



MARCH 2013 IMMIGRATION UPDATE

Posted on March 5, 2013 by Cyrus Mehta

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1. [USCIS Posts EB-5 Memorandum for Public Comment](#) - USCIS posted an updated memorandum on the EB-5 program, and is soliciting public comment.
2. [H-1B Filing Starts April 1](#) - Companies should prepare to file H-1B petitions, and evaluate their anticipated hiring needs for H-1B professionals for the 12-month period beginning on October 1, 2013.
3. [House, Senate Hold Hearings; President Weighs in on Immigration Reform in State of the Union Address](#) - Recent House of Representatives and Senate hearings focused on immigration reform. Also, President Obama included immigration reform issues in his State of the Union Address.
4. [USCIS Announces Forms Improvement Initiative](#) - Among other things, the agency is publishing many forms in a two-column, Adobe fillable format that restricts incorrect entries and provides informational pop-up boxes to assist users.
5. [OFLC Issues FAQs on H-2A Temporary Agricultural Foreign Labor Certification Program](#) - The FAQs include information on pre-filing; filing; job offers, assurances, and obligations; rates of pay; post-certification; labor certification fee requirements and processes; labor certification determinations; special procedures; H-2A labor contractors; and positive recruitment and hiring of U.S. workers.
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Details:

1. USCIS Posts EB-5 Memorandum for Public Comment

On February 14, 2013, U.S. Citizenship and Immigration Services posted an updated memorandum on the EB-5 program, and is soliciting public comment. The updated memo makes various technical changes. Among other things, it clarifies that a material change after filing of an I-526 through admission as a conditional resident requires a new I-526, and that any approved I-526 will be revoked if such a change occurs. The memo also notes that if an immigrant investor is guaranteed the return of a portion of his or her investment, or is guaranteed a rate of return on a portion of his or her investment, then that portion of the capital is not at risk. If the investor is guaranteed the right to eventual ownership or use of a particular asset, then the value of the guaranteed ownership or use of such asset will be subtracted from the total amount of the investor's capital contribution in determining how much money was truly placed at risk. The memo notes that nothing precludes an investor from receiving a return on his or her capital during or after the conditional residence period, so long as the return was not previously guaranteed to the investor and so long as the funds are not a return of the investor's principal.

The memo also notes that in the case of a troubled business, job preservation is allowed in addition to, or in lieu of, job creation. In a troubled business, 10 jobs must be preserved, created, or some combination of the two. For example, an investment in a troubled business that creates four qualifying jobs and preserves all six pre-investment jobs would satisfy the statutory and regulatory requirements. "Troubled business" is defined in the memo, which quotes the regulations.

The announcement is available at

<http://content.govdelivery.com/bulletins/gd/USDHSCIS-6c6f98>. The draft memo is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=5034678eeba48210VgnVCM100000082ca60aRCRD&vgnnextchannel=5034678eeba48210VgnVCM100000082ca60aRCRD>.

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2. H-1B Filing Starts April 1

Cyrus D. Mehta & Associates, PLLC (CDMA) reminds clients that H-1B filing starts April 1, 2013.

Companies should prepare to file H-1B petitions, and evaluate their anticipated hiring needs for H-1B professionals (specifically, those requiring initial H-1B visas) for the 12-month period beginning on October 1, 2013. That is the date on which new H-1B visas become available under the annual cap. Employers can file H-1B petitions no earlier than six months in advance of the anticipated start date, so April 1, 2013, signals the start of what has become an annual race to get petitions filed as early as possible to ensure acceptance before the cap of 85,000 visas is reached. The 85,000 cap includes the basic cap of 65,000, plus an additional 20,000 H-1B visas available to foreign nationals who have earned an advanced degree (master's or higher) from a U.S. university.

The H-1B cap for fiscal year 2013 was reached in June 2012. The pace of hiring this year means that the demand for new H-1B workers could result in the new cap being reached sometime in April. As in past years, some foreign nationals are not subject to the H-1B cap, including individuals who already have been counted toward the cap in a previous year and have not been outside the United States subsequently for one year or more. Also, certain employers, such as universities, government-funded research organizations, and some nonprofit entities are exempt from the H-1B cap. All other employers should be aware of the H-1B cap.

