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

AUGUST 2013 IMMIGRATION UPDATE

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Headlines:

1. **DHS Issues FAQ on Supreme Court's DOMA Ruling** – Secretary of Homeland Security Janet Napolitano said she has "directed to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse."
2. **DOL Labor Certification Registry Goes Live** – The registry is intended to provide the public with access to "appropriately redacted" copies of H-1B, H-1B1, E-3, H-2A, H-2B, and permanent labor certification documents issued by OFLC, as well as quarterly and annual case disclosure data.
3. **DOL Proposes To Delay Effective Date of H-2B Wage Methodology Final Rule Indefinitely** – The wage rule revised the methodology by which the DOL calculates the prevailing wage to be paid to H-2B workers and U.S. workers recruited in connection with temporary labor certifications to employ H-2B nonimmigrant worker
4. **USCIS Updates DOMA FAQ** – The latest FAQ notes that U.S. citizens and lawful permanent residents in same-sex marriages to foreign nationals can now sponsor their spouses for family-based immigrant visas, and that spouses who were married in a U.S. state or foreign country that recognizes same-sex marriage, but who live in a state that does not, can file immigrant visa petitions for their spouses.
5. **ABIL Global: South Africa** – A significant amendment to the law is expected in the next few months that will affect transferring employees and their families to South Africa.
6. **ABIL Global: France** – Under a new law, marriage will confer the same rights under French immigration procedures regardless of the sex of the spouses. Also, the deployment of biometrics has led to modifications in procedures for applying for a residence permit.

7. **Firm In The News...**

Details:

1. **DHS Issues FAQ on Supreme Court's DOMA Ruling**

The Department of Homeland Security issued a FAQ on July 1, 2013, in response to the Supreme Court's decision on June 26, 2013, *United States v. Windsor*, which struck down the 1996 Defense of Marriage Act (DOMA) as unconstitutional. That law had prohibited the federal government from recognizing same-sex marriages, regardless of whether they were legally valid in certain states or in other countries, and from conferring federal benefits on same-sex spouses that are enjoyed by heterosexual spouses.

The FAQ notes that Secretary of Homeland Security Janet Napolitano said she has "directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse." The FAQ provides the following questions and answers:

> **Q1: I am a U.S. citizen or lawful permanent resident in a same-sex marriage to a foreign national. Can I now sponsor my spouse for a family-based immigrant visa?**
>
> A1: Yes, you can file the petition. You may file a Form I-130 (and any applicable accompanying application). Your eligibility to petition for your spouse, and your spouse's admissibility as an immigrant at the immigration visa application or adjustment of status stage, will be determined according to applicable immigration law and will not be automatically denied as a result of the same-sex nature of your marriage.
>
> **Q2: My spouse and I were married in a U.S. state that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse?**
>
> A2: Yes, you can file the petition. In evaluating the petition, as a general matter, USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. That general rule is subject to some limited exceptions under which federal immigration agencies historically have considered the law of the state of residence in addition to the law of the state of celebration of the marriage.

Whether those exceptions apply may depend on individual, fact-specific circumstances. If necessary, we may provide further guidance on this question going forward.

About 30,000 same-sex binational couples include spouses who may now be eligible for immigration benefits. The Supreme Court's ruling applies only to same-sex couples in the 13 states that recognize gay marriage, not to the other states that don't. Legal observers disagree whether a gay couple who gets married in one state and moves to another state that doesn't recognize the marriage will still be entitled to federal benefits.

USCIS's new FAQ is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fbfe0b8497b9f310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. The Supreme Court's DOMA decision is available at http://www.cnn.com/interactive/2013/06/politics/scotus-ruling-windsor/index.html?hpt=hp_t1. Details and additional coverage are available at http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/. Another FAQ about the ruling's impact on immigration cases is available at http://immigrationequality.org/2013/06/the-end-of-doma-what-your-family-needs-to-know/.

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2. **DOL Labor Certification Registry Goes Live**

The Department of Labor (DOL) recently announced implementation of the Labor Certification Registry (LCR) on the Office of Foreign Labor Certification's (OFLC) iCERT Visa Portal System website. The LCR is intended to provide the public with access to "appropriately redacted" copies of H-1B, H-1B1, E-3, H-2A, H-2B, and permanent labor certification documents issued by OFLC, as well as quarterly and annual case disclosure data.

