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

AUGUST 2012 IMMIGRATION UPDATE

Posted on August 3, 2012 by Cyrus Mehta

Headlines

1. **EB-5 Immigrant Investor Update: New Office; Stats, Summary Released** - USCIS has announced formation of a new EB-5 program office. Also, USCIS released FY 2012 third-quarter statistics at its stakeholder call in July, and released a summary of questions and answers from the previous stakeholder meeting in May. USCIS also announced that it plans to release a new version of its draft EB-5 policy memo soon.

2. **DOL Reaches Agreement Resulting in Record Back Wage Amount for H-2A Temporary Agricultural Workers** - Peri & Sons, a Nevada-based onion grower, has agreed to pay a record total of $2,338,700 in back wages to 1,365 workers, along with a civil money penalty of $500,000, for violations under the H-2A program.

3. **Senate Holds Hearing on Student Visa System** - Discussed at the hearing were findings from the GAO's June 2012 report assessing ICE's oversight of the Student and Exchange Visitor Program.

4. **Global Entry Program Expands to Ireland's Shannon and Dublin Airports** - Global Entry kiosks are now available in CBP preclearance facilities at Ireland's Shannon and Dublin airports.

5. **U.S., Canada Issue Joint Statement on 'Beyond the Border' Initiative** - The action plan includes 32 initiatives and calls for enhancements to programs that help trusted businesses and travelers move efficiently across the border; introduces new measures to facilitate movement and trade; and invests in improvements to shared infrastructure and technology.

6. **DOL Requests Comments on LCA for H-1B, H-1B1, and E-3 Applications** - The Department of Labor's Employment and Training

Administration has requested comments on the labor condition application and instructions for H-1B, H-1B1, and E-3 nonimmigrants; ETA Forms 9035, 9035E, and 9035CP; and the Wage and Hour Division's Nonimmigrant Worker Information Form WH-4 (extension with revisions).

7. **Smith Letter Denounces Deferred Action, Requests Anti-Fraud Measures; NAFSA Applauds Obama Administration Policy** - Rep. Smith recommended various anti-fraud measures; NAFSA called the Obama administration's action a "major step forward"; USCIS postponed its July 9 engagement with no new date set.

8. **ABIL Global: Turkey** - Turkey moves toward stricter employer qualifications to sponsor work permits

9. **ABIL Global: Canada** - Canada announced new rules for criminal admissibility to Canada, and new criteria for QuЋbec permanent residence applications.

10. **Firm In The News...**

Details

1. EB-5 Immigrant Investor Update: New Office; Stats, Summary Released

U.S. Citizenship and Immigration Services (USCIS) has announced formation of a new EB-5 program office. Also, USCIS released the latest third-quarter statistics on its stakeholder call in late July, and released a summary of questions and answers from the previous stakeholder meeting in May. USCIS also announced that it plans to release a new version of its draft EB-5 policy memo soon. Highlights of the latest developments are included below.

New EB-5 program office. On July 18, 2012, USCIS Director Alejandro Mayorkas announced the creation of a new office to oversee administration of the EB-5 immigrant investor visa program. The office will be led by a new Chief of Immigrant Investor Programs. The position opening was announced the same day.

Director Mayorkas noted that the EB-5 program "has spurred the creation of tens of thousands of new jobs and the injection of billions of dollars into the U.S. economy since Congress created the program in 1990." Interest in the EB-5 program has grown exponentially in recent years, he noted, both from

domestic project developers seeking capital and foreign investors who have the capital that can fuel economic growth.

In fiscal year (FY) 2012 to date, USCIS approved more than 3,000 Form I-526 (Immigrant Petition by Alien Entrepreneur) petitions. Director Mayorkas said this was more than triple the number approved in all of FY 2009. "Since 2009, we have quadrupled the size of the EB-5 adjudications team and brought on board eight expert economists dedicated to the EB-5 program to ensure that EB-5 cases are handled expeditiously and with appropriate expertise."

By the end of July, a Review Board consisting of two Supervisory Immigration Services Officers and one economist "will review every pending application for regional center designation for which a denial has been recommended, with applicants receiving the opportunity to discuss their cases in-person before any final adverse decision is rendered," Director Mayorkas said.

The announcement is available at http://www.laborimmigration.com/wp-content/uploads/2012/07/Message+from+the+Director+07.18.2012.pdf.

Third-quarter statistics. USCIS said it has approved over 3,000 I-526 (Immigrant Petition by Alien Entrepreneur) petitions so far this year, and that the number of I-829 (Petition by Entrepreneur to Remove Conditions) filings has decreased. USCIS expects to see more filed in the fourth quarter.