CDMA recommends that clients keep us apprised of all new hires needing H-1B status before October 1, 2014. Examples would include F-1 students hired with optional practical training that expires before April 1, 2014, or current L-1B nonimmigrants who will have spent five years in that status as of any date before October 1, 2014.

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3. House, Senate Hold Hearings; President Weighs in on Immigration Reform in State of the Union Address

Recent House of Representatives and Senate hearings focused on immigration reform. Also, President Obama included immigration reform issues in his State of the Union Address.

House hearing. On February 5, 2013, the House of Representatives' Judiciary Committee held a hearing on "America's Immigration System: Opportunities for Legal Immigration and Enforcement of Laws Against Illegal Immigration." Rep. Bob Goodlatte (R-Va.), chairman of the committee, said that additional hearings on this topic would take place in the Immigration and Border Security Subcommittee.

Witnesses included Vivek Wadhwa, Director of Research, Pratt School of Engineering, Duke University; Michael Teitelbaum, Senior Advisor, Alfred P. Sloan Foundation and Wertheim Fellow, Harvard Law School; Puneet S. Arora, Vice President, Immigration Voice; Julian Castro, Mayor, San Antonio, Texas; Julie Myers Wood, President, Guidepost Solutions LLC; Chris Crane, President, National Immigration and Customs Enforcement Council 118, American Federation of Government Employees; Jessica Vaughan, Director of Policy Studies, Center for Immigration Studies; and Muzaffar Chishti, Director, Migration Policy Institute's office at New York University Law School.

Mr. Wadhwa noted that foreign students graduating from U.S. colleges and universities have difficulty in finding jobs because employers have difficulty in getting H-1B visas. Those graduates who are lucky enough to get a job and a visa and who decide to make the U.S. their permanent home find that it can take years—sometimes more than a decade—to get a green card, he said. "If they have ideas for building world-changing technologies and want to start a company, they are usually out of luck, because it is not usually possible for people on H-1B visas to work for the companies they might start." Not surprisingly, Mr. Wadhwa said, many are getting frustrated and returning home: "We must stop this brain drain and do all we can to bring more engineers and scientists here." He recommended (1) increasing the numbers of green cards available to H-1B holders; (2) allowing spouses of H-1B holders to work; (3) targeting immigration based on required skills; (4) allowing H-1B holders to change jobs without requiring sponsorship renewal; (5) extending the term of optional practical training for foreign students from one to four years; (6) instituting a startup visa; and (7) removing the country caps on permanent residence applications.

Mayor Castro recommended further strengthening border security; streamlining the legal immigration process "so that law-abiding companies can get the workers they need in this 21st century global economy"; and creating a path to citizenship "to bring the estimated 11 million undocumented

immigrants in this country out of the shadows and into the full light of the American Dream." He said that "outdated visa allocations" that separate family members for years "make no sense," and that companies who want to play by the rules are sometimes "handcuffed by rigid employment ceilings and burdensome regulations." He noted that as global competition increases, American companies watch U.S.-trained engineers, nurses, and entrepreneurs "leave in frustration only to invent new products, heal the sick and bring new innovations to other countries." Mayor Castro also lamented "DREAMers" who were brought to the United States as children but remain in legal limbo.

Ms. Vaughan said the most important responsibility of the U.S. government is to secure the borders. She said that the "most conspicuous void" in immigration law enforcement, however, has been in the workplace. Among other things, she recommended "outline, frequent and thorough enforcement discourages illegal workers by creating an expectation that they could be subject to arrest and removal at any time."

Mr. Chishti recommended, among other things, establishing a nonpartisan commission, called for by the Independent Task Force on Immigration and America's Future (convened by the Migration Policy Institute), that would make recommendations to Congress every year or two for adjusting immigration levels "based on analyses of labor market needs, unemployment patterns, and changing economic and demographic trends." He noted that the task force also recommended creating a provisional worker visa to bridge the "frequently artificial" distinction between temporary and permanent immigration and "build a system that is more closely aligned with how migration flows and labor markets work in practice." The commission would recommend the number of provisional workers to be admitted every year. Such provisional workers in all occupations would be allowed to enter the country sponsored by employers and work for two renewable three-year periods. They would be allowed to change employers after an initial period, and could bring family members. Over time, they could be eligible to adjust status to permanent residence. Mr. Chishti also suggested testing a variety of identity verification options. Among other things, he recommended that the Department of Homeland Security empanel a group of employer and worker representatives, and other stakeholders, to help it monitor E-Verify and advise on its progress during various stages of enrollment.

