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

JUNE 2012 IMMIGRATION UPDATE

Posted on June 2, 2012 by Cyrus Mehta

Headlines:

1. **USCIS Launches Online Immigration System** - Individuals can establish a USCIS ELIS account and apply online to extend or change their nonimmigrant status for certain visa types.

2. **USCIS EB-5 Stakeholders Meeting Provides Little New Information** - USCIS did not answer stakeholder questions that had been submitted before the meeting.

3. **Senators Urge Mayorkas Not To 'Undermine' L Visa Program** - The senators said they were concerned that the L-1B visa program, which allows companies to transfer employees with specialized knowledge from their foreign facilities to their U.S. offices, "is harming American workers."

4. **USCIS Centralizes Filing, Adjudication of Certain Waivers of Inadmissibility** - Beginning June 4, 2012, individuals abroad who have applied for certain visas and have been found ineligible by a U.S. consular officer will be able to mail requests to waive certain grounds of inadmissibility directly to a USCIS lockbox facility.

5. **DHS Extends, Redesignates Somalia for TPS** - Somali nationals with TPS who are seeking to re-register for TPS must file their application packages during the 60-day re-registration period that runs from May 1, 2012, through July 2, 2012.

6. **Department of Labor Advises on H-2B Final Rule Injunction, Procedures for H-2B Labor Certifications** - The Department of Labor published a Federal Register notice on May 16, 2012, advising on the injunction the U.S. District Court for the Northern District of Florida placed on implementation of the H-2B 2012 final rule.

7. **CDMA Sends Comment On Proposed Provisional Waiver Rule** - CDMA proposed, among other things, that USCIS remove portions of the proposed provisional waiver rule prohibiting the grant of a provisional waiver to those who are or have been in removal proceedings.

8. **ABIL Sends Comments on I-9 Proposed Revisions** - ABIL formally objected to the failure of USCIS to submit for full regulatory review, with opportunity for public comment, the proposed three-page instructions to the I-9 and another set of 64 pages of instructions in the "Handbook for Employers."

9. **NLRB Issues Guidance on Compliance Cases** - Among other things, a respondent may not use the compliance phase as a means to fish for disabling employee conduct under IRCA.

10. **Labor Dept. Says Preliminary Injunction on H-2B Final Rule Calls Into Doubt Its Authority** - The Department said the preliminary injunction calls into doubt the authority of the Department of Labor to fulfill its responsibilities under the INA and Department of Homeland Security regulations to issue labor certifications for H-2B workers.

11. **EEOC Ordered To Reveal Immigration Status or Abandon Claims** - The EEOC must either reveal the immigration status of women it is representing in a harassment lawsuit or abandon recovery of monetary damages for the claimants who will not disclose their status.

12. **ABIL Global: Canada** - As of March 1, 2012, certain individuals, previously ineligible for entry to Canada due to past criminality, may be eligible for a fee-exempt "on the spot" temporary resident permit for one visit to Canada.

13. **Firm In The News...**

Details

1. USCIS Launches Online Immigration System

On May 22, 2012, U.S. Citizenship and Immigration Services (USCIS) launched the first phase of its electronic immigration benefits system, USCIS ELIS.

Individuals can establish a USCIS ELIS account and apply online to extend or change their nonimmigrant status for certain visa types. Eligible individuals include foreign citizens who travel to the United States temporarily to study,

conduct business, receive medical treatment, or visit on vacation. USCIS ELIS will also enable USCIS officers to review and adjudicate online filings from multiple agency locations.

Following this first release, USCIS anticipates making adjustments and improvements in response to user feedback. Future releases will add form types and functions to the system, gradually expanding to cover filing and adjudication for all USCIS immigration benefits.

USCIS said the benefits of using USCIS ELIS include filing applications and paying fees online, shorter processing times, and the ability to update user profiles, receive notices, and respond to requests electronically. The system also includes tools to combat fraud and identify national security concerns.

