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

SEPTEMBER 2012 IMMIGRATION UPDATE

Posted on September 4, 2012 by Cyrus Mehta

Headlines:

1. **USCIS Submits Emergency Requests to OMB for Deferred Action-Related Forms; ICE Agents File Lawsuit** - USCIS has submitted information collection requests to the OMB for "emergency" consideration related to the new deferred action program.

2. **USCIS Allows 30 Additional Days for Public Comment on Revised I-9** - USCIS received over 6,200 comments in response to its earlier publication on March 27, 2012. Additional comments will now be accepted until September 21, 2012.

3. **Republican Party Platform Supports More STEM Visas and Includes Consideration of Guestworker Provision** - Among other things, the platform supports granting more work visas to holders of advanced degrees in science, technology, engineering, or math.

4. **Labor Dept. Proposes Reorganizing Applications for Prevailing Wage Determination and Temporary Employment Certification** - The ETA has proposed reorganizing ETA Form 9141, Application for Prevailing Wage Determination; ETA Form 9142, Application for Temporary Employment Certification; and the H-2A Certification Letter With Notification.

5. **USCIS Releases Guidance on Accommodating Religious Beliefs When Capturing Photographs and Fingerprints** - If removal of headwear or adjustments are needed, such as a same-gender photographer or fingerprint-taker, USCIS will offer a private or screened area, if available. If such an area is not available, USCIS will offer to reschedule the appointment.

6. **CBP Discontinues Admission Stamps on Forms for F, M, J International Students and Scholars** - If a state benefit-granting agency

rejects an unstamped Form I-20/DS-2019, applicants may make an appointment with USCIS online through InfoPass and take their I-20/DS-2019 to their local USCIS office to be stamped. This transitional step will end on November 21, 2012.

7. **State Dept. Announces Numerical Limits for Immigrants in FY 2012** - The worldwide employment-based preference limit for fiscal year 2012 is 144,951, and the family-sponsored preference limit is 226,000.

8. **CBP Warns I-94 Processing May Be Delayed** - The current processing time for entering foreign visitors' travel information into the I-94 database is 30 days or more.

9. **Groups of Travelers Can Now Submit Multiple ESTA Applications** - Multiple applications may be submitted and paid for in one transaction via the Electronic System for Travel Authorization

10. **Second Circuit Finds New York Law Prohibiting Nonimmigrant Pharmacists Unconstitutional** - In *Paidi v. Mills*, the U.S. Court of Appeals for the Second Circuit found unconstitutional a New York law stating that only U.S. citizens and legal permanent residents may obtain a pharmacist's license in New York.

11. **Chicago National Processing Center Has Moved** - Paper filings for the D-1, H-2A, and H-2B programs should be sent to the CNPC's new addresses.

12. **Firm In The News**

Details:

1. USCIS Releases Forms and Instructions for Deferred Action, Submits Emergency Requests to OMB for Related Forms; ICE Agents File Lawsuit

U.S. Citizenship and Immigration Services (USCIS) has released forms, instructions, and additional information relevant to the deferred action for childhood arrivals process. USCIS has begun accepting requests for consideration of deferred action for childhood arrivals.

As background, on June 15, 2012, Secretary of Homeland Security Janet Napolitano announced that certain young people who came to the United States as children and meet other key guidelines may be eligible, on a case-by-

case basis, to receive deferred action. USCIS is finalizing a process by which potentially eligible individuals may request consideration of deferred action for childhood arrivals.

At a stakeholder meeting on August 14, USCIS Director Alejandro Mayorkas said that the agency will not share information about applicants and their families with U.S. Immigration and Customs Enforcement (ICE) for enforcement purposes.

USCIS has submitted information collection requests to the Office of Management and Budget (OMB) for "emergency" consideration related to the new deferred action program.

The Form I-821D, Consideration of Deferred Action for Childhood Arrivals, will be used for those who are considered for relief from removal from the United States or from being placed into removal proceedings as part of the deferred action for childhood arrivals process. Those who submit requests with USCIS and demonstrate that they meet the threshold guidelines may have removal action in their case deferred for a period of two years, subject to renewal (if not terminated), based on an individualized, case-by-case assessment of the individualXs equities.

USCIS estimates that 1,041,300 respondents will use this form and that it will take 2 hours and 45 minutes to complete. The OMB notice for this form, which includes instructions on submitting comments, is available at http://www.gpo.gov/fdsys/pkg/FR-2012-08-16/pdf/2012-20247.pdf. Comments will be accepted until September 17, 2012.