Senate hearing. The Senate Judiciary Committee held a hearing on

comprehensive immigration reform on February 13, 2013. Witnesses included Janet Napolitano, Secretary of Homeland Security; Jose Vargas, Founder, Define American; Jessica Vaughan, Director of Policy Studies, Center for Immigration Studies; Steve Case, Chairman and CEO, Revolution, and Co-Founder, America Online; Chris Crane, President, National Immigration and Customs Enforcement Council 118 of the American Federation of Government Employees; and Janet Murgu'a, President and CEO, National Council of La Raza. Sens. Ted Cruz (R-Tex.), Mazie Hirono (D-Haw.), and Patrick Leahy (D-Vt.) submitted statements.

Sen. Leahy opened the hearing by noting that "ost importantly, comprehensive immigration reform must include a fair and straightforward path to citizenship for those TdreamersY and families who have made the United States their home -- the estimated 11 million undocumented people in the United States." He said he is "troubled by any proposal that contains false promises in which citizenship is always over the next mountain." Sen. Leahy noted that in Vermont, immigration "has promoted cultural richness through refugee resettlement and student exchange, economic development through the EB-5 Regional Center program, and tourism and trade with our friends in Canada. Foreign agricultural workers support Vermont's farmers and growers, many of whom have become a part of farm families that are woven into the fabric of Vermont's agricultural community." He said that President Obama "has a comprehensive proposal that he has deferred sending to us at the request of Senators working to develop their own legislation."

Mr. Case said the United States did not become the world's leading economy by luck or accident. He noted that pioneering immigrant entrepreneurs, beginning with the country's earliest settlers, took a risk hoping to turn dreams into business, and their startup businesses became primary drivers of our economic growth. He noted that U.S. Steel, Pfizer, Kraft Foods, Honeywell, AT&T, Yahoo, and Goldman Sachs were all started by immigrants. Today, he said, 40 percent of Fortune 500 companies in the United States were started by immigrants or the children of immigrants, employing 10 million people across the globe and earning \$4 trillion in revenue. Of the 10 most valuable brands globally, he said, seven of them come from U.S. companies founded by immigrants or their children, and in the past 15 years, immigrants founded one-quarter of U.S. venture-backed public companies. He said statistics show that immigrants are almost twice as likely as U.S.-born workers to start a company. Between 1995 and 2005, he noted, half of Silicon Valley startups had an immigrant founder. In

2005 alone, those businesses achieved \$52 billion in sales supporting 400,000 jobs. In 2011, he said, more than three-quarters of the patents filed at the top ten patent-producing U.S. schools had an immigrant inventor. Of the 1,600 computer science PhD graduates from U.S. universities in 2010, 60 percent were foreign students, Mr. Case noted. He added that "this is not just about technology companies." Mr. Case said that when Hamdi Ulukaya, an immigrant from Turkey, told friends that he was going to start a yogurt company in upstate New York in 2005, they advised against the idea, but Hamdi was adamant. He hired four employees to begin packaging yogurt by hand. Eight years later Chobani Yogurt generates \$1 billion in sales, has hired 1,500 American workers, and is expanding operations across the country.

Ms. Murgu'a said that "if we are to restore the rule of law, the single most essential element of immigration reform is an earned legalization program with a clear, achievable roadmap to citizenship. Not because enforcement is unimportant, but because enforcement is all we have done thus far, and restoring the rule of law requires both elements." She noted that the "continuation of a situation where we collectively nod and wink because our society benefits from labor is unacceptable. When our laws don't reflect reality, reality will win every time."

