



MAY 2012 IMMIGRATION UPDATE

Posted on May 2, 2012 by Cyrus Mehta

Headlines

1. [FY 2013 H-1B Petitions Coming In Fast](#) - Over 25,000 cap-subject H-1B petitions have been filed as of April 20, 2012.
2. [India, China EB-2 Category Retrogresses Dramatically](#) - As predicted for May, the India and China EB-2 priority dates have retrogressed dramatically, from May 1, 2010, to August 15, 2007.
3. [DOL Changes Effective Date of 2012 H-2B Final Rule; Preliminary Injunction Granted](#) - On April 26, 2012, a federal judge granted a preliminary injunction, applicable nationwide, against implementing the new H-2B program rule for 60 days.
4. [Office of Foreign Labor Certification Issues New FAQ on H-1B, H-1B1, and E-3 Programs](#) - The new FAQ answers a variety of questions.
5. [DOL Revises H-2A and H-2B Forms](#) - All H-2A and H-2B applications must be submitted using the revised form; Appendix A.2 remains unaffected.
6. [DOS Beefs Up Consular Services in Brazil, Plans Two New Consulates](#) - To address immediate growth in demand, the Department of State is sending dozens of consular officers to Brazilian posts to adjudicate visa applications.
7. [CBP Proposed Rule Allows More U.S. Returning Residents To File Single Customs Declaration for Members of Family](#) - CBP proposes to include foster children, stepchildren, half-siblings, legal wards, other dependents, domestic partners, and others in its definition of "members of a family residing in one household."
8. [CBP Adds 'Trusted Traveler' Enrollment Centers in Minnesota,](#)

North Dakota - CBP has added International Falls and Warroad, Minnesota, and Pembina, North Dakota, to its "trusted traveler" enrollment centers for Global Entry, NEXUS, and FAST.

9. [ABIL Global: Mexico](#) -A new Mexican immigration law will enter into force this year, after 40 years under the current law.

10. [Firm In The News...](#)

Details:

1. FY 2013 H-1B Petitions Coming In Fast

According to U.S. Citizenship and Immigration Services, over 25,000 cap-subject H-1B petitions have been filed as of April 20, 2012. If this keeps up, the H-1B cap could be reached quickly.

CDMA recommends that employers file early and allow time for the labor condition application process. Please contact CDMA for guidance and help with the process.

Click here for the [latest statistics](#).

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2. India, China EB-2 Category Retrogresses Dramatically

As predicted for May, the India and China EB-2 priority dates have retrogressed dramatically, from May 1, 2010, to August 15, 2007. Priority dates for those countries are not expected to advance again until October 1, 2012, at the earliest, when the new federal fiscal year begins.

If an I-485 Application for Adjustment of Status was filed while the person's priority date was current, it will remain pending until the priority date is current again. Because the I-485 will remain pending, the applicant can continue to apply for interim benefits, such as work authorization and advance parole, while the priority date is retrogressed.

The May bulletin from the Department of State's Visa Office is available at http://www.travel.state.gov/visa/bulletin/bulletin_5692.html. Contact CDMA for assistance.

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3. DOL Changes Effective Date of 2012 H-2B Final Rule; Preliminary

Injunction Granted

On February 21, 2012, the Department of Labor published a final rule amending the H-2B program regulations and providing for an effective date of April 23, 2012, which is 60 days after the date of publication of the final rule. The Department clarified that the final rule would not be operative until April 27, 2012, which is 60 days after February 27, 2012, the date on which the rule was reported to Congress, and the earliest date on which the rule can become operative by law. An injunction has temporarily blocked implementation, however.

The Department said that applications postmarked on or after April 27, 2012, would be adjudicated in accordance with the requirements described in the final rule. Any application filed under the *current* regulation that is postmarked on or after April 27, 2012, will be returned, and the employer (and its agent or attorney) informed of the need to file a new application in accordance with the provisions of the new H-2B final rule.

The Department also noted that employers who file H-2B applications with a start date of need before October 1, 2013, do not need to obtain the pre-approved H-2B registration under 20 CFR 655.15, and the Department will continue to adjudicate temporary need by reviewing the employer's statement of temporary need in Section B of the ETA Form 9142. Employers with H-2B applications postmarked on or after April 27, 2012, with a start date of need on or after October 1, 2013, must comply with all the requirements contained in the registration process unless the Office of Foreign Labor Certification publishes additional guidance in the Federal Register.

Meanwhile, on April 26, 2012, Judge M. Casey Rogers of the Northern District of Florida granted a preliminary injunction, applicable nationwide, against implementing the new program rule for 60 days. The U.S. Chamber of Commerce and others had filed suit on behalf of landscaping and forestry businesses in the U.S. District Court in Pensacola, Florida, arguing that the Department of Labor overstepped its authority by requiring companies to provide immigrant workers hired for low-skilled jobs wage guarantees and travel reimbursements. The Chamber said that such policies will drive up costs for landscape companies and should be issued by the Department of Homeland Security rather than Labor. Congress has blocked implementation of the related wage rule until September 30, 2012.