USCIS also has submitted an emergency request to the OMB for a revision of Form I-765, Application for Employment Authorization. The OMB notice for this form, which includes instructions on submitting comments, is available at http://www.gpo.gov/fdsys/pkg/FR-2012-08-16/pdf/2012-20251.pdf. Comments will be accepted until September 17, 2012.

Individuals requesting consideration of deferred action for childhood arrivals must submit:

- Form I-821D, Consideration of Deferred Action for Childhood Arrivals (http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=05faf6c546129310VgnVCM100000082ca60aRCRD&vgnextchan

nel=db0
29c7755cb9010VgnVCM10000045f3d6a1RCRD)

- Form I-765, Application for Employment Authorization (with accompanying fees; the total is $465, including the biometrics fee and issuance of a secure employment authorization document) (http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f61417654
3f6d1a/?vgnextoid=05faf6c546129310VgnVCM100000082ca60aRCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD); and
- I-765WS Worksheet (to establish economic need for employment) (http://www.uscis.gov/USCIS/Forms/Form%20Pages/i-765ws.pdf).

USCIS recently developed a series of related resources, including a website, available at http://www.uscis.gov/childhoodarrivals. Related announcements are available at
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/
?vgnextoid=450a5b0325a29310VgnVCM100000082ca60aRCRD&vgnextchannel=
68439c7755cb9010VgnVCM10000045f3d6a1RCRD,
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a
/?vgnextoid=9296f6c546129310VgnVCM100000082ca60aRCRD&vgnextchannel=
68439c7755cb9010VgnVCM10000045f3d6a1RCRD, and
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/
?vgnextoid=162f81268a8e8310VgnVCM100000082ca60aRCRD&vgnextchannel=68
439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Meanwhile, a group of 10 U.S. Immigration and Customs Enforcement (ICE) agents have filed a lawsuit against the new deferred action directive on undocumented childhood arrivals. The agents argue that the new program forces them to violate immigration law.

Kansas Secretary of State Kris Kobach, an advisor to Mitt Romney's presidential campaign, is representing the agents in the lawsuit filed in federal court in

Dallas, Texas, against Janet Napolitano, Secretary of Homeland Security, and John Morton, ICE Director. The lawsuit is receiving financial support from NumbersUSA. "This Directive not only circumvents Congress, it also infringes on the plaintiffs' ability to fulfill the oath they made to uphold the laws of this country. The plaintiffs seek to prevent law enforcement officers from being forced to either violate federal law if they comply with the Directive or risk adverse employment action if they disobey the unlawful orders of the DHS Secretary," Secretary Kobach said.

Also, Texas Governor Rick Perry sent a letter to Greg Abbott, Texas Attorney General, asserting that Secretary Napolitano's action was "a slap in the face to the rule of law and our Constitutional framework of separated powers" and "unilaterally undermine the law." Governor Perry said he was writing to ensure that "all Texas agencies understand that Secretary Napolitano's actions confer absolutely no legal status whatsoever" to anyone who qualifies for deferred action. "In Texas, our legislature has passed laws that reflect the policy choices that they believe are right for Texas. The secretary's directive does not undermine or change our state laws, or any federal laws that apply within the State of Texas," he said.

Governor Perry's letter is available at http://wwwdotashwinsharmadotcom.files.wordpress.com/2012/08/o-abbottgreg20120817_1.pdf.

For our commentary on the lawsuit, see *They Still Have Their Dream: Lawsuit Against Dreamers Will Go Nowhere*, http://blog.cyrusmehta.com/2012/08/they-still-have-their-dream-law-suit.html

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2. USCIS Allows 30 Additional Days for Public Comment on Revised I-9

U.S. Citizenship and Immigration Services (USCIS) announced that it is allowing an additional 30 days for public comment on the revised I-9 form. USCIS received over 6,200 comments in response to its earlier publication on March 27, 2012. Additional comments will now be accepted until September 21, 2012.

USCIS previously announced that employers should continue to use the current I-9 employment eligibility verification form even after the August 31, 2012, Office of Management and Budget control number expiration date passes.

The notice announcing the extension of the comment period, which includes instructions on submitting comments, *is available at* *http://www.gpo.gov/fdsys/pkg/FR-2012-08-22/pdf/2012-20631.pdf*.

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3. Republican Party Platform Supports More STEM Visas and Includes Consideration of Guestworker Provision

The Republican Party's platform for 2012, which was formally approved at the Republican National Convention during the last week in August, supports granting more work visas to holders of advanced degrees in science, technology, engineering, or math (STEM) from other nations. The platform also supports encouraging foreign students who graduate from an American university with an advanced STEM degree to remain in the United States.