The LCR displays all certified H-1B1 and E-3 Labor Condition Applications (LCA) and permanent labor certifications, dating back to April 15, 2009. However, the DOL said it is experiencing technical difficulties with the display of approved H-1B LCAs. In addition, due to the historical paper-based filings of H-2A and H-2B applications, the DOL said that it must manually redact and upload these labor certification documents to the LCR. Therefore, only a limited number of

records covering fiscal year 2013 are currently available. The agency said it anticipates that H-1B LCAs will be available soon, and that staff will continue to upload historical H-2A and H-2B documents in the coming months.

The registry is available at http://icert.doleta.gov/index.cfm?event=ehLCJRExternal.dspLCRLanding. A related Federal Register notice is available at http://www.gpo.gov/fdsys/pkg/FR-2013-01-24/pdf/2013-01406.pdf. The announcement is available at http://www.foreignlaborcert.doleta.gov/news.cfm.

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3. **DOL Proposes To Delay Effective Date of H-2B Wage Methodology Final Rule Indefinitely**

The Department of Labor (DOL) proposes to delay indefinitely the effective date of the "Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program" final rule (2011 wage rule) "to comply with recurrent legislation that prohibits the from using any funds to implement it, and to permit time for consideration of public comments sought in conjunction with an interim final rule published April 24, 2013, 78 FR 24047."

The 2011 wage rule revised the methodology by which the DOL calculates the prevailing wage to be paid to H-2B workers and U.S. workers recruited in connection with temporary labor certifications to employ H-2B nonimmigrant workers. The 2011 wage rule was originally scheduled to become effective on January 1, 2012, and the effective date has been extended a number of times, most recently to October 1, 2013. The Department is now proposing to delay the effective date of the 2011 wage rule "until such time as Congress no longer prohibits the from implementing" it.

DOL explained that, among other things, the appropriations bill enacted in November 2011 prevented funding but did not prohibit the 2011 wage rule from going into effect. The DOL explained that the 2011 wage rule would supersede and nullify the prevailing wage provisions at 20 CFSR 655.10(b) of the DOL's existing H-2B regulations. Accordingly, in light of the November 2011 appropriations bill, the DOL decided to delay the effective date of the 2011 wage rule. If the wage rule had taken effect, the DOL explained, "uch an occurrence would have rendered the H-2B program inoperable because the

issuance of a prevailing wage determination is a condition precedent to approving an employer's request for an H-2B labor certification."

Subsequent appropriations legislation contained the same restriction prohibiting the DOL's use of appropriated funds to implement, administer, or enforce the 2011 wage rule and, the DOL said, necessitated subsequent extensions of the effective date of that rule. The DOL therefore now proposes to delay the effective date indefinitely until such time as the rule can be implemented with appropriated funds.

Additionally, the DOL and the Department of Homeland Security (DHS) recently promulgated an interim final rule, requesting comments, to establish a new wage methodology in response to *CATA v. Solis*, decided in 2013. The interim final rule requires prevailing wage determinations issued using the Occupational Employment Statistics (OES) survey to be based on the mean wage for an occupation in the area of intended employment, without tiers or skill levels. The comment period closed on June 10, 2013, and the DOL and DHS are reviewing the comments and determining whether further revisions to 20 CFSR 655.10(b) are warranted.

DOL explained that the confluence of the recent Congressional prohibition of implementation of the 2011 wage rule and the DOL's current review and consideration of comments made in response to the proposed new wage methodology require the indefinite delay of the effective date of the 2011 wage rule. Even if Congress lifts the prohibition of implementation of the 2011 wage rule, the DOL said it would need time to assess the current regulatory framework; consider any changed circumstances, novel concerns, or new information received; and minimize disruptions.

The DOL invites comment until August 9, 2013, on the proposed indefinite delay of the effective date of the 2011 wage rule. If Congress should no longer prohibit implementation, the DOL would publish a notice in the Federal Register within 45 days on the status of 20 CFR 655.10 and the effective date of the 2011 wage rule.

The DOL's Federal Register notice of proposed rulemaking is available at http://www.ofr.gov/OFRUpload/OFRData/2013-17676_PI.pdf.

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4. USCIS Updates DOMA FAQ

U.S. Citizenship and Immigration Services has updated its frequently asked questions (FAQ) on same-sex marriages under the Supreme Court's recent decision holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. The latest FAQ notes that U.S. citizens and lawful permanent residents in same-sex marriages to foreign nationals can now sponsor their spouses for family-based immigrant visas. Their eligibility will be determined according to applicable immigration law and they will not be denied because of a same-sex marriage.