The Louisiana Department of Agriculture & Forestry released a statement from Commissioner Mike Strain noting that "these jobs are seasonal. Americans workers aren't willing to take a seasonal job peeling crawfish or shrimp or picking crab meat for four or five months. Consequently, employers cannot fill vacancies for temporary jobs in their peeling plants, sugar mills, forests and packing factories so they have to advertise for guest workers who are willing to do those jobs." Mr. Strain also said, "This injunction is a step in the right direction and I applaud the decision of Judge Rogers, who clearly recognized the economic harm to small business caused by the Department of Labor's H-2B rules. However, I know employers need more than a 60-day reprieve from the detrimental effects of these H-2B rules and the H-2B changes should be permanently withdrawn or legislatively removed by Congress." He said that many agricultural industries could be adversely affected otherwise.

A group of business advocacy associations has filed a similar suit in federal court in Philadelphia against the Department's H-2B wage rule. The issues are whether the Department must consider employer hardship and economic concerns during regulatory formulation, and whether the Department has jurisdiction to issue H-2B regulations.

U.S. Citizenship and Immigration Services has postponed a stakeholder engagement scheduled for May 2, 2012, on "Temporary Need in the H-2B Context." A new date has not yet been set.

Employers with questions about the H-2B process may e-mail them to H-2B.Regulation@dol.gov. The Department said it will provide responses in the form of Frequently Asked Questions (FAQs) on its website. The new guidance, issued before the preliminary injunction, is available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-23/pdf/2012-9612.pdf>.

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4. Office of Foreign Labor Certification Issues New FAQ on H-1B, H-1B1, and E-3 Programs

The Department of Labor's Office of Foreign Labor Certification issued a new frequently asked questions (FAQ) document on March 27, 2012. The FAQ answers the following questions:

- Is there a fee to file a Labor Condition Application (LCA) with the Department of Labor for the H-1B, H-1B1, or E-3 programs?

- How do I change my iCERT System account access information?
- How do I enter an untitled custom survey on the LCA?
- Where can I obtain a list of acceptable prevailing wage source surveys for Section G of the ETA Form 9035/9035E?

The FAQ is available at

http://www.foreignlaborcert.doleta.gov/pdf/H_1B_H_1B1_E_3_FAQ032712.pdf.

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5. DOL Revises H-2A and H-2B Forms

The Department of Labor has revised the ETA Form 9142, Appendix B.1 and associated instructions, in connection with the H-2B 2012 final rule.

Employers filing H-2B applications under the 2012 final rule are supposed to use the revised ETA Form 9142 and Appendix B.1 starting with applications postmarked on or after April 27, 2012, the Department said in an announcement. Given the federal court injunction mentioned in the prior article, however, it is unclear whether the new forms should be used after April 27.

The current ETA 9142 expired at the end of April. Therefore, all H-2A applications postmarked after April 30, 2012, must be submitted using the revised form. Appendix A.2 (H-2A only) remains unaffected and employers may continue to use it.

The new forms are available at

<http://www.foreignlaborcert.doleta.gov/form.cfm>.

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6. DOS Beefs Up Consular Services in Brazil, Plans Two New Consulates

The Department of State plans to open two new consulates in Belo Horizonte and Porto Alegre, Brazil, which the White House said are important economic and cultural centers for the states of Minas Gerais and Rio Grande do Sul.

In remarks to the U.S.-Brazil Partnership for the 21st Century, Secretary of State Hillary Clinton said the openings are intended to "make it easier to get those visas, easier to travel, knock down some of the barriers that have been put up, and continue to promote people-to-people contact." It was not clear from the official statements when the consulates would open, but reports suggested

they may not begin operations until 2014.

To address immediate growth in demand, the Department of State is sending dozens of consular officers to Brazilian posts to adjudicate visa applications. Between August and December 2011, the Department sent 82 temporary duty officers to Brazil, who issued more than 135,000 visas to Brazilian travelers. The Department of State is doubling the number of diplomats performing consular work in Brazil over the next year.

The Department is also implementing a pilot program in which consular officers may waive in-person interviews for certain qualified individuals, such as those renewing their visas within 48 months of the expiration of their previous visas, and Brazilians below the age of 16 and those age 66 and older. Because security is paramount, consular officers may interview any visa applicant in any category. Nonetheless, the Department said that this program "will benefit thousands of Brazilians who want to visit the United States."

According to a White House statement released on April 9, 2012, Brazil now ranks as the fourth largest source of overseas visitors, with 1.5 million visits to the United States in 2011, representing a 26 percent increase from 2010. Visa issuances to Brazilians tripled between 2006 and 2011, and are on pace for significant gains in 2012, the White House noted. As of February, visa processing was up 57 percent in 2012 from the same time frame in 2011. The Department of Commerce forecasted that 2.8 million Brazilians will travel to the United States in 2016, an increase of 87 percent from 2011. Visa interview wait times have dropped dramatically in Brazil, and now average just two weeks or less in Brasilia, Recife, and Rio de Janeiro, and 35 days or fewer in Sao Paulo.