The notice is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4eaa169ccc477310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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2. USCIS EB-5 Stakeholders Meeting Provides Little New Information

U.S. Citizenship and Immigration Services (USCIS) held a quarterly EB-5 stakeholders meeting on May 1, 2012. Over 250 people attended in person, and over 300 listened by phone. Despite the interest in the meeting, USCIS did not provide much information. For example:

- USCIS did not allow questions about and did not comment on the "tenant-occupancy" methodology issue, stating that the issue is under review. USCIS confirmed that applicants who were issued a "tenant-occupancy" RFE will be contacted with a notice that their deadline for response will be extended. However, there were no promises of forthcoming guidance related to the RFE.
- USCIS did not answer stakeholder questions that had been submitted before the meeting.
- USCIS expressed no specific plan or goals to improve processing times, which have slowed in recent months.
- USCIS expressed no specific plan or goals to improve communication

through the public engagement mailbox or through the I-924 applicant e-mail lines.
- USCIS expressed no specific plan or goals to communicate expectations and standards in a more open manner.
- USCIS suggested that a new draft of its “foundational” EB-5 policy memo would be emerging "in a few weeks," and that the agency is not currently deferring to the draft memo or implementing the "material change" guidance included in the current draft.
- USCIS refused to say how it would handle pending EB-5 petitions if Congress fails to extend the EB-5 pilot program after September 30, 2012. USCIS said it would address this issue at its July EB-5 stakeholders meeting.

According to the latest EB-5 program statistics based on preliminary data for the second quarter of fiscal year (FY) 2012, USCIS received 2,771 I-526 (Immigrant Petition by Alien Entrepreneur) petitions and had approved 2,101 and denied 384 so far. This was an 85 percent approval rating, compared to an 81 percent approval rating for all of FY 2011 and an 89 percent approval rating for all of FY 2010. As of the second quarter of FY 2012, USCIS had received 375 I-829 (Petition by Entrepreneur to Remove Conditions) petitions and had approved 522 and denied 24 so far. This was a 96 percent approval rating, matching a 96 percent approval rating for all of FY 2011 and exceeding an 83 percent approval rating for FY 2010.

USCIS also noted that as of March 31, 2012, processing times were reaching 6 months for an I-924 initial application (target is 4 months), and were reaching 8 months for an I-924 amendment application (target is 4 months). USCIS recently approved four new regional centers: the California Regional Center, LLC; Las Vegas EB-5 Immigration, LLC; New York City Real Estate Regional Center, LLC; and Lone Star Regional Center, LLC. The full list of RCs by state is available at http://www.uscis.gov/eb-5centers/.

The next USCIS stakeholder engagement meetings are scheduled for July 26, 2012 (regional center discussion) and October 23, 2012 (general EB-5 discussion). See http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e0138e0732344310VgnVCM100000082ca60aRCRD&vgnextchann

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l=e0b081c52aa38210VgnVCM100000082ca60aRCRD for additional details on the engagement meetings and the latest statistics. A recording of the stakeholder engagement is available at https://www.dropbox.com/sh/49aajm17197dduj/UflFKzZOOq. The latest statistics are available at http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/Upc
oming%20National%20Engagement%20Pages/2012%20Events/May%202012/EB-5Stats.pdf. The latest EB-5 regional center statistics and information page is available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1
a/?vgnextoid=2785a5f224a2e210VgnVCM100000082ca60aRCRD&vgnextchannel=
2785a5f224a2e210VgnVCM100000082ca60aRCRD.

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3. Senators Urge Mayorkas Not To 'Undermine' L Visa Program

Sens. Charles Grassley (R-Iowa) and Richard Durbin (D-Ill.) recently urged Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services, not to propose changes that "would undermine the L visa program" when USCIS issues new guidance on the L-1B "specialized knowledge" standard, expected in the near future. The senators shared their thoughts in a letter sent to Director Mayorkas on March 7, 2012.

The senators said they were concerned that the L-1B visa program, which allows companies to transfer employees with specialized knowledge from their foreign facilities to their U.S. offices, "is harming American workers" because some employers, especially foreign outsourcing companies, "use L-1B visas to evade restrictions on the H-1B visa program." For example, the senators noted, the L-1 program does not have an annual cap and does not include the labor protections of the H-1B program.

In January 2011, the Department of State issued new guidance to consular officers on adjudicating visas under the specialized knowledge category, outlining criteria including (1) the proprietary nature of the knowledge possessed by the visa applicant, (2) whether the visa applicant is "key" or

normal personnel, and (3) whether the applicant possesses more skills or knowledge than an "ordinary" employee. The senators also noted that in July 2008, USCIS's Administrative Appeals Office (AAO) considered the definition of "specialized knowledge" and concluded that such employees are "an elevated class of workers within a company and not an ordinary or average employee." The senators advocated adoption of the standards and reasoning articulated in the January 2011 Department of State guidance and the July 2008 AAO decision. "We are concerned that any weakening of the standard would create additional incentives for some employers to use the L-1B visa program in order to circumvent even the minimal wage and other protections for American workers in the H-1B visa program."

