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

JULY 2012 IMMIGRATION UPDATE

Posted on July 3, 2012 by Cyrus Mehta

Headlines

1. **Supreme Court Strikes Down Most Provisions of Arizona's Immigration Enforcement Law** - The Supreme Court struck down most provisions of Arizona's 2010 immigration-related law, allowing to stand one provision requiring police to verify immigration status in certain circumstances.

2. **Continued Heavy Demand in Employment Second Preference Category Leads to Worldwide Cut-Off Date for July** - Continued heavy demand for visa numbers in the employment second preference category has required the establishment of a January 1, 2009, worldwide cut-off date for July.

3. **DOL Announces Address Change for Filing, Processing Temporary Labor Certifications** **-** Effective August 2, 2012, the Chicago National Processing Center address and contact info will change.

4. **Grassley Letter Challenges President's Authority To Implement Deferred Action** - Sen. Charles Grassley (R-Iowa) and a group of other Republicans are challenging President Obama's authority to implement deferred action and work authorization for certain children of undocumented persons based on prosecutorial discretion.

5. **Georgia Technology Company Agrees to Pay $741,288 in Back Wages to 73 H-1B Workers** - Semafor Technologies LLC has agreed to pay 73 employees $741,288 in back wages following an investigation by the Department of Labor's Wage and Hour Division that found violations of the H-1B visa program.

6. **H-1B Cap Reached** - H-1B numbers for FY 2013 have run out.

7. **Social Security Administration Releases Guidance on Employment Authorization for Nonimmigrants** P The SSA guidance includes a table listing

the most recent automatic EAD extension information by country.

8. **USCIS Eliminates Original Signature Requirement on Supporting Forms for Certain Applications to Extend/Change Nonimmigrant Status** - USCIS explained that elimination of the signature requirement for forms filed with certain applications is part of its larger efforts to transition to electronic filing.

9. **Multi-State Prostitution Ring Dismantled** - The perpetrators acquired women to act as prostitutes, on many occasions smuggling them into the United States from Mexico and Central America.

10. **Appeals Court Denies Petition for Review, Upholds BIA Decision of Abandonment of LPR Status** - The U.S. Court of Appeals for the Sixth Circuit denied the petition for review, holding that intent alone is insufficient to maintain LPR status and that her extended periods in Pakistan supported the BIA's finding that she had abandoned her status.

11. **ABIL Global(www.abil.com): Belgium** - Belgium is working on implementation of the EU Blue Card directive; there is an increasing focus on compliance; and a potential future change relates to the transfer of legislative power regarding work permits from the federal level to the regions.

12. **Firm In The News...**

Details

1. Supreme Court Strikes Down Most Provisions of Arizona's Immigration Enforcement Law

On June 25, 2012, the Supreme Court struck down most provisions of Arizona's immigration-related law, allowing to stand one provision requiring police to verify the immigration status in certain circumstances of those they have stopped, detained, or arrested and whom they suspect may not be in the United States legally. The provisions that were struck down included requiring immigrants to carry documentation, making seeking or engaging in unauthorized work a state misdemeanor crime, and allowing warrantless arrests of suspected undocumented persons who may have committed a removable offense. The Court noted that the federal government is responsible for immigration and removal.

Five other states (Alabama, Georgia, Indiana, South Carolina, and Utah) have

similar laws, which may be challenged following the Supreme Court outcome.

The decision is available at http://www.supremecourt.gov/opinions/11pdf/11-182.pdf. For our blog on this decision, see *DREAMING IN ARIZONA: CAN PROSECUTORIAL DISCRETION CO-EXIST WITH SHOW ME YOUR PAPERS?* http://blog.cyrusmehta.com/2012/06/dreaming-in-arizona-can-prosecutorial.html

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2. Continued Heavy Demand in Employment Second Preference Category Leads to Worldwide Cut-Off Date for July

Continued heavy demand for visa numbers in the employment second preference category has required the establishment of a January 1, 2009, worldwide cut-off date for the month of July. The Department of State's Visa Bulletin for July says that this action has been taken in an effort to hold number use within the annual numerical limit. "Should there be an increase in the current demand pattern, it may be necessary to make this category completely 'unavailable' prior to September 30, 2012," the bulletin warns.