The FAQ also notes that spouses who were married in a U.S. state or foreign country that recognizes same-sex marriage, but who live in a state that does not, can file immigrant visa petitions for their spouses. The FAQ states that as a general matter, "the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes."

The FAQ also includes information about applying for benefits, what to do about previous denials, changes in eligibility based on same-sex marriage, residence requirements, inadmissibility waivers. It is available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD.

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5. ABIL Global: South Africa

A significant amendment to the law is expected in the next few months that will affect transferring employees and their families to South Africa.

Transferring Employees and Their Families to South Africa

Under current South African immigration law, a company can transfer or deploy one or more of its employees to a company that is "operating in South Africa." This is on condition that the two companies are in a holding, subsidiary, or "affiliate relationship."

There are three key conditions to qualify for such a permit. First, the person must be an existing employee who will return to his or her employment at the offshore company at the end of the term of the deployment. Second, the company in South Africa must in fact be operating. And third, there must be a qualifying relationship between the two companies. The term "affiliate

relationship" is not defined and deliberately allows for considerable flexibility. These permits are usually issued for a two-year period and cannot be renewed or extended.

The permit requirements fall into two broad categories: those that are specific to the intra-company transfer work permit and those that are required for any permit that authorizes a period of residence in South Africa of more than three months. The key requirements specific to the intra-company transfer work permit include, among other things, a copy of the employee's offshore contract and proof that he or she has the skill needed for the assignment in South Africa.

All family members (assuming they are not South African citizens or permanent residents) accompanying the foreign national to be transferred, no matter their ages, must apply for appropriate permits to reside in South Africa.

As may be suggested by the "transfer" permit's name, South Africa's permit system is activity-specific. So if the family includes dependents who will be studying at a tertiary institution or a school (but excluding a pre-school), they must obtain study permits before they can attend the institution. If the dependent is not attending school or is home-schooling, he or she needs a long term visitor permit to accompany the holder of the transfer permit.

For purposes of residence in South Africa, the Immigration Act recognizes non-formalized life partnerships and does not discriminate based on sexual orientation. Couples do not need to be married or in a civil union for purposes of obtaining a residence permit. But the couple will need to prove the fact of the spousal relationship. The term "spouse" refers to the partner, whether married or not. The relationship must be monogamous. The spouse also must obtain a long-term visitor permit to accompany the holder of the transfer permit.

There is no special dispensation for the spouse who wishes to study, be employed, or be self-employed, while in South Africa. They (and/or the place of learning or employer) must comply with all the relevant prescribed requirements of the appropriate temporary residence permit. This is the case even if the spouse wishes to work (or remain working) for an employer back home even where the company does not have a presence in South Africa.

Under current policy, the South African Department of Home Affairs prefers

that people seeking to take up a post in South Africa (and their families), should apply for the appropriate permit at the nearest South African embassy or consulate and have obtained the permit(s) before they leave for South Africa. Application can be made for all the appropriate permits (for the transferee, the spouse, and the children) at the same time. The consequent permit, if approved, will be endorsed into the applicant's passport.

The general rule is that foreign nationals must at all times have a permit in their passport that accurately describes the purpose and period for which they have been authorized to enter and remain in South Africa. If those circumstances change, the person must apply to the Department of Home Affairs for authorization to remain in the country under those changed circumstances.

A significant amendment to South African law is expected in the next few months. It is imperative that proper and comprehensive advice be sought from a skilled immigration attorney.

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6. ABIL Global: France

Under a new law, marriage will confer the same rights under French immigration procedures regardless of the sex of the spouses. Also, the deployment of biometrics has led to modifications in procedures for applying for a residence permit.

Same-Sex Marriage Rights Conferred Under French Immigration Procedures

The Act of May 17, 2013, modifies section 143 of the Civil Code to read: "Marriage is contracted by two persons of opposite sex or the same sex." France thus joins the countries that have legalized marriage between persons of the same sex. Those countries include Belgium, Spain, Canada, some states in the United States and Brazil, the Netherlands, Sweden, New Zealand, South Africa, Mexico (Federal District), Argentina, Norway, Denmark, Portugal, Iceland, and Uruguay. The new law means that in France, marriage will confer the same rights under French immigration procedures regardless of the sex of the spouses.