A USCIS spokesperson said, "USCIS is currently reviewing its L-1B policy guidance, which is comprised of a series of memoranda dating back to 1994, to assess whether that guidance assists adjudicators in applying the law in new business settings that companies face today."

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4. USCIS Centralizes Filing, Adjudication of Certain Waivers of Inadmissibility

Beginning June 4, 2012, individuals abroad who have applied for certain visas and have been found ineligible by a U.S. consular officer will be able to mail requests to waive certain grounds of inadmissibility directly to a U.S. Citizenship and Immigration Services (USCIS) lockbox facility. This change affects where individuals abroad, who have been found inadmissible for an immigrant visa or a nonimmigrant K or V visa, must send their waiver applications.

Those filing waiver applications with a USCIS lockbox will now be able to track the status of their cases online. The change affects filings for:

- Form I-601, Application for Waiver of Grounds of Inadmissibility
- Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal
- Form I-290B, Notice of Appeal or Motion (if filed after denial of a Form I-601 or Form I-212).

Applicants who mail their waiver request forms should use the address provided in the revised form instructions on the USCIS website. Applicants who wish to receive an e-mail or text message when USCIS has received their waiver

request may attach Form G-1145, E-Notification of Application/Petition Acceptance, to their application.

During a limited six-month transition period, immigrant visa waiver applicants in Ciudad Juarez, Mexico, may either mail their waiver applications to the USCIS lockbox in the United States or file in person at the USCIS office in Ciudad Juarez. USCIS said it is aware of the pending caseload for applicants in Ciudad Juarez and "is taking proactive steps to work through these cases." USCIS plans to increase significantly the number of officers assigned to adjudicate the residual cases filed before June 4 and those filed during the interim six-month transition period. USCIS has already begun testing this process and has transferred applications from Ciudad Juarez to other USCIS offices in the United States.

This change is separate and distinct from the provisional waiver proposal published in the Federal Register on March 30, 2012.

The USCIS announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8e5b8976a0a77310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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5. DHS Extends, Redesignates Somalia for TPS

The Department of Homeland Security has redesignated Somalia for temporary protected status (TPS) and extended the existing TPS designation from September 18, 2012, through March 17, 2014. Somali nationals with TPS who are seeking to re-register for TPS must file their application packages during the 60-day re-registration period that runs from May 1, 2012, through July 2, 2012. Somalis (or persons without nationality who last habitually resided in Somalia) in the United States who do not currently have TPS may apply under the re-designation during the six-month period that runs from May 1, 2012 through October 29, 2012. U.S. Citizenship and Immigration Services (USCIS) encourages eligible individuals to register as soon as possible.

A Somali national may be eligible under the redesignation if she or he has continuously resided in the United States since May 1, 2012, and has been

continuously physically present in the United States since Sept. 18, 2012.

DHS anticipates that there are approximately 250 individuals who will be eligible to re-register for TPS under the existing designation of Somalia and estimates that fewer than 1,000 additional individuals will be eligible for TPS under the redesignation.

DHS said the extension of the current Somalia TPS designation is due to the continued disruption of living conditions in the country based upon extraordinary and temporary conditions that prompted the Attorney General's redesignation of Somalia for TPS on September 4, 2001. The latest redesignation is based on "ongoing armed conflict and the worsening of the extraordinary and temporary conditions, including the effects of the recent severe drought in Somalia."

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=be2e332606807310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. The related Federal Register notice is available at http://www.gpo.gov/fdsys/pkg/FR-2012-05-01/pdf/2012-10388.pdf.

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6. Department of Labor Advises on H-2B Final Rule Injunction, Procedures for H-2B Labor Certifications

The Department of Labor published a Federal Register notice on May 16, 2012, advising on the injunction the U.S. District Court for the Northern District of Florida placed on implementation of the H-2B 2012 final rule, published in February, and outlining procedures to be followed in seeking labor certification to file H-2B petitions. The notice states that employers must file H-2B labor certification applications under the 2008 H-2B rule, using those procedures and forms associated with the 2008 H-2B rule for which the Department has received an emergency extension.

The notice states that "this preliminary injunction necessarily calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and regulations to issue the labor

certifications that are a necessary predicate for the admission of H-2B workers." The Office of Foreign Labor Certification plans to post additional filing guidance on its website at http://www.foreignlaborcert.doleta.gov/.

