



APRIL 2013 IMMIGRATION UPDATE

Posted on April 2, 2013 by Cyrus Mehta

Headlines

- 1. [H-1B Filing for FY 2014 Starts April 1; USCIS Will Begin Premium Processing for H-1B Cap Cases on April 15](#)** - Companies should file H-1B petitions now, and evaluate their anticipated hiring needs for H-1B professionals for the 12-month period beginning on October 1, 2013. USCIS will begin premium processing for H-1B cap cases on April 15.
- 2. [USCIS Releases New Two-Page I-9 Verification Form, Handbook for Employers](#)** - Changes to the I-9 include new fields, reformatting, and revised instructions to both employees and employers.
- 3. [No Wages Due If H-1B Employee Is Voluntarily Nonproductive, ALJ Finds](#)** - An arts school did not owe an H-1B nonimmigrant employee back pay for voluntarily nonproductive "work" time.
- 4. [Deferred Enforced Departure Extended for Liberians](#)** - USCIS announced that it is automatically extending EADs through September 30, 2013, for Liberian nationals covered under DED. The automatic EAD extension followed President Barack Obama's decision to extend DED through September 30, 2014.
- 5. [Effects of Sequestration: CBP Releases Info on Effects on Border, Traveler Programs; USCIS To Lose \\$151 Million](#)** - CBP warned that it anticipates "significant potential impacts to cross-border travel and trade," which will increase as peak travel seasons occur.
- 6. [Witnesses Argue in Favor of Skilled Immigration at House Hearing](#)** - Judiciary Committee Chairman Bob Goodlatte (R-Va.) opened the hearing by noting, among other things, a study finding that each additional 100 immigrants with advanced STEM degrees is associated with an additional 262

jobs for U.S. natives.

7. ABIL Global: Belgium - New sanctions and measures against employers of unauthorized workers have been implemented, as has a new legal framework for enhanced inspection coordination relating to the employment of foreign nationals. Also, the administrative fees for residence permits have increased.

8. Firm In The News ...

Details

1. H-1B Filing for FY 2014 Starts April 1; USCIS Will Begin Premium Processing for H-1B Cap Cases on April 15

Cyrus D. Mehta & Associates, PLLC (CDMA) reminds clients that H-1B filing for fiscal year 2014 starts on April 1, 2013. To facilitate the prioritized data entry of cap-subject petitions requesting premium processing, USCIS will begin premium processing for H-1B cap cases on April 15, 2013.

Companies should file H-1B petitions now, 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 (masterXs 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 in early 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.

U.S. Citizenship and Immigration Services (USCIS) said it anticipates receiving more petitions than the H-1B cap between April 1 and April 5, 2013. If USCIS receives more petitions than it can accept, it will use a lottery system to randomly select the number of petitions filed during that period to reach the numerical limit. The agency will reject petitions that are subject to the cap but not selected, as well as petitions received after it has the necessary number of petitions needed to meet the cap. The lottery for the H-1B cap was last used in April 2008.

USCIS noted that filers of H-1B cap cases may continue to request premium processing concurrently. Due to "historic" premium processing levels, combined with the possibility that the H-1B cap will be met quickly, USCIS said it has temporarily adjusted its current premium processing practice. As noted above, to facilitate the prioritized data entry of cap-subject petitions requesting premium processing, USCIS will begin premium processing for H-1B cap cases on April 15, 2013, even if they are filed earlier.

USCIS' announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f537eff29cb6d310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439>

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=7b63eff29cb6d310VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD>. A related announcement on premium processing for H-1B cap-subject petitions is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=7b63eff29cb6d310VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD>

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2. USCIS Releases New Two-Page I-9 Verification Form, Handbook for Employers

U.S. Citizenship and Immigration Services (USCIS) has released a revised Employment Eligibility Verification Form (I-9), effective March 8, 2013. All employers must complete an I-9 for each employee hired in the United States. Changes to the I-9 include new fields, reformatting, and revised instructions to

both employees and employers. Optional fields have been added for employee e-mail addresses and telephone numbers, as well as foreign passport information if applicable.