Mr. Crane remarked on low employee morale at U.S. Immigration and Customs Enforcement. Out of 291 federal agencies, he said, only 12 ranked lower than ICE in employee morale and job satisfaction, according to the results of a survey that included managers, officers, agents, and administrative personnel. Among other things, he blamed confusion among ICE employees about who they can or cannot arrest and which federal laws they should enforce. Among other things, he claimed that undocumented aliens in jail are being released by claiming they qualify under Deferred Action for Childhood Arrivals without being required to provide any documentation.

State of the Union. On February 12, 2013, President Barack Obama delivered his first State of the Union address of his second term in office. On the topic of immigration reform, he noted that the U.S. economy "is stronger when we harness the talents and ingenuity of striving, hopeful immigrants. And right now, leaders from the business, labor, law enforcement, faith communities -- they all agree that the time has come to pass comprehensive immigration reform." Real reform, he said, means:

strong border security, and we can build on the progress my administration has already made -- putting more boots on the Southern border than at any time in our history and reducing illegal crossings to their lowest levels in 40 years. Real reform means establishing a responsible pathway to earned citizenship -- a path that includes passing a background check, paying taxes and a meaningful penalty, learning English, and going to the back of the line behind the folks trying to come here legally. And real reform means fixing the legal immigration system to cut waiting periods and attract the highly skilled entrepreneurs and engineers that will help create jobs and grow our economy.

President Obama noted that bipartisan groups in both chambers were "working diligently" to draft a bill. "Send me a comprehensive immigration reform bill in the next few months, and I will sign it right away," he said.

Witness testimony from the House hearing is available at http://judiciary.house.gov/hearings/113th/hear_02052013.html. Testimony from the Senate hearing is available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=edb04882c2725d013ec8d198a622e257>. The State of the Union Address transcript is available at <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

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4. USCIS Announces Forms Improvement Initiative

U.S. Citizenship and Immigration Services (USCIS) recently announced improvements to its online forms. Among other things, the agency is publishing many forms in a two-column, Adobe fillable format. USCIS said that when completed electronically, this format restricts incorrect entries and provides informational pop-up boxes to assist users.

Other changes include:

- Including plain-language, comprehensive instructions in several naturalization forms;
- Centralizing filing locations at USCIS Lockbox facilities. Beginning in February 2013, those filing Form N-470, Application to Preserve Residence for Naturalization Purposes, should mail their applications to the Dallas Lockbox facility;

- Publishing high-volume forms with 2D barcode technology. The barcode at the bottom of the page will store the data entered on the form via a computer. USCIS will then be able to scan the information from the barcode and upload it directly to USCIS systems;
- Enhancing Web content, including posting filing addresses and detailed fee information on forms' landing pages.

The latest fee schedule is available at

<http://www.uscis.gov/files/form/g-1055.pdf>. Fee information is also available in the instructions to forms and in detailed fee charts on many form landing pages.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d778667aad6ac310VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD>.

Additional details are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d9e2728c2a6ac310VgnVCM100000082ca60aRCRD&vgnnextchannel=fe529c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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5. OFLC Issues FAQs on H-2A Temporary Agricultural Foreign Labor Certification Program

The Office of Foreign Labor Certification (OFLC) of the Department of Labor's Employment and Training Administration recently released rounds 7 and 8 of its FAQs on the 2010 final rule on the H-2A temporary agricultural foreign labor certification program.

Round 7 FAQ. The round 7 FAQ includes information on pre-filing; filing; job offers, assurances, and obligations; rates of pay; post-certification; labor certification fee requirements and processes; and labor certification determinations.

Among other things, the FAQ notes that dairy farmers who perform milking operations are not able to qualify for an H-2A labor certification. OFLC explained that to qualify, the employer's need must be seasonal. OFLC said it considers each employer's specific circumstances on a case-by-case basis, but that the majority of dairy activities, and milk production in particular, "are year-round and therefore cannot be classified as either temporary or seasonal."

The FAQ also notes that nonpayment or untimely payment (later than 30 calendar days after the date of certification) of H-2A labor certification fees may be considered a substantial violation and subject the employer to debarment from the H-2A program.