According to the latest EB-5 program statistics based on preliminary data for the third quarter of FY 2012, USCIS received 4,156 I-526 (Immigrant Petition by Alien Entrepreneur) petitions and had approved 3,002 and denied 775 so far. This was a 79 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 third quarter of FY 2012, USCIS had received 546 I-829 (Petition by Entrepreneur to Remove Conditions) petitions and had approved 639 and denied 42 so far. This was a 94 percent approval rating, nearly matching a 96 percent approval rating for all of FY 2011 and exceeding an 83 percent approval rating for FY 2010.

USCIS approved 209 regional centers as of the third quarter. The full list of RCs by state is available at http://www.uscis.gov/eb-5centers/.

The next USCIS stakeholder engagement meeting is scheduled for October 16,

2012, in Washington, DC. See http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e0138e0732344310VgnVCM100000082ca60aRCRD&vgnextchannel=e0b081c52aa38210VgnVCM100000082ca60aRCRD for additional details on the engagement meetings.

Summary of May stakeholder meeting. After USCIS's EB-5 stakeholders meeting held on May 1, 2012, attendees lamented that the agency provided little substantive information and did not answer many submitted questions. Over 250 people attended in person, and over 300 listened by phone. USCIS subsequently released a summary of the meeting that provided additional information, presumably based on written questions that were submitted to the agency.

The summary of the May stakeholder engagement meeting is available at http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/May%202012/May_2012_Quarterly_EB5_Engagement_Executive_Summary.pdf.

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2. DOL Reaches Agreement Resulting in Record Back Wage Amount for H-2A Temporary Agricultural Workers

Peri & Sons, a Nevada-based onion grower, has agreed to pay a record total of $2,338,700 in back wages to 1,365 workers, along with a civil money penalty of $500,000, for violations under the H-2A temporary agricultural worker program.

An investigation by the Department of Labor's Wage and Hour Division determined that workers employed by Peri & Sons involved in irrigation, as well as in harvesting, packing, and shipping onions sold in grocery stores nationwide, were not paid properly for work performed. All of the workers came to the United States from Mexico under the H-2A temporary agricultural worker visa program. In most cases, their earnings fell below the hourly wage required by the program, as well as below the federal minimum wage of $7.25 per hour for a brief period of time. Investigators also found that workers were not paid for time spent in mandatory pesticide training or reimbursed for

subsistence expenses while traveling to and from the United States. Additionally, their return transportation costs at the end of the contract period were not paid as required.

A fact sheet on H-2A requirements is available at http://www.dol.gov/whd/regs/compliance/whdfs26a.htm. The press release announcing the agreement is available at http://www.dol.gov/opa/media/press/whd/WHD20121352.htm.

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3. Senate Holds Hearing on Student Visa System

The Senate's Subcommittee on Immigration, Refugees and Border Security held a hearing on July 24, 2012, on "Strengthening the Integrity of the Student Visa System by Preventing and Detecting Sham Educational Institutions." Witnesses included Rebecca Gambler, Director, Homeland Security and Justice, U.S. Government Accountability Office (GAO), and John Woods, Assistant Director for National Security Investigations, U.S. Immigration and Customs Enforcement (ICE).

Ms. Gambler discussed findings from the GAO's June 2012 report assessing ICE's oversight of the Student and Exchange Visitor Program (SEVP). The GAO reported that ICE does not have a process to identify and assess risks posed by schools in SEVP. Specifically, SEVP does not (1) evaluate program data on prior and suspected instances of school fraud and noncompliance, or (2) obtain and assess information from Counterterrorism and Criminal Exploitation Unit (CTCEU) and ICE field office school investigations and outreach events.

Moreover, the GAO found weaknesses in ICE's monitoring and oversight of SEVP-certified schools that contribute to security and fraud vulnerabilities. For example, the GAO noted that ICE has not consistently implemented internal control procedures for SEVP in the initial verification of evidence submitted in lieu of accreditation. In addition, ICE has not consistently followed the standard operating procedures that govern the communication and coordination process among SEVP, CTCEU, and ICE field offices.

The GAO recommended that ICE, among other things, identify and assess program risks, consistently implement procedures for ensuring schools' eligibility, and revise its standard operating procedure to specify which information to share among stakeholders during criminal investigations. Ms.

Gambler reported that ICE concurred with all the recommendations the GAO made and "has actions planned or under way to address them."

