect today's business realities. The tactical team will identify ways to enhance USCIS policies, practices and training across a range of existing nonimmigrant visa categories used by entrepreneurs."

Mr. Mayorkas also presented five naturalized immigrant entrepreneurs with USCIS's "Outstanding Americans by Choice" awards. One award recipient, Vivek Wadhwa, an entrepreneur and researcher at Duke University, said the EIR initiative cannot fix by itself the "reverse brain drain" of foreign-born entrepreneurs who receive an education in the United States and then leave to form companies in their home countries because of concerns about U.S. immigration laws and regulations. "We will now have created competitors worldwide we didn't need to create," he warned. A Scottish entrepreneur, Scott Allison, said at the summit that the immigration process "shouldn't be something we have to worry about. But we do have to worry about it. I don't know where my home is."

USCIS's announcement.

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9. DS-230 Expires for Certain Applicants, Online Forms Launched

A new DS-260 form has replaced the DS-230 for certain applicants. The DS-260, Online Immigrant Visa Application & Registration, and DS-261, Choice of Address and Agent, are electronic visa application forms completed and submitted online to the Department of State via the Internet through the Consular Electronic Applications Center. The forms may be partially completed, saved online to finish, and submitted later; or they can be completed and submitted in a single session.

The forms eventually will be implemented worldwide and required for all immigrant visa applications.

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10. Over One Million Employers Use E-Verify; USCIS Announces Expansion of Self-Check

U.S. Citizenship and Immigration Services (USCIS) recently announced that in December 2011, E-Verify reached a milestone: employers are now using E-Verify at more than one million worksites.

Also, USCIS announced on February 9, 2012, that Self Check, a free online service of E-Verify that allows workers to check their own employment eligibility status, is now available in all 50 states; Washington, DC; Guam; Puerto Rico; the U.S. Virgin Islands; and the Commonwealth of the Northern Mariana Islands. Launched in March 2011, Self Check was developed through a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA) to provide a tool for workers to check their own employment eligibility status and guidance on how to correct their DHS and SSA records. It is the first online E-Verify service offered directly to workers. A Spanish version was added in August 2011.

The E-Verify announcement is available at http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Newsletters/E-Verify-Connection06.pdf. The Self Check announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3dc19bbc3d265310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. Self Check is available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2ec07cd67450d210VgnVCM100000082ca60aRCRD&vgnextchannel=2ec07cd67450d210VgnVCM100000082ca60aRCRD. A "Self Check Information Toolkit" is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f190861dab4b1310VgnVCM100000082ca60aRCRD&vgnextchannel=2ec07cd67450d210VgnVCM100000082ca60aRCRD. E-Verify is available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD.

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11. **DOL Announces Comprehensive Final Rule on H-2B Labor Certification Program**

The U.S. Department of Labor's Employment and Training Administration and Wage and Hour Division announced on February 10, 2012, a final rule on the

H-2B temporary nonagricultural worker program. The rule, which will be effective on April 23 and will be published in the February 21 edition of the *Federal Register,* includes changes to several aspects of the program intended to ensure that U.S. workers receive greater access to jobs. The H-2B program is limited by law to a cap of 66,000 visas per year.

The final rule creates a national registry for all H-2B job postings and increases the recruitment period for U.S. workers. The rule also requires the rehiring of former employees when available.

In addition, the rule extends H-2B program benefits, such as transportation costs and wages, to U.S. workers performing substantially the same work as H-2B workers. Worker protections also will be strengthened by enhanced transparency throughout the employment process, the DOL said in a press release.

The announcement is available at http://www.dol.gov/opa/media/press/eta/eta20120283.htm. The rule is available at http://s.dol.gov/MZ. Fact sheets and other information are available at http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm and http://www.foreignlaborcert.doleta.gov/h-2b.cfm.

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12. **Passenger Pre-Screening Initiative Expands to Additional Airports**

The Department of Homeland Security (DHS) announced on February 8, 2012, the expansion of TSA Pre™, a passenger pre-screening initiative, to additional airports across the country following its launch at seven pilot locations.

More than 336,000 passengers have been screened through TSA Pre™ lanes. Under this initiative, the Transportation Security Administration (TSA) focuses its efforts on passengers the agency knows less about while providing expedited screening for travelers who volunteer information about themselves before flying.