Employers should have begun using the newly revised Form I-9 (Rev. 03/08/13)N for all new hires and reverifications. Employers may continue to use previously accepted revisions until May 7, 2013. After May 7, 2013, employers must only use the I-9 version with the revision date of (Rev. 03/08/13)N. The revision date of the I-9 is printed on the lower left corner of the form.

USCIS noted that employers should not complete a new I-9 for current employees if a properly completed I-9 is already on file.

A Spanish version of the revised I-9 is available on the USCIS website for use in Puerto Rico only. Spanish-speaking employers and employees in the 50 states; Washington, DC; and other U.S. territories may use the Spanish version for reference but must complete the English version of the form.

USCIS said it is updating, and will release shortly, a new handbook for employers containing guidance for completing the I-9.

USCIS is holding numerous upcoming webinars on the I-9 form. For the full list, see

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=413628ac1dc0c210VgnVCM100000082ca60aRCRD&vgnextchannel=413628ac1dc0c210VgnVCM100000082ca60aRCRD>.

The revised form is available in English and Spanish. The Department of Homeland Security published a notice in the Federal Register about the revised I-9. The USCIS announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=bc6e41f935a4d310VgnVCM100000082ca60aRCRD&vgnextchannel=55b2aca797e63110VgnVCM1000004718190aRCRD>. The Federal Register notice is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-03-08/pdf/2013-05327.pdf>.

USCIS also released a new M274 Handbook for Employers. It has a revision date of 3-8-13 and is available at <http://www.uscis.gov/files/form/m-274.pdf>.

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3. No Wages Due If H-1B Employee Is Voluntarily Nonproductive, ALJ Finds

The Department of Labor's Office of Administrative Law Judges recently found that North Shore School for the Arts (NSSA) did not owe an H-1B nonimmigrant employee back pay for voluntarily nonproductive "work" time. NSSA had employed Natsuko Imai as a piano/music teacher for 20 hours per week at a wage rate of \$40 per hour.

Among other things, an NSSA representative stated that Ms. Imai took some students into her own private studio rather than continuing to work with them as NSSA students, which was against NSSA policy. The representative also stated that Ms. Imai was uncooperative in working to get more students. The representative made suggestions for doing so that Ms. Imai rejected. Despite claims to the contrary, Ms. Imai was trying to get into graduate school and spent much of her time practicing piano rather than teaching or performing related outreach duties.

Administrative Law Judge (ALJ) Stephen M. Reilly noted that wages are to be paid for nonproductive time if the employee is "ready, willing, and able" to work and the nonproductive time resulted from a decision of the employer. He found Ms. Imai's testimony "rife with evasiveness, equivocation and forgetfulness." He said that her demeanor during testimony "raised questions regarding her truthfulness." He also found her disregard of the law "troubling" because she admitted to working while on an F-1 student visa and also to working outside NSSA while she was in H-1B status, which are violations. She further admitted that she did not report income for tax purposes. She said she knew these actions were against the law when she did them. ALJ Reilly gave her testimony "little weight" because of these factors and her evasive answers. For example, the ALJ noted that she said that obtaining a doctoral degree was not her plan, but acknowledged that she had applied to doctoral programs and sought and obtained several recommendations for that purpose.

ALJ Reilly also noted that although Ms. Imai spent long hours at the school, her focus was on practicing the piano, not teaching or performing her job duties. He found that Ms. Imai did not make herself available to perform her job duties and thus was not ready, willing, and able to work. The ALJ did not hold the NSSA's representative blameless either, stating that she was "blinded to

reality." ALJ Reilly found the employer responsible for back pay for work performed (74.5 hours plus interest, for a total of \$2,980), but not for the hours in dispute during which Ms. Imai was not performing work.