The platform also states that a Republican administration and Congress would partner with local governments through cooperative enforcement agreements and "will consider, in light of both current needs and historic practice, the utility of a legal and reliable source of foreign labor where needed through a new guest worker program."

The platform states that the presence of "millions of unidentified persons" poses grave risks to the safety and sovereignty of the United States. "Our highest priority, therefore, is to secure the rule of law both at our borders and at ports of entry." The platform supports Republican legislation to give the Department of Homeland Security long-term detention authority "to keep dangerous but undeportable aliens off our streets," along with expediting expulsion of criminal aliens and making gang membership a deportable offense.

The platform opposes "any form of amnesty." It supports the mandatory use of the Systematic Alien Verification for Entitlements (SAVE) program before granting any State or federal government entitlement or IRS refund. The platform "insist upon enforcement at the workplace through verification systems so that jobs can be available to all legal workers. Use of the E-Verify program P an Internet-based system that verifies the employment authorization and identity of employees P must be made mandatory nationwide." The platform also supports state enforcement efforts in the workplace.

"State efforts to reduce illegal immigration must be encouraged, not attacked," the platform says. "The pending Department of Justice lawsuits against Arizona, Alabama, South Carolina, and Utah must be dismissed immediately. The double-layered fencing on the border that was enacted by Congress in 2006, but never completed, must finally be built. In order to restore the rule of law, federal funding should be denied to sanctuary cities that violate federal law and endanger their own citizens, and federal funding should be denied to universities that provide in-state tuition rates to illegal aliens, in open defiance of federal law."

The platform also supports English as the nation's official language.

The full text of the Republican Party Platform for 2012 is available at http://whitehouse12.com/republican-party-platform/%23Item11.

4. Labor Dept. Proposes Reorganizing Applications for Prevailing Wage Determination and Temporary Employment Certification

The Department of Labor's Employment and Training Administration (ETA) has proposed reorganizing ETA Form 9141, Application for Prevailing Wage Determination; ETA Form 9142, Application for Temporary Employment Certification; and the H-2A Certification Letter With Notification.

Specifically, the Department is soliciting comments concerning the collection of data in the following information collections: Office of Management and Budget (OMB) Control Number 1205-0466, currently containing ETA Form 9141, Application for Prevailing Wage Determination, and ETA Form 9142, Application for Temporary Employment Certification, which expires on October 31, 2012; and OMB Control Number 1205-0404 containing the H-2A Certification Letter known as ETA-9144.

The Department proposes to divide 1205-0466 into three distinct information collection requests (ICRs), segregated by program, and to merge 1205-0404 into the collection that remains in 1205-0466. The Department proposes to separate out ETA Form 9141, Application for Prevailing Wage Determination, into its own collection, 1205-NEW2. The Department also proposes to divide the ETA Form 9142, Application for Temporary Employment Certification, into two collections. One would remain as 1205-0466 and would contain the ETA Form 9142A, H-2A Application for Temporary Employment Certification and Appendix A, along with other information collection burdens for the H-2A Temporary Labor

Certification Program, while the second would become 1205-NEW1 and contain ETA Form 9142B, H-2B Application for Temporary Employment Certification and Appendix B, along with all the information collection burdens for the H-2B Temporary Labor Certification Program. Once separated, 1205-0404, which contains one additional information collection burden for the H-2A program, would be merged with 1205-0466 so that most of the H-2A materials can be accounted for in one ICR.

The Department said it is using this opportunity to separate the collections into "more manageable and easy to understand ICRs."

Comments will be accepted by October 15, 2012. The notice, which includes instructions on submitting comments, is available at http://www.gpo.gov/fdsys/pkg/FR-2012-08-15/pdf/2012-19944.pdf.

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5. USCIS Releases Guidance on Accommodating Religious Beliefs When Capturing Photographs and Fingerprints

U.S. Citizenship and Immigration Services (USCIS) recently released policy guidance on accommodating religious beliefs during fingerprint and photograph capture. Among other things, the guidance notes that USCIS will accommodate an individual who wears headwear as part of his or her religious practices. Religious headwear may be worn if a reasonable likeness can be obtained from an individual, the full face is visible, and the religious headwear does not cast a shadow on the face. If removal of headwear or adjustments are needed, such as a same-gender photographer or fingerprint-taker, USCIS will offer a private or screened area, if available. If such an area is not available, USCIS will offer to reschedule the appointment.

The notice is available at http://www.uscis.gov/USCIS/Laws/Memoranda/2012/August%202012/Accommodating%20Religious%20Beliefs%20PM.pdf.