The China and India employment second preference categories are already unavailable, and will remain so for the remainder of the fiscal year.

The July Visa Bulletin is available at http://www.travel.state.gov/visa/bulletin/bulletin_5733.html.

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3. DOL Announces Address Change for Filing, Processing Temporary Labor Certifications

Effective August 2, 2012, the Chicago National Processing Center (NPC) address and contact info will change:

- Old Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 536 South Clark Street, 9th Floor, Chicago, IL 60605-1509.
- New Address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, 11 West Quincy Court, Chicago, IL 60604-2105;

telephone: (312) 886-8000; facsimile: 312-353-8830.

- New Address in connection with fees: The following address is to be used for all invoices/fees submitted in connection with the H-2A program: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, P.O. Box A3804, Chicago, IL 60690-A3804.

On August 2, 2012, the Chicago NPC is expected to be fully functional in the new location. For three weeks after that date, the Chicago NPC will receive via courier all written correspondence submitted to the former address. On August 23, 2012, the courier will cease to operate and all submissions to the former address of the Chicago NPC will be returned to the sender. The address above for the collection of H-2A fees should be used beginning on August 2.

The notice is available at http://www.gpo.gov/fdsys/pkg/FR-2012-06-20/pdf/2012-15013.pdf.

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4, Grassley Letter Challenges President's Authority To Implement Deferred Action

Sen. Charles Grassley (R-Iowa) and a group of other Republicans sent a letter on June 19, 2012, challenging President Obama's authority to implement deferred action and work authorization for certain children of undocumented persons based on prosecutorial discretion. The Obama administration announced the new program in a directive from the Secretary of Homeland Security, Janet Napolitano, issued on June 15. "Not only do we question your legal authority to act unilaterally in this regard, we are frustrated that you have intentionally bypassed Congress and the American people," the letter states.

The letter also expresses concerns that the directive allows individuals under the age of 30 to obtain work authorization, citing the Bureau of Labor Statistics in noting that the unemployment rate for young adults aged 16 to 24 has been nearly 17 percent for the past year. The letter states that "t is astonishing that your administration would grant work authorizations to illegal immigrants during this time of record unemployment."

The letter poses a number of "serious questions" and asks for responses and "any relevant documentation related to this directive" by July 3, 2012.

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5. Georgia Technology Company Agrees to Pay $741,288 in Back Wages to 73 H-1B Workers

Semafor Technologies LLC, a Norcross, Georgia, technology company, has agreed to pay 73 employees $741,288 in back wages following an investigation by the Department of Labor's Wage and Hour Division that found violations of the H-1B visa program. The company specializes in software development, on-site/off-site application outsourcing, infrastructure, consulting, and product development services.

The notice is available at http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20120612_1.xml.

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6. H-1B Cap Reached

On June 12, 2012, U.S. Citizenship and Immigration Services (USCIS) announced that it had received enough H-1B petitions to fulfill the numerical limit for the fiscal year ending September 30, 2013. As of June 12, 2012, petitions for new employment of H-1Bs, that is, for employment of a person who is not yet in H-1B status for another employer, will not be accepted again until April 1, 2013. Those petitions received after April 1, 2013, must request employment starting October 1, 2013, so that they will be subject to next year's cap (FY 2014).

H-1B1 petitions for nationals of Chile and Singapore may still be approved due to free trade agreements with those countries, and "cap exempt" employers (such as universities and nonprofit research organizations) may continue to seek H-1B status on behalf of their employees. In addition, petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted toward the FY 2013 H-1B cap.

The "final receipt date" for H-1B purposes is June 11, 2012. Regulations now provide that all H-1B petitions received by USCIS on or before June 11, 2012, have been submitted "under the cap," but all H-1B petitions received by USCIS on or after June 12, 2012, will be rejected.

Contact your Alliance of Business Immigration Lawyers attorney about options for beneficiaries of H-1B petitions who did not make the cut-off for the cap.