The case is available at

[http://www.oalj.dol.gov/Decisions/ALJ/LCA/2012/WAGE_and_HOUR_DIVISION_NORTH_SHORE_SCHOOL_F_2012LCA00039_\(JAN_18_2013\)_102855_CADEC_SD.PDF](http://www.oalj.dol.gov/Decisions/ALJ/LCA/2012/WAGE_and_HOUR_DIVISION_NORTH_SHORE_SCHOOL_F_2012LCA00039_(JAN_18_2013)_102855_CADEC_SD.PDF).

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4. Deferred Enforced Departure Extended for Liberians

U.S. Citizenship and Immigration Services (USCIS) recently announced that it is automatically extending employment authorization documents (EADs) through September 30, 2013, for Liberian nationals covered under deferred enforced departure (DED). The automatic EAD extension followed a memorandum announcing President Barack Obama's decision to extend DED through September 30, 2014, for qualified Liberians and those persons without nationality who last habitually resided in Liberia. USCIS said the six-month extension of existing EADs will permit eligible Liberians to continue working in the United States while they file their applications for new EADs that will cover the full 18 months of the DED extension.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0beebe0548f6d310VgnVCM100000082ca60aRCRD&vgnextchannel=6>

<http://www.gpo.gov/fdsys/pkg/FR-2013-03-21/html/2013-06519.htm>. A related Federal Register notice is available at

<http://www.gpo.gov/fdsys/pkg/FR-2013-03-21/html/2013-06519.htm>. The

Presidential Memorandum is available at

<http://m.whitehouse.gov/the-press-office/2013/03/15/presidential-memorandum-deferred-enforced-departure-liberians>.

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5. Effects of Sequestration: CBP Releases Info on Effects on Border, Traveler Programs; USCIS To Lose \$151 Million

U.S. Customs and Border Protection (CBP) has released information about the effects of "sequestration" (mandated federal budget cuts under the Budget Control Act of 2011) on traveler and border programs. CBP stands to lose \$512 million in fiscal year (FY) 2013 funds, according to the Office of Management and Budget (OMB). CBP warned that it anticipates "significant potential impacts to cross-border travel and trade," which will increase as peak travel seasons occur. The agency noted that, among other things, it will lose "up to several thousand" CBP officers at ports of entry in addition to undergoing "significant cuts" to operating budgets and programs.

CBP said that security will remain the highest priority. The agency noted that all trusted traveler and trader programs, including Global Entry, SENTRI, NEXUS, C-TPAT, and FAST, will be "maintained and emphasized."

CBP said it anticipates the following effects, among others, at ports of entry:

- Increased wait times for personal vehicles and pedestrians at land border ports of entry, with the potential of doubling of peak wait times up to several hours or more at the largest ports, leading to potential gridlock during peak travel seasons;
- Increased wait times at major international airports of up to 50 percent or more, with peak wait times of up to 3-4 hours or more at some gateway airports;
- Reduced flexibility to maintain or extend operating hours or respond to requests for new services.

CBP noted that the cuts are taking place against a backdrop of significant growth in international travel and trade. According to CBP, international air travel has increased by 12 percent over the past three years and is expected to increase an additional 5 percent this year. Also, land border passenger traffic is increasing on both the northern and southern borders.

CBP has launched a Web page to provide information and updates on the effects of sequestration on its operations, available at

http://www.cbp.gov/xp/cgov/newsroom/advisories/info_seq_cbrops/.

Meanwhile, the Office of Management and Budget released a document showing FY 2013 cuts to all federal government branches and agencies resulting from sequestration. Among other things, it shows that U.S. Citizenship and Immigration Services, which is primarily funded from fee-based services,

stands to lose \$151 million. U.S. Immigration and Customs Enforcement also released several thousand lower-risk detainees in anticipation of budget cuts.

A list of the Department of Homeland Security's cuts begin on page 27 of the OMB publication, "OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013." See page 7 of the OMB publication for a paragraph explaining what the numbers mean. The OMB publication is available at

http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13_ombjcsequestrationreport.pdf.