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6. CBP Discontinues Admission Stamps on Forms for F, M, J International Students and Scholars

As of August 10, 2012, U.S. Customs and Border Protection (CBP) no longer

provides admission stamps on Forms I-20/DS-2019 for prospective and returning international students and scholars (traveling on F, M, and J visas) seeking admission to the United States. CBP said this change makes CBP processes consistent with U.S. Citizenship and Immigration Services' (USCIS) recent change to stop stamping Forms I-20/DS-2019.

USCIS implemented this change as part of the launch of the USCIS Electronic Immigration System.

CBP noted that placing an admission stamp on Forms I-20/DS-2019 has been a longstanding practice at CBP, but it is not required. Although the admission stamps on Forms I-20/DS-2019 are not indicators of lawful status or academic program duration, some state and federal benefit-granting agencies have required international students and scholars to present stamped versions. State requirements vary.

If a state benefit-granting agency rejects an unstamped Form I-20/DS-2019, applicants may make an appointment with USCIS online through InfoPass and take their I-20/DS-2019 to their local USCIS office to be stamped. This transitional step will end on November 21, 2012.

The notice is available at http://www.cbp.gov/xp/cgov/travel/travel_news/cbp_i20_stamp.xml.

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7. State Dept. Announces Numerical Limits for Immigrants in FY 2012

The Department of State determines worldwide numerical limitations on visa issuances, based in part on data provided by U.S. Citizenship and Immigration Services (USCIS). On August 8, 2012, USCIS provided the required data to the Department's Visa Office. The Department has determined that the worldwide employment-based preference limit for fiscal year 2012 is 144,951, and the family-sponsored preference limit is 226,000. The per-country limit is fixed at 7 percent of the family and employment annual limits; for FY 2012, the per-country limit is 25,967. The dependent area annual limit is 2 percent, or 7,419.

The Visa Bulletin for September 2012, which includes the cut-off dates for employment-based and family-based visa numbers, is available at http://www.travel.state.gov/visa/bulletin/bulletin_5759.html.

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8. CBP Warns I-94 Processing May Be Delayed

U.S. Customs and Border Protection (CBP) is automating traveler arrival records to streamline passenger processing. The current processing time for entering foreign visitors' travel information into the I-94 database is 30 days or more. This does not affect the majority of foreign travelers visiting for business or leisure and will not affect any visitor's record of departure, CBP said.

Visitors may need to prove their legal-visitor status within the first 30-45 days of their U.S. stay to:

- employers;
- motor vehicle registration or drivers' licensing agencies;
- the Social Security Administration;
- U.S. Citizenship and Immigration Services; or
- universities and schools.

If visitors need to provide evidence of legal status during this time frame, they should include:

- an unexpired foreign passport;
- the country of citizenship; and
- CBP Arrival/Departure Record, Form I-94 (if issued)

Contact CBP for more information or with questions:

Tel: (877) CBP-5511

TTD: (866) 880-6582

The announcement is available at http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/i94_data_entry.xml.

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9. Groups of Travelers Can Now Submit Multiple ESTA Applications

U.S. Customs and Border Protection (CBP) announced on August 9, 2012, that multiple applications may be submitted and paid for in one transaction via the Electronic System for Travel Authorization (ESTA). The new online application is available beginning on Wednesday, August 15.

Applicants must enter biographic data and an e-mail address to create a Group ID that will allow a family or group the ability to input up to 50 ESTA

applications and complete the transaction in a single credit card payment. All payments for ESTA applications must be made by credit card or debit card when applying or renewing. Applications will not be submitted for processing until all payment information is received.

ESTA is an electronic travel authorization that all nationals of Visa Waiver Program (VWP) countries must obtain before boarding a carrier to travel by air or sea to the United States under the VWP. This travel authorization has been mandatory since January 12, 2009. ESTA applications may be submitted at any time before travel, although CBP recommends applying at least 72 hours before departure. Once approved, authorizations are generally valid for multiple entries into the U.S. for up to two years or until the applicant's passport expires or other specific circumstances give rise to a need to reapply, whichever comes first.

The Department of Homeland Security administers the VWP. The program enables eligible nationals of 36 VWP designated countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Additional information regarding the VWP is available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/. Frequently asked questions about the VWP and ESTA are available at http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/faq_vwp.xml .

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10. Second Circuit Finds New York Law Prohibiting Nonimmigrant Pharmacists Unconstitutional

In *Paidi v. Mills*, the U.S. Court of Appeals for the Second Circuit found unconstitutional New York Education Law ¤ 6805(1)(6), which stated that only U.S. citizens and legal permanent residents may obtain a pharmacist's license in New York.