Contact your ABIL attorney immediately if your organization wishes to sponsor any more cap-subject H-1B nonimmigrants for FY 2013.

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7. Social Security Administration Releases Guidance on Employment Authorization for Nonimmigrants

The Social Security Administration recently released guidance to staff, effective May 21, 2012, on employment authorization for nonimmigrants with respect to Social Security issues. Topics discussed include the policy for nonimmigrant employment authorization, evidence proving a nonimmigrant's employment authorization, the validity period, automatic extensions of employment authorization documents (EADs), nonimmigrants with automatic EAD extensions, the procedure when a Social Security number applicant submits an EAD based on an automatic EAD extension, and the policy for employment authorization by Class of Admission (COA).

The guidance includes a table listing the most recent automatic EAD extension information by country, and a table listing those who are employment-authorized without specific Department of Homeland Security (DHS) authorization, such as A-1 ambassadors and career diplomats, A-2 foreign government officials, H-1C registered nurses, H-2A agricultural workers, J-1 exchange visitors, and others. The guidance notes that although those listed under a COA in the table are employment-authorized without DHS authorization, "employers may still ask for an EAD before the alien can start working." The guidance also includes a table listing COAs and descriptions of nonimmigrants who are authorized to work only with authorization from DHS, and another table listing those who are not authorized to work in the U.S.

The guidance is available at https://secure.ssa.gov/poms.nsf/lnx/0110211420.

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8. USCIS Eliminates Original Signature Requirement on Supporting Forms for Certain Applications to Extend/Change Nonimmigrant Status

U.S. Citizenship and Immigration Services (USCIS) released a policy memorandum on June 1, 2012, eliminating the original signature requirement for supporting Certificates of Eligibility for Nonimmigrant Student Status (Forms I-20) or Certificates of Eligibility for Exchange Visitor Status (DS-2019) submitted

with Applications to Extend/Change Nonimmigrant Status (Forms I-539). USCIS explained that this change is part of its larger efforts to transition to electronic filing.

USCIS explained that applicants must submit an I-20 with the I-539 form when applying to change nonimmigrant status to F-1 or M-1, for reinstatement to F-1 or M-1 status, for a transfer of schools when in M-1 status, or for an extension of M-1 status. Signatures are required for the Designated School Official and the student. USCIS requires applicants to submit a DS-2019 with the I-539 when applying to change status to J-1. Signatures are required for the applicant and the Responsible Officer or Alternate Responsible Officer for the exchange program.

USCIS noted that when its Electronic Immigration System (USCIS ELIS) is launched for public use, applicants will have the option of submitting their applications either by using ELIS or filing on paper. For applications filed via ELIS, the agency will accept a scanned, electronic version of a valid and properly executed I-20 or DS-2019 for all I-539 filings when required. For any I-539 filed outside ELIS, the agency will accept a photocopy of a valid and properly executed I-20 or DS-2019. Regardless of how the applicant files once ELIS is launched, USCIS will not return the I-20 or DS-2019 to the applicant upon approval of the I-539.

Applicants wishing to have USCIS stamp their I-20 or DS-2019 may make an appointment online through InfoPass and take their form to their local USCIS office. Stamping of I-20s and DS-2019s is a "transitional service that field offices will perform for 6 months after ELIS launches for public use," USCIS explained.

The memorandum is available at http://www.uscis.gov/USCIS/Laws/Memoranda/2012/June%202012/Submission%20of%20Form%20I-20%20or%20DS-2019%20in%20Support%20of%20Form%20I-539.pdf. For FAQs on ELIS, see http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=c5f924fa49716310VgnVCM100000082ca60aRCRD&vgnextchannel=c5f924fa49716310VgnVCM100000082ca60aRCRD.

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9. Multi-State Prostitution Ring Dismantled

Gregorio Hernandez-Castilla of Indianapolis, Indiana, was sentenced recently to 41 months in prison after pleading guilty to conspiring to operate an interstate prostitution ring with his two brothers. The prosecution was the result of an extensive investigation by multiple law enforcement agencies.