The notice is available at http://www.foreignlaborcert.doleta.gov/pdf/h_2bfrn.pdf.

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7. CDMA Sends Comment On Proposed Provisional Waiver Rule

Cyrus D. Mehta & Associates, P.L.L.C. (CDMA) sent comments on the recently proposed rule regarding TProvisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate RelativesУ (DHS Docket No. USCIS-2012-2003) to U.S. Citizenship and Immigration Services (USCIS) on June 1, 2012. USCIS has proposed regulatory changes pursuant to which an applicant for an immigrant visa could, prior to departing from the United States to attend a visa interview, be granted a provisional waiver of the inadmissibility under INA ¤ 212(a)(9)(B) that will result from the applicantXs prior unlawful presence in the United States when the applicant departs the United States to apply for an immigrant visa.

CDMA proposed that USCIS remove provisions in its proposed rule which would forbid the grant of a provisional waiver to various types of applicants who are or have been in removal proceedings; that USCIS alter how the proposed rule addresses applicants who may face inadmissibility under INA ¤ 212(a)(6)(C) on the basis of alleged fraud; and that USCIS extend eligibility for provisional waivers to over-21-year-old sons and daughters of U.S. citizens. While commending USCIS for its proposal, CDMAXs comment points out that allowing applicants who are in removal proceedings or are subject to a final removal order to apply for a discretionary provisional waiver of inadmissibility will create greater efficiencies and is consistent with past regulatory practice in the area of advance permission to reapply for admission. Moreover, allowing either an advance waiver of inadmissibility due to fraud, or at least an advance determination of whether an applicant should be found inadmissible due to fraud, will allow more applicants who may otherwise need to pursue a complex claim under *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), in immigration court, to utilize the provisional waiver process instead. Finally, expanding the provisional waiver process to cover adult sons and daughters of U.S. citizens could fill some of the gap left by the failure to enact the DREAM Act.

CDMAXs detailed comment on the proposed provisional waiver rule

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8. ABIL Sends Comments on I-9 Proposed Revisions

The Alliance of Business Immigration Lawyers (ABIL) sent comments on the revised Form I-9 (Employment Eligibility Verification) on May 23, 2012, to U.S. Citizenship and Immigration Services (USCIS). ABIL formally objected to the failure of USCIS to submit for full regulatory review, with opportunity for public comment, the proposed three-page instructions to the I-9 and another set of 64 pages of instructions in the "Handbook for Employers," accessible at http://www.uscis.gov/files/form/m-274.pdf. These instructions are to be treated as incorporated amendments of USCIS regulations, and ABIL noted that the I-9 instructions impose substantive legal requirements.

The agency "has not complied with several federal statutes and presidential directives including the Administrative Procedure Act , the , the Regulatory Flexibility Act, Executive Orders 12866 and 13563 and OMB Circular A-4," ABIL said. Moreover, the PRA public burden and cost estimate of $414,375,200 is "woefully inadequate." The time estimate for completion of the form is three minutes, which, according to the three-page I-9 instructions, includes reading the instructions. This could not conceivably include a reading of the M-274Xs 64 pages of instructions, ABIL noted. Moreover, given the number of respondents (projected by USCIS to be 78 million), the cost burden estimate "must inevitably be many multiples of $414,375,200." For the foregoing reasons, ABIL urged the Office of Management and Budget (OMB) to remand the information collection review to USCIS as unapproved and to direct the agency to comply in full with the applicable laws and regulations.

ABIL included detailed comments on the revised draft I-9. The comments will be posted shortly on http://www.abil.com/.

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9. NLRB Issues Guidance on Compliance Cases

The National Labor Relations Board (NLRB) issued guidance on May 4, 2012, to regions for investigating and litigating compliance issues under *Flaum Appetizing Corp.*, 357 NLRB No. 162 (Dec. 30, 2011). The memo acknowledges that the Supreme Court in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S.

137 (2002) concluded that the Immigration Reform and Control Act of 1986 (IRCA) bars the NLRB from awarding backpay to any individual who was not legally authorized to work in the United States during the backpay period. However, the NLRB noted that an employee's work authorization status generally is irrelevant to the merits of an unfair labor practice compliant; it only becomes a triable issue at the compliance stage. Nonetheless, the NLRB memo states, a respondent "may not use the compliance phase as a means to fish for disabling employee conduct under IRCA, i.e., no legal authorization for its employees to work in the United States."