The nonimmigrant plaintiffs had obtained pharmacists' licenses. Most of them had H-1B temporary worker visas; the remaining plaintiffs had TN (Trade NAFTA) visas. The court noted that although all of the plaintiffs were on temporary visas, they all were legally authorized to reside and work in the United States for more than six years, and in some cases for more than 10 years.

The court noted that the Fourteenth Amendment to the U.S. Constitution provides that states may not deny to any person within its jurisdiction the equal protection of the laws. Under the Fourteenth Amendment, any law that interferes with the exercise of a fundamental right or "operates to the peculiar disadvantage of a suspect class" is to be reviewed under a strict scrutiny standard. The court also pointed out that the Supreme Court has long held that states cannot discriminate based on alienage. There are only two exceptions to the strict scrutiny standard, the court noted. The first exception "allows states to exclude aliens from political and governmental functions as long as the exclusion satisfies a rational basis review." The second exception acknowledges that people who reside in the United States without authorization may be treated differently in some instances from those who are in the United States legally.

In the instant case, the court noted that New York was proposing that a third exception be established that the Fourteenth Amendment's protections not apply to nonimmigrant lawfully admitted persons who require a visa to remain in the United States. The court rejected New York's approach, noting that, among other things, the bedrock of the Supreme Court's decisions in this area is the fact that "although lawfully admitted aliens and U.S. citizens are not constitutionally distinguishable, aliens constitute a discrete and insular minority because of their limited role in the political process" and are therefore relatively powerless and vulnerable. The court said that the state's focus on lawfully admitted nonimmigrants' "transience" was "overly formalistic and wholly unpersuasive," since the plaintiffs were transient in name only.

The court said it agreed with the district court that there is no evidence that transience among New York pharmacists threatens public health or that nonimmigrant pharmacists, as a class, are considerably more transient than LPR and citizen pharmacists. "Citizenship and Legal Permanent Residency carry no guarantee that a citizen or LPR professional will remain in New York (or the United States for that matter), have funds available in the event of malpractice, or have the necessary skill to perform the task at hand." Noting that there are other ways to limit the dangers of potentially transient professionals, the court held that the statute unconstitutionally discriminated against the plaintiffs in violation of their Fourteenth Amendment rights.

The court added that the federal power to determine immigration policy is settled, extensive, and predominant. Federal law recognizes that states have a

legitimate interest in ensuring that applicants for professional licenses have the necessary educational and experiential qualifications for the positions sought. But "that traditional police power cannot morph into a determination that a certain subclass of immigrants is not qualified for licensure merely because of their immigration status," the court said. By making immigration status a professional qualification and thereby causing the group of noncitizens and non-LPRs whom Congress intended to allow to practice specialty occupations to be ineligible to do so, the New York statute "has created an obstacle to the accomplishment and execution of the ," the court noted, agreeing with the district court that Congress's federal laws creating H-1B and TN status were not merely "advisory."

The decision is available at http://docs.justia.com/cases/federal/appellate-courts/ca2/10-4397/10-4397-2012-07-10.pdf.

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11. Chicago National Processing Center Has Moved

The Chicago National Processing Center (CNPC) has a new address. Paper filings for the D-1, H-2A, and H-2B programs should be sent to the CNPC's new addresses below. The CNPC move does not affect the electronic filing of labor condition applications (LCAs), but any employer with permission to file by hard copy should direct its LCA filing(s) to the new address.

Payments of H-2A labor certification fees should be sent to the new P.O. Box address (also listed below).

Mailing Address for Application Filings:

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

P.O. Box Address for the Receipt of H-2A-Related Filing Fees:

U.S. Department of Labor
Employment and Training Administration

Office of Foreign Labor Certification
Chicago National Processing Center
P.O. Box A3804
Chicago, IL 60690-3804

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12. Firm In The News

Cyrus D. Mehta was listed in *Who's Who Legal 2012*'s Corporate Immigration category.
http://www.whoswholegal.com/profiles/41905/0/Mehta/cyrus-d-mehta/)

Cyrus Mehta has been appointed Chair of AILA' National's Ethics Committee. Cora-Ann Pestaina has again been appointed (for the third consecutive year) Co-Chair of AILA-NY's Department of Labor Committee. David Isaacson has been appointed Co-Chair of AILA-NY's Federal Practice Committee.

CDMA is assisting in Free Legal Assistance Deferred Action Clinic sorganized by the City Bar Justice Center,
http://www2.nycbar.org/citybarjusticecenter/images/stories/pdfs/deferredaction-savethedate.pdf

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