Mr. Woods said that ICE has already made progress in implementing the GAO's recommendations. He noted that ICE's CTCEU is "the first national program dedicated to the enforcement of nonimmigrant visa violations." SEVP and CTCEU execute complementary missions to regulate foreign students and exchange visitors and to proactively develop investigations that bolster national security, he said.

Mr. Woods noted that each year, CTCEU "analyzes the records of hundreds of thousands of potential status violators using information from SEVIS and the United States Visitor and Immigrant Status Indicator Technology database, along with other information." The CTCEU resolves these records "by further identifying potential violations that would warrant field investigations, establishing compliance, or establishing departure dates from the United States. Since the creation of the CTCEU in 2003, analysts have resolved more than two million such records."

Ms. Gambler's testimony is available in "Student and Exchange Visitor Program: DHS Needs to Take Actions to Strengthen Monitoring of Schools" at http://www.judiciary.senate.gov/pdf/12-7-24GamblerTestimony.pdf. Mr. Woods' testimony is available at http://www.judiciary.senate.gov/pdf/12-7-24WoodsTestimony.pdf. The main hearing page, which includes a link to a webcast of the hearing, is available at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=2b53f9fbe82f752c41d78bced00d6e3c.

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4. Global Entry Program Expands to Ireland's Shannon and Dublin Airports

U.S. Customs and Border Protection (CBP) announced on July 26, 2012, that Global Entry kiosks are now available in CBP preclearance facilities at Ireland's Shannon and Dublin airports. The Global Entry program allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States. Current Global Entry members can begin using these new kiosks immediately.

The Global Entry program is now available at 37 U.S. and preclearance airports. Over the last four years, CBP has enrolled more than 378,000 members in

Global Entry, with more than 1.1 million travelers receiving Global Entry benefits. Travelers have used the kiosks more than 2.7 million times.

Travelers who use Global Entry kiosks on average experience reduced wait times of 70 percent over travelers going through traditional passport inspection, and more than 75 percent of travelers using Global Entry are processed in under five minutes, according to CBP.

The program is available to U.S. citizens, U.S. lawful permanent residents, and pre-approved Mexican nationals. In addition, citizens of the Netherlands may apply under a special reciprocal arrangement that links Global Entry with the Dutch Privium program. In a recently implemented arrangement, the Republic of Korea's Smart Entry Service program has been linked to Global Entry, allowing Korean citizens to participate in Global Entry. Canadian citizens and residents may participate in Global Entry through membership in the NEXUS program.

Applications for Global Entry must be submitted online using the CBP Global Online Enrollment System (GOES). A non-refundable fee of $100 is also collected via the website for a five-year membership in Global Entry. CBP will review the applicant's information and conduct a background investigation. The applicant must complete an in-person interview at a CBP enrollment center, at which time fingerprints are collected.

GOES is available at https://goes-app.cbp.dhs.gov/main/goes. The announcement is available at http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/07262012_2.xml.

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5. U.S., Canada Issue Joint Statement on 'Beyond the Border' Initiative

On June 28, 2012, the United States and Canada released a joint "Statement of Privacy Principles" as an "important milestone in the implementation of the Beyond the Border Action Plan," according to Secretary of Homeland Security Janet Napolitano. The Statement of Privacy Principles concerns the provision, receipt, and use of personal information exchanged between the two countries to "address shared threats to national security."

U.S. President Barak Obama and Canadian Prime Minister Harper announced

the joint "Beyond the Border" declaration on February 4, 2011. The action plan includes 32 initiatives and calls for enhancements to programs that help trusted businesses and travelers move efficiently across the border; introduces new measures to facilitate movement and trade across the border while reducing the administrative burden for business; and invests in improvements to shared border infrastructure and technology. "By expediting lawful trade and commerce into and across our shared border, the United States and Canada seek to enhance our economic competitiveness, create jobs and support economic growth," a related announcement notes.

The announcement is available at http://www.dhs.gov/ynews/releases/20120628-us-and-canada-btb-statement-of-privacy-principles.shtm. The Statement of Privacy Principles is available at http://www.dhs.gov/files/publications/btb-action-plan-statement-of-privacy-principles.shtm. The joint declaration is available at http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord.