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6. Witnesses Argue in Favor of Skilled Immigration at House Hearing

Skilled immigration was the topic of a hearing held on March 5, 2013, by the House of Representatives Subcommittee on Immigration and Border Security. Judiciary Committee Chairman Bob Goodlatte (R-Va.) opened the hearing. Witnesses included Bruce Morrison, Chairman, Morrison Public Affairs Group (testifying on behalf of IEEE-USA); Dean Garfield, President and CEO, Information Technology Industry Council; Deepak Kamra, General Partner, Canaan Partner; and Benjamin Johnson, Executive Director, American Immigration Council.

Rep. Goodlatte noted, among other things, that foreign-born inventors have received 76 percent of patents awarded to top U.S. patent-producing universities in cutting-edge fields like semiconductor device manufacturing, information technology, digital communications, pharmaceuticals, and optics. He cited a study finding by the American Enterprise Institute and the Partnership for a New American Economy that each additional 100 immigrants with advanced STEM (science, technology, engineering, and mathematics) degrees is associated with an additional 262 jobs for U.S. natives. The study also found, he noted, that immigrants with advanced degrees pay over \$22,000 per year in taxes on average but their families receive less than \$2,300 in government benefits.

Rep. Goodlatte lamented that despite the "outstanding track record of immigrants in founding some of our most successful companies," the United States only selects less than one percent of immigrants on the basis of

entrepreneurial talents. By contrast, he noted, Australia, the United Kingdom, and Canada each select over 60 percent of immigrants on the basis of skills and education. He recommended an approach similar to a House bill that did not pass the Senate last year. That bill would have redirected approximately 50,000 green cards from the diversity visa lottery toward foreign students graduating from U.S. universities with advanced degrees in STEM fields.

He recommended that in the new Congress, all aspects of high-skilled immigration policy should be reviewed with an eye toward improving temporary visa programs for skilled workers, such as those on H-1B and L visas; improving the E-2 temporary visa program for entrepreneurs; offering green cards to aspiring entrepreneurs "that don't demand that they themselves be rich but that instead rely on the judgment of the venture capitalists who have funded them"; reducing backlogs for second- and third-preference employment-based green cards; and seeking to help the United States retain more foreign graduates of U.S. universities.

Mr. Morrison noted that the Immigration Act of 1990 nearly tripled employment-based green cards from 54,000 to 140,000 per year, and set a permanent cap of 65,000 H-1B visas per year. He said this was to encourage employers hiring foreigners for permanent jobs to use legal permanent residence visas, putting them on a path toward citizenship. He argued in favor of providing more green cards for skilled workers and a more direct way for employers to sponsor new hires for green cards as soon as they are hired. He noted that 20 percent of IEEE-USA members are immigrants, and student chapters with a mix of native-born and foreign student members abound. He said there is a consensus among IEEE-USA membership that they do not want to be part of a system that uses temporary visas "to advantage or disadvantage some employees over others." With green cards, he said, "you do not have to write endless rules regarding portability and prevailing wages. The job market sorts all this out."

Mr. Garfield said the United States is creating technology jobs faster than we can fill them. He noted that other than a modest permanent change in 2004, the private sector has access to roughly the same number of H-1B visas as it did in 1990. He said the United States is likely to run out of the annual allotment of 65,000 H-1B visas "within weeks" of April 1, "leaving no new hiring options for FY 2014 and forcing businesses to move jobs elsewhere even when they may not want to." Mr. Garfield said his organization recommends reform

that helps to fill skilled job openings while accelerating new jobs and new knowledge-driven businesses; supplementing the U.S. workforce with skilled immigration reform; and using skilled immigration reform to maximize work in the United States that could be performed elsewhere.

Mr. Kamra argued in favor of a "StartUp Visa" category. He said the H-1B visa is not a workable solution for starting a company in the United States, since entrepreneurs need to devote themselves full-time to building a new company. He recommended including criteria such as requiring entrepreneur visa candidates to receive legitimate funding and to prove subsequent job creation or company growth. Among other things, he recommended that the required first round of funding for any StartUp Visa recipient not be too high, and that ongoing monitoring of the entrepreneur's progress and milestones account for the high-risk nature of such companies.