- General Provisions; Conflict of Laws In Other Countries; Consular MarriageThe above implies that two foreigners of the same sex can marry when one of them resides or is domiciled in France. However, this rule

does not apply to nationals of countries with which France is bound by bilateral agreements (Poland, Algeria, Tunisia, Morocco, republics of the former Yugoslavia, Cambodia and Laos), which provide that the law governing conditions for marriage is the personal law. The marriage, however, may take place in a non-prohibitive state having no bilateral agreement with the country of the spouses.A consular marriage (registered at the French consulate) between same-sex French nationals would not raise an issue. However, a consular marriage between a French national and a foreign national may be more complex in consular posts in countries that prohibit same-sex marriage. In such case, the Civil Code provides that marriage may take place in France.

- The law of May 17, 2013, also provides that marriages between same-sex couples, validly celebrated abroad at a time when the French law forbade it, may be recognized retroactively.
- Foreign nationals may find themselves in situations where their marriages in France are not recognized by their countries of origin.
- Article 202-1 of the Civil Code provides that the conditions for marriage are governed by family law, but article 202-2 provides that two persons of the same sex can marry when the family law or the law of the state of residence of one spouse permits. This arrangement allows avoidance of the application of the family law of one spouse prohibiting marriage between persons of the same sex when the marriage took place on the territory of a state recognizing marriage between persons of the same sex.

- Impact on French Immigration Rights of Foreign Nationals Moving to FranceA same-sex marriage between a foreign national and a French national will allow the issuance of a visa and a residence permit to the foreign national as the spouse of a French national, on the basis of the Civil Code and Article L313-11-4 CESEDA.Recognition of marriage for same-sex couples could also give rise to new legal actions when a decision refusing stay may be considered as disproportionate interference with the rights to private and family life, under Article 8 of the European Convention on Human Rights.
- The marriage between a third-country national in the European Union with a European citizen is expected to allow the issuance of a residence permit as a European spouse under Articles L121-3 to L121-5 CESEDA.

- Derivative residence and worker rights known as "accompanying family rights" will be applicable to married foreign workers under Intra-Company Transfer, EU Blue Card, and Skills and Talents status, regardless of the sexual identity of the spouses when the marriage is celebrated in France or recognized by France (marriage between two foreigners) on the basis of the new provisions of the Civil Code and Article L313-11-3 CESEDA (code de l'entrée et du séjour des étrangers et du droit d'asile).

Biometrics Deployed

The deployment of biometrics in all French departments (*département*, or administrative area) has led to modifications in procedures for applying for a residence permit and requires an additional appearance at the Prefecture for fingerprinting. This change also will affect the beneficiaries of one-stop Office Français de l'Immigration et de l'Intégration (OFII) processing (e.g., Intra-Company Transferees, EU Blue Cards, Skills and Talents) by the end of the year.

    - Gradual Deployment of Biometrics and Modifications in Residence Permit Application ProcessAfter a first stage completed in 2011 with the release of the new uniform format for residence permits, the second step will be to collect and insert fingerprints of foreign nationals collected by the Prefecture into the integrated residence electronic component of the permit.Fingerprints will be valid for five years.

- The fingerprinting will require modifications of the procedures for applying for a residence permit. Any person requesting a residence permit (first application or renewal) will be required to go in person to the Prefecture for fingerprinting, as noted above. A deposit at City Hall will no longer be possible and procedures by mail will be affected.

- A regulation of the Council of the European Union (EC), No. 380/2008 of April 18, 2008, mandates a new format for biometric residence permits comprising an electronic component into which are inserted a photograph and two fingerprint images. Under this regulation, the Ministry of Interior issued two circulars in April 2011 and June 2012, describing the details on implementing the new residence permit requirement and the progressive deployment of biometrics, which is now effective in several departments.

- Impact on Categories of Foreigners Benefiting From the One-Stop OFII Process

To date, the three categories of foreigners benefiting from the one-stop OFII process (Intra-Company Transferees, EU Blue Cards, Skills and Talents), as well as family members of holders of these permits, have been exempted temporarily from biometric compliance in the departments using the one-stop OFII process. This exemption is valid until completion of the deployment of biometrics. France had aimed at full deployment by the end of the first half of 2013, but only a few departments have implemented biometrics to date: Loire-Atlantique, Alpes-Maritimes, Hauts-de-Seine, SaÔne-et-Loire, Essonne, Seine-et-Marne, and Puy-de-DÔme. However, the deployment will affect all French departments by the end of the year.

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7. Firm In The News

Cyrus Mehta was a Speaker at the New York City Bar, Summer Series, on *Careers in Immigration Law,* held on July 18, 2013.

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