In *Flaum*, the NLRB concluded that "IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted." In the compliance phase, the NLRB memo says, regions should demand a full accounting of evidence upon which a respondent intends to rely to assert that employees are ineligible for backpay under *Hoffman Plastics.*

The NLRB memo also notes, among other things, that before *Flaum*, an employer was permitted to require discriminatees to complete the appropriate portion of the I-9 employment authorization verification form and submit appropriate documentation as a condition of reinstatement. "A reinstatement offer will no longer be considered valid if it is conditioned on re-verification of employment status," the NLRB memo states.

The memo is available at http://www.nlrb.gov/search/simple/all/om%2012-55.

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10. Labor Dept. Says Preliminary Injunction on H-2B Final Rule Calls Into Doubt Its Authority

On May 7, 2012, the Office of Foreign Labor Certification of the Department of Labor's Employment and Training Administration released the following statement regarding the preliminary injunction of the H-2B final rule by the U.S. District Court for the Northern District of Florida:

On April 26, 2012, the Temporary Non-Agricultural Employment of H-2B Aliens in the United States, Final Rule, 77 FR 10038, Feb. 21, 2012 was preliminarily enjoined by the U.S. District Court for Northern District of Florida, Pensacola Division in Bayou Lawn & Landscape Services, et al. v. Hilda L. Solis, et al., 12-cv-00183-RV-CJK, and was never implemented. Therefore, for the present time

employers should file their H-2B labor certification applications under the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 78020, Dec. 19, 2008. However, please be aware that this preliminary injunction necessarily calls into doubt the underlying authority of the Department of Labor to fulfill its responsibilities under the Immigration and Nationality Act and Department of Homeland Security regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers.

The statement is available at http://www.foreignlaborcert.doleta.gov/.

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11. EEOC Ordered To Reveal Immigration Status or Abandon Claims

On May 7, 2012, Judge Lonny R. Suko of the U.S. District Court for the Eastern District of Washington told the Equal Employment Opportunity Commission (EEOC) that it had to either reveal the immigration status of women it is representing in a harassment lawsuit or abandon recovery of monetary damages for the claimants who will not disclose their status. The EEOC had objected on Fifth Amendment grounds, and sought a protective order. *EEOC v. Evans Fruit Co., Inc.*, Case No. CV-10-3033 LRS (E.D. Wash.). The court noted that even if an assertion of Fifth Amendment privileges is proper, "there are consequences." The court said "it should have been apparent to the EEOC that some of the claimants now had a choice to make: either continue to be part of the litigation and provide answers in discovery subject to the protective order, or decline toЙbe part of the litigation."

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12. ABIL Global: Canada

As of March 1, 2012, certain individuals previously ineligible for entry to Canada due to past criminality may be eligible for a fee-exempt "on the spot" temporary resident permit for one visit to Canada.

To qualify for the exemption, the port of entry applicant must:

- have served no jail time, and
- have committed no other acts that would prevent him or her from entering Canada.

Applicants may be eligible for the fee waiver if they:

- have been convicted of an eligible offense (or its equivalent in foreign law);
- have served no jail time;
- have committed no other acts that would prevent them from entering Canada; and
- are not inadmissible for any other reason.

Eligible convictions include those equivalent to *criminal* offenses under the *Immigration and Refugee Protection Act* (IRPA), Section 36(2).

The equivalent convictions vary from country to country. Among others, they include:

- driving under the influence of alcohol;
- public mischief; or
- shoplifting.

All *serious criminal* offenses, defined under Section 36(1) of IRPA, are not eligible. Among others, they include:

- robbery;
- fraud over C$5000; or
- assault causing bodily harm.

Applicants may become admissible again if they:

- apply for a temporary resident permit and are approved;
- demonstrate through appropriate documentation that they meet the legal requirements to be deemed rehabilitated;
- apply for rehabilitation and are approved; **or**
- obtain a pardon.

Legal representation for these various applications and processes is strongly recommended because refusal rates are high.

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13. **Firm InThe News**

Cyrus Mehta will speak on "Third Party Placement" at the upcoming American

Immigration Lawyers Association Conference to be held on June 13-16, 2012, in Nashville, TN.

David Isaacson will speak on “Crimes for Business Immigration Lawyers” at the upcoming American Immigration Lawyers Association Conference to be held on June 13-16, 2012, in Nashville, TN.

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