Mr. Johnson noted that the talent we seek often comes to the United States not only through employment-based channels but also through family reunification, the admission of refugees and asylees, and even within the population of unauthorized workers. He suggested that the quest for talent is not an isolated enterprise but part of systematic immigration reform. He lamented the reductive "buzz words and myths" that fail to acknowledge the "nuanced and complex role immigration plays in American economic growth, business development, and global competitiveness" and pitting native-born workers against their foreign-born colleagues. He argued in favor of creating a "revamped and revitalized immigration system."

Mr. Johnson recommended reforms that provide job portability, labor protections and economic opportunities for both workers and their families. He said the current system is inflexible and outdated, and argued in favor of a "nimble and efficient system" that responds in real time to the needs of the market by giving employers the ability to fill positions quickly with workers who are protected from exploitation.

The witness statements are available at
http://judiciary.house.gov/hearings/113th/hear_03052013.html.

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

New sanctions and measures against employers of unauthorized workers have been

implemented, as has a new legal framework for enhanced inspection coordination relating to the employment of foreign nationals. Also, the administrative fees for residence permits have increased.

New Sanctions/Measures

The Belgian Act, dated February 11, 2013, provides for sanctions and measures against employers of third-country nationals without authorization. The law implements European Directive 2009/52.

Under the new rules, in addition to already existing sanctions, an employer who employs third-country nationals staying in Belgium without authorization can be sanctioned financially (for example, back payment of remunerations, taxes, and social security contributions).

A potential employer of a third-country national also is subject to a threefold "information obligation." The employer must: (1) verify before the start of employment whether the third-country national holds a valid residence permit or other authorization of stay; (2) keep available for inspection a copy or record of the residence permit or other authorization to stay; and (3) notify the authorities of the start and termination of employment under the applicable rules. Infringement of these rules, including document fraud of which the employer was aware, is considered a serious infringement under the Code on Labor and Social Security Criminal Law.

The Belgian Act also provides sanctions and, to some extent, potential liability with regard to a portion of wages for parties who work, directly or indirectly, as a contractor or subcontractor, with employers of unauthorized third-country nationals.

These new provisions took effect March 4, 2013.

Legal Framework for Enhanced Inspection Coordination

Inspections for compliance relating to the employment of foreign nationals in Belgium is a responsibility at both the federal and regional levels (Brussels, Flanders, and Walloon Regions, and the German-speaking community).

On June 11, 2011, the Belgian federal authorities entered into a cooperation agreement with these regional authorities. The agreement will enhance inspections related to the employment of foreign nationals in Belgium by coordinating inspections and facilitating the exchange of information between

the inspection services.

The Belgian federal authorities have approved the cooperation agreement by an Act dated March 1, 2013, which took effect March 31, 2013.

Increase in Administrative Fees for Residence Permits

Belgian residence permits are electronic identification cards, issued by the municipal authorities but produced by an external company. The Belgian Ministry of Interior Affairs recently decided to slightly increase (from 3 to 5 EUR) the fees that are charged to municipalities for these electronic ID cards. The overall fees charged to applicants also will increase.

A Royal Decree dated March 15, 2013, that took effect on April 1 determines the new fees chargeable to the municipal authorities:

- The fee for "regular" processing (3 to 5 weeks) of an electronic residence permit is now 15 EUR;
- If transport of the permits is handled exclusively by an external company, the fees for "very urgent" processing (2 working days) and "urgent" processing (3 working days) are 180 and 116 EUR, respectively. If the municipality is also involved in the transport of the permits, these fees may be 86 or 57 EUR, respectively.

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8. Firm In The News

New Publications and Items of Interest

Cyrus Mehta spoke at the American Immigration Lawyers Association's Philadelphia Chapter conference on March 15, 2013. Mr. Mehta was the Program Chair, *Basic Immigration Law 2013*, at Practising Laws Institute, New York, March 14, 2013

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