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6. DOL Requests Comments on LCA for H-1B, H-1B1, and E-3 Applications

The Department of Labor's Employment and Training Administration has requested comments on the labor condition application (LCA) and instructions for H-1B, H-1B1, and E-3 nonimmigrants; ETA Forms 9035, 9035E, and 9035CP; and the Wage and Hour Division's Nonimmigrant Worker Information Form WH-4 (extension with revisions). Among other things the changes in the H-1B LCA would appear to make it difficult or at least more cumbersome for any employer sending H-1B workers off site; clarify what employers are attesting to regarding prevailing wage determinations; and clarify what H-1B dependent employers are attesting to.

The notice, which includes information on the Department's rationale for proposed changes and instructions on how to comment, was published on July 9, 2012, and is available at http://www.gpo.gov/fdsys/pkg/FR-2012-07-09/pdf/2012-16587.pdf.

For our blog commentary on this development, *SeeYTHE H-1B PROCESS GETS*

*EVEN HARDER: DOL PROPOSES DRAMATIC CHANGES TO THE LCA FORM*y by Cora-Ann V. Pestaina, http://blog.cyrusmehta.com/2012/07/the-h-1b-process-gets-even-harder-dol.html

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7. Smith Letter Denounces Deferred Action, Requests Anti-Fraud Measures; NAFSA Applauds Obama Administration Policy

Rep. Lamar Smith (R-Tex.), chairman of the House of Representatives' Committee on the Judiciary, sent a letter on July 3, 2012, to John Morton, Director, U.S. Immigration and Customs Enforcement, denouncing the new Obama administration plan to exercise its prosecutorial discretion to grant deferred action and work authorization to certain children of undocumented persons. Rep. Smith called it an "overreach of executive branch authority," a "magnet for fraud," and a "blatantly political" action that is an "unprecedented breach of faith with the American people and ignores the rule of law."

Rep. Smith recommended various anti-fraud measures, including matching and verifying school transcripts for applicants, requiring applicants to seek relief in person, and requiring applicants to demonstrate physical presence through documentation.

Rep. Smith expressed concerns that deferred action is already being applied, and asked a number of questions, including how many individuals had been granted deferred action and whether any evidentiary standard was in place. Rep. Smith said that the "lack of forethought" about processing and implementation before the policy was announced was a "dereliction of the duty the President vowed to uphold." "Unfortunately, this administration continues to place partisan politics and illegal immigrants ahead of the American people and the rule of law," he said. Rep. Smith asked for ongoing briefings to be kept informed about the policy as it is developed and implemented.

Not everyone was displeased by the new Obama administration policy, however. NAFSA: Association of International Educators applauded the action and called it a "major step forward." NAFSA said it has long urged making deferred action official government policy for undocumented students in the United States. "It will offer urgently needed reprieve, on a rigorous case-by-case basis, for individuals who currently find themselves, through no fault of their

own, in an untenable and frightening legal limbo," NAFSA said, noting that undocumented students, brought to the United States by their parents as children, "today live under the constant threat of deportation and are unable to contribute productively to the only country they call home."

NAFSA also called for Congress to pass the DREAM Act and confer the benefits in that act by law.

Rep. Smith's letter to Director Morton is available at http://judiciary.house.gov/news/pdfs/DreamActLetterICE.pdf. NAFSA's statement is available at http://www.nafsa.org/pressroom/default.aspx?id=33261.

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8. ABIL Global: Turkey

Turkey moves toward stricter employer qualifications to sponsor work permits.

Historically, obtaining work permits in Turkey meant adjudication periods of three to nine months, requests for documents without explanation, and a lack of transparency of requirements by the Work Permit Directorate (Directorate). In 2010 the Turkish government made a bold effort to change the work permit regime. In the same year it also chose to enact employer qualifications for the entity that wished to sponsor a work permit. This was a relatively new concept in Turkey. Since implementation, the Directorate has attempted to create exemptions.

On July 29, 2010, the Directorate published a communique that requires an employer to have at least five Turkish citizen employees per registered worksite per foreign applicant as evidenced on payroll records (termed 5:1 ratio). The communique also requires that the employerXs *paid in capital* must be at least 100,000 Turkish Lira (TL). Alternatively, the employer can show either gross (assumedly annual) sales amounting to 800,000 TL annually or exports with a gross annual value of USD $250,000. The current exchange rate is 1.8 TL to 1 USD.