Secretary Clinton's remarks are available at

<http://www.state.gov/secretary/rm/2012/04/187614.htm>. The White House statement is available at

<http://iipdigital.usembassy.gov/st/english/texttrans/2012/04/201204103555.html%23axzz1tM1aPPOI> A related fact sheet is available at

<http://iipdigital.usembassy.gov/st/english/texttrans/2012/04/201204103555.html%23ixzz1tM2laWnZ>.

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7. CBP Proposed Rule Allows More U.S. Returning Residents To File Single Customs Declaration for Members of Family

U.S. Customs and Border Protection (CBP) has issued a proposed rule to expand the definition of "members of a family residing in one household" to allow more U.S. returning residents to file a family customs declaration for articles acquired abroad. CBP said it anticipates that this proposed change will reduce the amount of paperwork required during inspection and therefore facilitate passenger processing. CBP believes that this proposed change also will more accurately reflect relationships between members of the public who are traveling together as a family.

CBP proposes to include foster children, stepchildren, half-siblings, legal wards, other dependents, and individuals with an *in loco parentis* or guardianship relationship within the definition of "members of a family residing in one household." CBP also proposes that the definition include two adult individuals in a committed relationship wherein the partners share financial assets and obligations, and are not married to or a partner of anyone else, including but not limited to long-time companions and couples in civil unions or domestic partnerships. CBP proposes to add these relationships to the definition and refer to them as "domestic relationships." The proposed term "domestic relationship" would not extend to roommates or other cohabitants not otherwise meeting the above definition. Additionally, the proposed changes would not alter the requirements that, to file a family declaration, members of a family residing in one household must live together in one household at their last permanent residence and intend to live together in one household after their arrival in the United States.

Written comments must be submitted by May 29, 2012.

[The proposed rule.](#)

Related [CBP announcement](#).

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8. CBP Adds 'Trusted Traveler' Enrollment Centers in Minnesota, North Dakota

U.S. Customs and Border Protection has added International Falls and Warroad, Minnesota, and Pembina, North Dakota, to its "trusted traveler" enrollment centers for Global Entry, NEXUS, and FAST. These programs are compliant with Western Hemisphere Travel Initiative (WHTI) requirements that U.S. and Canadian citizens entering the United States from Canada, the

Caribbean, Bermuda, or Mexico by air, land, or sea have a WHTI-compliant document.

[CBP announcement.](#)

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9. ABIL Global: Mexico

On May 24, 2011, President Felipe Calderon of Mexico signed a new Immigration Law, which abolished and superseded the General Population Law that had been in existence for 40 years. The new law involves significant changes to the current immigration regime, although these will not become evident until implementing regulations are published.

Publication of the regulations has been considerably delayed mainly due to the pressure of several nongovernmental organizations advocating for immigrants' human rights, along with bureaucratic delays in government offices. Regulations are expected to be published later this year.

The regulations are expected to pave the way to protect the human rights of immigrants; develop immigration processes focused mainly on demographic and immigration control issues; promote national security and economic development; and simplify immigration processes to attract foreign investors.

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10. Firm In The News

Cyrus Mehta was a guest speaker on "H-1B and L-1B Denials and Preserving Permanent Residence" at the American Immigration Lawyers Association's Philadelphia Chapter Dinner Meeting held on April 19, 2012.

Cyrus Mehta was quoted in an article in *Business Standard* published on April 4, 2012, on a class action suit claiming that Tata Consultancy Services forced Indian workers to remit their tax refunds to the company. Mr. Mehta noted, "The judge has certified it as a class action, which means that all employees who fall under the fact pattern can join the litigation. I don't think this litigation has anything to do with anti-India sentiment rather than lawyers who try to bring novel legal claims on behalf of employees, and Indian firms seem to have become an easy target. This is because tax and visa rules involving foreign workers on temporary visas, who are also employees of the IT firm in India, are amorphous and subject to varying interpretation." The article is available at

<http://t.co/PxDcAgXi>. See also

<http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4680%23.T4YxQFia2dA.facebook> for an article on the same case, also quoting Mr. Mehta.

Cyrus Mehta and Laura Danielson were quoted in an article published on April 17, 2012, by *Knowledge@Wharton Today*, "For High-Skilled Workers, the Visa Race is On." Ms. Danielson noted that U.S. employers are more confident about hiring again, and said that studies have repeatedly confirmed that an increase in high-skilled professionals leads to net job growth for the U.S. economy. H-1B demand is surging among her clientele in the medical devices, automotive, biotechnology, and IT industries. She noted that employers looking for skills in the STEM (science, technology, engineering, and mathematics) often find them among Chinese professionals. Mr. Mehta said that if the current increased pace of H-1B applications continues, the annual cap could be reached within the next few months. He also noted that some of the current demand could represent spillover from recent denials of L-1B specialized knowledge visas by the consulate in Chennai, India. The article is available at

<http://knowledgetoday.wharton.upenn.edu/2012/04/for-high-skilled-workers-the-visa-race-is-on/>.

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