The three brothers headed the Hernandez-Castilla criminal organization, which had been operating for a number of years in the Indianapolis area, largely under the direction of Jose Luis Hernandez-Castilla. The brothers would acquire women to act as prostitutes, on many occasions smuggling them into the United States from Mexico and Central America. Once here, many were often without any means of support, and thus would engage in prostitution to pay off debts they owed the brothers for subsidizing their entry into the country.

In addition, the brothers directed another group of individuals who acted as local managers by running prostitution operations out of apartments and houses located throughout Indianapolis and in surrounding states, including Michigan, Illinois, and Ohio. The women engaged in prostitution were rarely allowed to stay in any one location for more than a week, and the operation employed numerous drivers who would transport the women from one site to another on a regular basis.

The organization operated almost exclusively within the Hispanic community, the Department of Homeland Security reported, advertising its services through the distribution of business cards bearing advertisements and telephone numbers for auto repair or western wear outfitters. These business cards were known within the Hispanic community as contact numbers for arranging appointments with prostitutes.

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10. Appeals Court Denies Petition for Review, Upholds BIA Decision of Abandonment of LPR Status

In *Lateef v. Holder*, the petitioner argued that despite multiple long absences from the United States, she did not intend to abandon her lawful permanent resident (LPR) status, which also served as the foundation for her husband's and child's entry into the United States. The U.S. Court of Appeals for the Sixth Circuit denied the petition for review, holding that intent alone is insufficient to maintain LPR status and that her extended periods in Pakistan, including her

final trip that lasted a year and three months, supported the BIA's finding that she had abandoned her LPR status. The court also noted that the petitioner had lied in one instance to border officials about the date of her last visit to the United States.

Circuit Judge Jane B. Stranch dissented, noting among other things that errors by U.S. immigration officials were responsible for at least some of the delays in her returning, and that the petitioner's daughter in Pakistan had emotional and physical problems that compelled her to spend time in Pakistan to care for her.

The decision is available at http://docs.justia.com/cases/federal/appellate-courts/ca6/10-3354/10-3354-2012-06-26.pdf.

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11. ABIL Global (www.abil.com): Belgium

Belgium is working on implementation of the European Union (EU) Blue Card directive; there is an increasing focus on compliance; and a potential future change relates to the transfer of legislative power regarding work permits from the federal level to the regions.

Work Permits; Implementation of the EU Blue Card Directive

The Belgian work permit system is a very business-friendly model in practice. The "regular" work permit, with a resident labor test, has become very rare in the corporate immigration context. "Fast-track" work permits, without a resident labor test, can be obtained quite fast, within two to three weeks after the date of filing of the application.

The economic recession has not led to drastic changes to the Belgian work permit system. However, one protective measure, regarding Bulgarian and Romanian nationals, should be mentioned:

- In principle, European Union (EU) nationals may work in Belgium without work permits, on the basis of the right of free movement of workers.
- For Bulgaria and Romania, which joined the EU on January 1, 2007, restrictions on this right of free movement of workers were maintained during an initial transition term until the end of 2008. That was prolonged for another three years, until December 31, 2011. The Belgian government has decided to continue the restrictions until December 31,

2013. As a rationale for this decision, the government explicitly referred to the expected economic recession in 2012/2013 as well as to similar decisions of neighboring countries to maintain the restrictions.

In other developments, the Belgian Parliament and the Minister of Employment are currently working on implementation of the EU Blue Card Directive.

The available texts indicate that the Blue Card will exist alongside the current fast-track work permit B for highly skilled employees. The salary threshold for a Blue Card in 2012 will probably be ЫI49,995, which is higher than the current threshold for a highly skilled work permit B (ЫI37,721 for 2012).

The Belgian authorities will probably choose not to take professional experience into account to prove "higher professional qualifications," but a higher education will be required, on condition that the studies needed to acquire it lasted at least three years. Belgium will probably not apply numerical limits.

Focus on Compliance

New Code on Labour and Social Security Criminal Law. A new Code on Labour and Social Security Criminal Law took effect on July 1, 2011. It mainly codifies existing compliance rules with regard to labor and social security law-related issues, including employment of foreigners, but also creates new compliance rules.