The 5:1 ratio has been particularly burdensome to employers. This is partially because the ratio must be evident at each worksite. Therefore, work permit applications will be denied if they do not evidence a 5:1 ratio of Turks to foreigners at the worksite selected for the foreigner (the worksite location is

normally specified on social security records). Soon after the publication of the employer criteria, the Directorate was confronted with many employers who could no longer sponsor foreigners. In an attempt to ameliorate the impact of the 5:1 ratio requirement, the Directorate published the following exemptions on April 25, 2011:

- **Founder/investor** of a newly established legal entity: If such a founder/investor owns at least 20% (but amounting to at least 40,000 TL) worth of shares of the entity, and within 6 months, the five employee criteria can be met, the founder/investor is exempt.
- **Technical specialists**: If there is evidence the position that is the subject of the work permit application requires advanced technology **and** a Turkish national specialist cannot be found, both the 5:1 employee ratio and the capital requirement will not apply.
- For companies that satisfy the **foreign direct Investment** requirements, the 5:1 ratio will be applied by taking into consideration every employee of all the companyXs worksites in Turkey. Also, if the foreign employee is a Tkey personnelУ under this law, the Directorate may not count him or her in the 5:1 ratio.
- **Government involvement**: When the foreigner will work on a product or service procurement for public institutions or is pursuant to a public tender, or when the work permit application is subject to a bilateral or multilateral agreement to which Turkey is a party, both the 5:1 ratio and capital requirement will not apply.

The Work Permit Directorate has not yet published guidance on the evidence to be presented to qualify for these exemptions. Although these exemptions have been published and available for over a year, the exemptions are not sufficient to meet the legitimate business needs of companies.

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9. ABIL Global: Canada

Canada has announced new rules for criminal admissibility to Canada, and new criteria for QuЋbec permanent residence applications.

New Rules for Criminal Admissibility to Canada

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, under new rules that took effect March 1, 2012.

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 a 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; **and**
- shoplifting.

No *serious criminal* offenses, defined under Section 36(1) of IRPA, are eligible. Among others, they include:

- robbery;
- fraud over C$5000; **and**
- 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. Contact your Alliance of Business Immigration Lawyers attorney for assistance.

New Criteria for QuЋbec Permanent Residence Applications

Over the last three years, the number of applications for economic permanent immigration to the Canadian province of QuЋbec has more than doubled, rising from approximately 30,000 in 2008 to approximately 65,000 in 2011. In response to this growing volume, the QuЋbec government's Ministry of Immigration and Cultural Communities (MICC) proposed on March 21, 2012, an omnibus bill encompassing several major changes to QuЋbec's immigration law, the *Loi sur lXimmigration au QuЋbec*. If passed in the QuЋbec National Assembly, the bill will represent significant changes to eligibility for obtaining a QuЋbec Selection Certificate to immigrate permanently to QuЋbec.

The proposed changes will govern applications accepted by QuЋbec for the period April 1, 2012, through March 31, 2013. These changes are aimed at expediting processing times and according priority treatment to candidates for QuЋbec permanent residence with professional profiles currently highly sought after in the QuЋbec labor market, and at restricting the eligibility of other candidates. A new Demand Management System will dictate the numbers of applications for QuЋbec permanent residence accepted.

Applications for QuЋbec permanent residence by foreign workers and students will be divided into two main groups. Group 1 will not have any restrictions on the number of applications accepted and will include candidates who obtain at least 12 out of 16 points for their Field of Training based on the MICC's list of Fields of Training. Other candidates who may form part of Group 1 are foreign nationals working in QuЋbec with valid work permits, foreign nationals participating in recognized youth exchange programs, foreign nationals holding valid study permits who obtained their diplomas from recognized post-secondary educational institutions in QuЋbec, and foreign nationals with an employment offer validated by the MICC. Foreign workers who can be attributed points for their Field of Training but obtain less than 12 points will form part of Group 2, with a limit of 14,300 applications.

Under the new Demand Management System, applications for business immigrants will be restricted to pre-set quotas. For investors, the maximum number of applications accepted for the period April 1, 2012, through March

31, 2013, is 2,700. That quota was reached on April 12, 2012. A maximum of 215 entrepreneur applications will be accepted for the April 1, 2012-March 31, 2013, period. The Demand Management System is not intended to have an impact on the Québec government's commitment to accept approximately 50,000 immigrants annually from 2012 to 2015. The proposed changes will make it more difficult, however, for many candidates who would have qualified before March 21, 2012, for permanent immigration to Québec.

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10. **Firm In The News**

Cyrus Mehta was quoted by NDTV in an article on the Infosys whistleblower case and related visa issues. Mr. Mehta discussed the B-1 in lieu of H-1B visa program and the ambiguity in the law concerning B-1 visas. The article is available at http://www.ndtv.com/article/india/infosys-visa-issues-will-the-case-hold-in-us-court-247712.

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