OFLC noted that when the prevailing wage rate for a specific crop in a specific state changes after a certification has been granted, the agency posts the new prevailing wage rate, including the effective date, on its website in the Agricultural On-Line Wage Library (AOWL), available at <http://www.foreignlaborcert.doleta.gov/aowl.cfm>. Also, the Chicago National Processing Center (NPC) sends a letter to all potentially affected employers notifying them of the change. Because OFLC receives new wage findings from states for different crops/occupations on a rolling basis, it encourages employers to periodically check the AOWL to ensure that they are paying the appropriate required wage throughout the certified period of employment.

Round 8 FAQ. The round 8 FAQ includes information on special procedures (such as for employers engaged in itinerant custom combine activities); pre-filing; filing; job offers, assurances, and obligations, including rates of pay, pre-employment costs, and reimbursements; H-2A labor contractors; and positive recruitment and hiring of U.S. workers.

Among other things, the FAQ notes that an employer may request a pre-occupancy housing inspection well in advance of its date of need. Early contact with the state workforce agency (SWA) will provide the employer with time to resolve potential housing compliance issues without affecting the issuance of the temporary labor certification, OFLC noted. An employer is not required to submit proof that its housing complies with applicable program requirements at the time of filing its Application for Temporary Employment Certification (ETA Form 9142), but OFLC said the Department cannot grant a temporary labor certification without proof, which is typically provided in the form of a confirmation from the SWA that the employer-provided housing has sufficient

capacity and complies with applicable requirements.

OFLC encourages an employer who has not already obtained the SWA's approval of its housing to contact the SWA to schedule the required pre-occupancy housing inspection as part of its initial preparations to submit the ETA 9142. At the latest, the employer must request the housing inspection when submitting its job order (ETA Form 790) to the SWA.

The FAQ notes that the Agricultural Online Wage Library, available at <http://www.foreignlaborcert.doleta.gov/aowl.cfm>, reflects the current prevailing wage rate for agricultural occupations.

FAQ #7 is available at

http://www.foreignlaborcert.doleta.gov/pdf/FAQ_Round%207_final.pdf. FAQ #8 is available at http://www.foreignlaborcert.doleta.gov/pdf/h2a_round8.pdf.

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6. ABIL Global: Germany

The EU Blue Card visa category is an interesting option available to companies assigning personnel to Germany.

The German residence and work permit regulations are complex. Regulations have to be well-understood to maximize the chances for success of international transfers. Even if the German labor market is basically still affected by the so-called ban on recruitment (i.e., the categorical ban on the recruitment of foreign employees), foreign employees can regularly be employed under certain circumstances in practice.

In particular, there are certain advantages to the employment of highly qualified staff in comparison to normal staff. There is a considerable accumulated need in Germany for highly qualified employees against the background of intensified global competition for the most qualified labor.

The relatively high former salary threshold for executives and the highly skilled (€86,400 gross until December 31, 2008) had been reduced significantly (to €67,000 gross per year as of January 1, 2012) and was further reduced last year. Effective August 1, 2012, the salary threshold was eliminated for the highly skilled visa category. It was reduced by the implementation of the European Union (EU) Blue Card Directive and the implementation of the EU Blue Card (*Blaue Karte EU*) visa category in Germany. As of January 1, 2013, the

salary threshold now is €46,400 gross for academic persons and is down to €36,192 gross for certain job categories (such as natural scientists, mathematicians, engineers, doctors, or IT consultants) and applicants holding a degree from a German university.

The grant of a residence permit to take up employment under the EU Blue Card visa category is possible without the need for a job market test, which alone cuts the processing time to 4-8 weeks instead of 8-12 weeks for visa categories that can only be granted once a job market test has been carried out. However, the conditions of employment must be at least comparable to those that would be offered for the position to a person from the local (German and EU) job market. It is not yet clear if a local employment contract is required for the EU Blue Card.

The EU Blue Card may be granted as a settlement permit after a certain period of time if the employee has duly contributed to the social security system. This is an advantage for the holder of the permit but not necessarily for the sponsor, because the permit is not linked to employment with a specific company. Nevertheless, the EU Blue Card visa category is a very interesting option available to companies assigning personnel to Germany.

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7. Firm In The News

David Isaacson was a panelist at the March 4, 2013 meeting of the AILA New York Chapter (hosted by the Federal Practice Committee of which he is the co-chair), speaking on recent notable decisions of the U.S. Court of Appeals for the Third Circuit.

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