Unauthorized/illegal employment of a foreigner who is not entitled to live in Belgium more than three months is among the infringements that are considered very serious ("type 4" infringements).

The potential penalties for such infringement include a jail term of six months to three years and/or a criminal fine between ЫI3,600 and ЫI36,000 per employee, with a maximum of ЫI3,600,000 (ЫI36,000 x 100). Furthermore, the employer may be prohibited from operating the business for a limited time, between one month and three years. The court may also order closure of the company for the same duration.

The same two accompanying penalties (prohibition from operating the business and closure of the company for a limited time, between one month and three years) may be imposed upon "HR advisors," largely defined as professionals providing advice or help to one or more employers or employees

with regard to the carrying out of obligations as sanctioned by the Code, either for their own account or within an entity. According to some comments to the Code, HR consultants and payroll personnel are included in this category, but probably not lawyers or notary publics (although they may risk being an accomplice to an infringement). The courts can only impose these two accompanying penalties if they are deemed necessary to stop an infringement or to avoid repeat offending, provided that they are in proportion with overall socio-economic interests.

If the Public Prosecutor determines that this infringement does not justify criminal prosecution, an administrative fine may be imposed, ranging between ЫІ1,800 and ЫІ18,000 per employee, with a maximum of ЫІ1,800,000 (ЫІ18,000 x 100).

The Belgian authorities are working on implementation of the EU Illegals Employment Directive. A first proposal of an Act has been prepared but the text is not yet publicly available. The new Act may include the following:

- The basic principle is that employers cannot employ a person who is not an EU citizen, who does not enjoy the right of free movement, and who is present on the Belgian territory, without that person meeting the requirements for stay or residence in Belgium. The employer must check the residence documents of the potential employee before employment. Furthermore, the employer must keep a copy of these documents available for inspection and notify the competent authorities of the start of the employment.
- The new Act provides effective, proportionate, and dissuasive sanctions against employers who employ unauthorized third-country nationals in Belgium. These include general financial and criminal sanctions. The employer may also be liable to pay any outstanding remuneration to the employee. Finally, the employer may be required to pay taxes and social security contributions to Belgium.
- If the infringing employer is a direct subcontractor, the contractor will also be severally liable, unless the subcontractor states in writing that it does not employ unauthorized employees. If the infringing employer is an indirect subcontractor, the contractor can only be severally liable after notification by the social inspection services and only up to the salary as of the date of such notification.

- Employees may exercise their rights before the court, as may representative organizations for employers or employees and the Centre for Equal Opportunities and Opposition to Racism (an independent government agency that fights discrimination and racism and that assists victims).

Draft Act on increased coordination of inspection of illegal employment and fraud. On June 22, 2012, the Belgian federal government agreed to a draft Act that approves a cooperation agreement between the inspection departments on federal (Belgium) and regional (Brussels, Flanders, and Wallonia) levels. According to a press release on June 23, 2012, the aim is to enhance the cooperation between the inspection departments at the different levels "primarily in order to inspect the employment of foreign employees."

Potential Change: Transfer of Legislative Power From Federal to Regional Level

A potential future change relates to the transfer of legislative power regarding work permits from the federal level to the regions. At present the regions (Brussels, Flanders, and Wallonia) process work permits on the basis of federal legislation. The coalition agreement of the federal government and the general policy statement of the federal Minister of Employment both mention the transfer of legislative authority regarding economic migration to the regions.

No specific steps have been taken yet to initiate this process. It is not yet clear whether, when, and to what extent the transfer of legislative power will be implemented. This could lead to different rules for Brussels, Flanders, and Wallonia.

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12. Firm In The News

Cyrus Mehta was quoted in the media recently, at http://www.ilw.com/immigrationdaily/digest/2012,0620.shtm, http://www.fronterasdesk.org/news/2012/jun/22/details-romneys-immigration-platform/#.T-TczlLeCqg, http://business-standard.com/india/news/annual-quota-for-h1-b-visas-exhausted/477313/, and http://articles.economictimes.indiatimes.com/2012-06-10/news/32141672_1_uk-borde

r-agency-highly-skilled-immigrants-kamal-rahman.

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