TSA Administrator John S. Pistole said the agency is moving away from a one-size-fits-all approach to "a more intelligence-driven, risk-based transportation security system."

TSA Pre™ is currently operating with American Airlines at airports in Dallas, Miami, Las Vegas, Minneapolis, and Los Angeles, and with Delta Air Lines at

airports in Atlanta, Detroit, Las Vegas, and Minneapolis. US Airways, United Airlines, and Alaska Airlines are all opting in new passengers and will begin operations later this year. TSA will continue expanding TSA Pre™ to additional airlines and airports as they are ready.

Eligible participants include certain frequent flyers from participating airlines as well as members of U.S. Customs and Border Protection's Trusted Traveler programs (Global Entry, SENTRI, and NEXUS) who are U.S. citizens and fly on a participating airline. If TSA determines a passenger is eligible for expedited screening following the TSA Pre™ vetting process, information will be embedded in the barcode of the passenger's boarding pass. TSA will read the barcode at the security checkpoint and then may refer the passenger to a TSA Pre™ lane, where they will undergo expedited screening, which could mean no longer removing certain items, such as shoes, laptops, light outerwear, belts, and 311-compliant bags from carry-ons.

TSA said it will continue to "incorporate random and unpredictable security measures throughout the airport" and that no individual will be guaranteed expedited screening. As part of the agency's risk-based security initiative, TSA is testing several other screening initiatives related to providing positive ID verification for airline pilots and the use of expanded behavior detection techniques.

The announcement, which includes a list of airport locations where TSA Pre™ will be implemented in 2012, is available at http://www.dhs.gov/ynews/releases/20120208-tsa-precheck-pilot-expands.shtm. Those interested in participating in the pilot may apply via Global Entry at http://www.globalentry.gov/.

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13. **USCIS Ombudsman Recommends Improving Adjudication Quality for Extraordinary Ability and Other Employment-Based Adjudications**

In a recent report, the U.S. Citizenship and Immigration Services (USCIS) Ombudsman noted that stakeholders have raised concerns about consistency in adjudications of extraordinary ability and other employment-based petitions. Recent concerns have focused on the subjective nature of final merits determinations. Stakeholders report that an I-140 policy memo that USCIS issued in December 2010 has not resulted in a clearer adjudicatory standard.

The Ombudsman noted that USCIS has been challenged in identifying an objective standard and application for a final merits determination, and some Immigration Services Officers (ISOs) report that the I-140 policy memo did little to change their analysis of I-140 petitions.

The Ombudsman made the following recommendations to USCIS to improve fairness, consistency, and transparency in adjudications of these petitions:

1. Conduct formal rulemaking to clarify the regulatory standard and, if desired, explicitly incorporate a final merits determination into the regulations;
2. In the interim, provide public guidance on the application of a final merits determination; and
3. In the interim, provide ISOs with additional guidance and training on the proper application of the "preponderance of the evidence" standard when adjudicating EB-1-1, EB-1-2, and EB-2 petitions.
4. The Ombudsman gave the following reasons for these recommendations:

- Stakeholders are concerned that the current I-140 policy memo allows for too much subjectivity for adjudicative petitions.
- Stakeholders presented in an *amicus curiae* briefing to USCIS's Administrative Appeals Office that the decision in *Kazarian v. USCIS* does not require USCIS to implement a two-part review as provided for in the I-140 memo, and that application of the I-140 policy memorandum has not resulted in a clearer adjudicatory standard.
- ISOs lack guidance that clearly demonstrates the nature and type of evidence that typically establishes whether an individual possesses "extraordinary ability," may be classified as an "outstanding professor or researcher," or has "exceptional ability."
- USCIS has not clearly explained the objective factors that USCIS adjudicators should consider when conducting a final merits determination.

The report and recommendations are available at http://www.dhs.gov/xlibrary/assets/cisomb-rec_extraordinaryability_petitions.pdf. The December 2010 I-140 policy memo, which the Ombudsman noted rescinded and superseded all previously published USCIS policy guidance regarding EB-1 adjudications, is available at http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.p

df.

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14. **ABIL Global: Professional Immigration in France: Update and Outlook**

A French government circular of May 31, 2011, instructed the labor authorities to apply greater scrutiny in adjudicating work permits and to interpret the regulations restrictively, with the aim of reducing the number of foreign nationals being admitted to France for professional purposes. On a more positive note, France has created a new immigration category by implementing the European Union (EU) Blue Card directive to attract skilled workers from third countries and facilitate the mobility and permanent residence of such workers within the EU. Details of these developments are provided below.

Restrictive measures: greater scrutiny of employer and employment. Under the government circular, the labor authorities are to deepen the scrutiny with which they verify the existence of the employer and its past and present compliance with the labor, social security, and immigration regulations. Any violations may be sufficient grounds to deny a work permit application.

Labor market tests must be applied strictly and an application will be denied if market analysis reveals insufficiently high demand for the position sought to be filled or the possibility of filling the position by a training program in the near future. Any advertising seeking candidates for a position must be carried out for a reasonable period of time. "Two to three months" is considered reasonable, whereas in the past the administration considered two to three weeks reasonable.

The labor authorities also must evaluate if the foreign worker is not under- or overqualified for the employment offered. If he or she is underqualified, the application must be denied. If he or she is overqualified, the advertisement must be modified and published again.

Such authorities must also verify that:

- the compensation meets the appropriate thresholds, as determined by the collective bargaining agreements, market, and the minimum salary laws;
- the candidate has adequate knowledge of the French language; and
- the candidate is provided adequate housing.

- Restrictive measures: greater scrutiny of change-of-status applications. The circular urges French labor authorities to examine any request for a change of status very carefully, especially when such applications are made by foreign students. The circular states that foreign students must return to their home countries after the end of the schooling.

These instructions resulted in a massive protest by universities and students, and even criticism within the government. The government issued a new circular on January 13, 2012, which provides guidance to adjudicating officers to avoid tarnishing the attractiveness of French schools to foreign students and undermining French business in need of young foreign talent.

These restrictive measures do not apply to work permit categories which receive preferential processing, such as intra-company transfers, secondments, and seasonal workers.

These restrictive measures have increased the processing time for all work permit categories.

List of jobs for which workers are in shortage reduced by half. A decree of August 11, 2011, has reduced to half the list of jobs in certain fields where employers encounter difficulties in recruiting workers. The list now contains only 14 job categories, as opposed to 30 previously. Foreign workers may fill these jobs without first having to go through a labor market test as part of their work permit application. The reduced list applies throughout the French territory, unlike the previous regional lists, which allowed local market situations to be taken into account. This list will be revised by August 1, 2013, at the latest.

France has signed bilateral agreements regarding the control of migration flows with several countries (Brazil, Burkina Faso, Cameroon, Cape Verde, Gabon, Mauritius, Benin, Congo, Senegal, and Tunisia). These agreements allow nationals to obtain work permits under conditions negotiated country by country, and may contain a more generous list of jobs.

Good news: the French Blue Card permit. Law no. 2011-672 of June 16, 2011, and decree no. 2011-1049 of September 6, 2011, provide the legal framework for the transposition of the EU "Blue Card" directive into French law.

The qualifying criteria are in accordance with the criteria stated in the EU directive:

1. An employment contract with a duration of one year or more;
2. A minimum annual salary threshold of 1.5 times the average salary of reference, which is determined by the Minister of Interior on an annual basis. According to the current reference salary (€ 34,296), this annual salary threshold is € 51,444; and
3. A three-year higher education diploma or equivalent knowledge through five years of experience.The Blue Card may also be issued to a third-country national who already holds a Blue Card issued by another member state and wants to accept employment in France. This can occur after 18 months of residence under the initial Blue Card. The application is made within one month of arrival in France. The applicant need not present a long-stay French visa.The French authorities have up to 90 days to adjudicate the Blue Card application and up to 6 months to adjudicate the accompanying spouse residence permit.
4. The advantages of the Blue Card over other categories are:
5. The Blue Card permit is issued without labor market testing. Its beneficiary and his or her spouse may qualify for the EU long-term resident permit after five years of residence under the Blue Card in the EU, of which only the last two years must be in France.
6. A qualifying third-country national is issued a joint residence and work permit for the length of employment, with maximum validity of three years. This permit is renewable. An accompanying spouse is issued a "Private and Family Life" category work permit, renewed annually for as long as the main applicant has a valid Blue Card permit.

- It does not require an intra-company prior employment;
- Mobility within EU is facilitated;
- Acquisition of long-term resident status is facilitated; and
- The qualifying criteria are very precise (leaving less room for the discretion of the government).

- The Blue Card is expected to be very good news for skilled third-country nationals who are unable to qualify under other categories.

Prognosis for the future: France has one of the highest birth rates in Europe. It is doing fine in replenishing its population. But France still needs immigrants more than ever to satisfy its need for qualified workers and to be a prominent actor in a global economy. The current government understood this well when

it created regulations adapted to global employment needs of multinational groups and allowed graduating foreign students to seek employment in France, and thus keep the talent in the country.

So what happened? The electoral campaign started this year and immigration is a hot issue in France, as it is in most other European countries. With its new anti-business immigration stance, the government is trying to recapture the voters it may have antagonized by its pro-business conduct in preceding years.

Business should be back to normal by the middle of this year, after the presidential and parliamentary elections.

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15. ABIL Global: Updates on Canada, Japan, Russia, United Kingdom

• Canada

Following the termination of the Facilitated Process of Information Technology Workers Program (Labor Market Exemption) in British Columbia in December 2011 and in all other provinces in September 2010, Québec authorities have also announced the end of the program for the seven different types of IT occupations. The Program expedited the admission of foreign workers in certain IT occupations, mainly those in software development.

As a result, Citizenship and Immigration Canada will require Labor Market Opinions (LMO) for temporary foreign IT workers who previously qualified for the exemption. The process will be much lengthier and will require a job posting of at least 14 days, followed by an application for the LMO work permit.

• Japan

Effective July 9, 2012, there will be a new Residency Management System for all foreign nationals residing in Japan. Consequently, the existing Alien Registration Card (ARC) will be replaced by a new Resident Card, which will serve as a form of identification for those foreigners working and living in Japan for more than 90 days. The Resident Card will be issued upon arrival at the four major international airports in Japan: Chubu, Haneda, Kansai, and Narita. Those travelers entering through other airports will receive their Resident Card in the mail after they arrive in Japan.

The new program will reduce the minimum period of stay from one year to three months and extend the maximum period of stay from three years to five

years. Those Resident Card holders travelling abroad while in Japan will no longer need to obtain a re-entry permit as long as they return within one year. Currently, a re-entry permit is required for any travel outside of Japan.

Foreign nationals currently holding valid ARCs that expire on or after July 8, 2015, must obtain the new Resident Card, but can do so anytime before that date. All others can continue using their current ARCs until expiration and obtain the Resident Card at the time of renewal.

• Russia

The Russian government has announced the work permit quota for 2012, as well as the list of 41 positions that are quota-exempt. The quota number has not changed significantly since last year and will continue to be distributed among the various regions in the country. Companies looking to sponsor foreign workers in Russia in 2013 must submit their forecasts to the local labor authorities before May 1, 2012.

Six new positions have been added to the quota-exempt position list since last year, including design engineers, electrical engineers, technicians, and others. Work permits for highly skilled professionals continue to be quota-exempt but such positions must meet strict salary requirements.

• United Kingdom

The government of the United Kingdom is urging all those who plan to come to the UK during the Olympic Games to plan ahead and begin making travel arrangements, including securing any necessary visas. The London 2012 Games will be the biggest event the UK has hosted and the government expects many extra visitors during the already busy summer season.

The UK government has also announced the creation of a new agency, the UK Border Force, which will take over border control and inspection procedures at the UK ports of entry starting March 1, 2012. The UK Home Secretary said that after it was revealed that thousands of people were let into the country without proper immigration checks, the UK Border Agency (UKBA) would be split into two separate bodies. The Border Force will "become a separate operational command, with its own ethos of law enforcement, led by its own Director General, and accountable directly to ministers." UKBA will continue to manage immigration administrative functions such as processing work and residence permit applications.

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16. Firm In The News

Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm?c=US) has published several new blog entries. "Immigration Reform Through Green Card Stories" is available at http://blog.cyrusmehta.com/2012/02/immigration-reform-through-green-card.html. "What A Company Needs To Know That Hosts But Does Not Employ Skilled Nonimmigrant Workers" is available at http://bit.ly/wpQZ1z. "Immigration Reform Through Green Card Stories" is available at http://blog.cyrusmehta.com/2012/02/immigration-reform-through-green-card.html. "Working: H-4 Spouses Get to Take a Step Forward, But Is It a Giant One?" is available at http://blog.cyrusmehta.com/2012/02/working-h-4-spouses-get-to-take-step.html.

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