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

NOVEMBER 2013 IMMIGRATION UPDATE

Posted on November 4, 2013 by Cyrus Mehta

Headlines:

1. **Federal Government Reopens; OFLC, USCIS Announce Temporary Accommodation for I-129 H-2A Petitions** **-** The Department of Labor's Office of Foreign Labor Certification and USCIS announced temporary accommodation for I-129 H-2A petitions.

2. **EOIR Updates Guidance on Immigration Court Filings After Government Shutdown, Changes Zip Code** - EOIR issued details about immigration court filings in the wake of the government shutdown, and announced a change in zip code.

3. **E-Verify Issues Guidance for Employers on Technical Glitch Related to Documentation** - On October 22, 2013, E-Verify experienced some technical issues, and has issued related guidance.

4. **USCIS Clarifies Eligibility Requirements for 17-Month Extension of Post-Completion OPT for F-1 STEM Students** - F-1 students engaging in post-completion OPT are eligible for a 17-month STEM extension even if they have not yet completed the thesis requirement or equivalent for their STEM degree.

5. **Congress Extends Special Immigrant Visa Program for Iraqis** - Visas may be issued to principal applicants until December 31, 2013.

6. **FY 2014 Limit Set for CNMI-Only Transitional Workers** - DHS has announced a limit of 14,000 nonimmigrants for FY 2014 for CNMI-Only Transitional Workers.

7. **SEVP Sought Feedback on Draft Guidance re Vacations, Temporary Absences, and Timely Filings** - The program is accepting feedback on draft guidance regarding vacations, temporary absences, and timely filings.

8. **ABIL Global: Schengen Area** - A new European regulation clarifies the calculation of the authorized length of short-term stays in the European Union (new "90-day rule,") and amends other rules.

9. **Firm In The News**

Details

1. Federal Government Reopens; OFLC, USCIS Announce Temporary Accommodation for I-129 H-2A Petitions

The Department of Labor's Office of Foreign Labor Certification issued the following announcement on October 23, 2013:

With the reopening of the federal government, USCIS has been informed that the Department of Labor's (DOL) Office of Foreign Labor Certification is once again accepting and processing applications, including Temporary Labor Certifications (TLCs).

On Oct. 21, 2013, DOL issued an announcement to H-2A stakeholders stating that once the TLC is certified, the Chicago National Processing Center will send an email to the employer and its authorized representative containing an Adobe PDF of the labor certification. The employer would need to print, sign and date the PDF version for submission to USCIS with the Form I-129, Petition for Nonimmigrant Worker.

USCIS usually requires that a petitioner submit the certified TLC on blue security paper with original signatures. Beginning October 23, 2013, USCIS in consultation with DOL has determined that USCIS will temporarily accept Form I-129 H-2A petitions that are filed with a copy of the certified TLC. During this temporary accommodation, the signatures on the TLC submitted to USCIS do not need to be original. This temporary accommodation is being implemented because of the unique time sensitivities associated with agricultural work.

H-2A petitioners must submit the original Form I-129 petition, all required fees, and supporting documentation with a copy of the signed, certified TLC. DOL has indicated that this accommodation should last no longer than 30 days. USCIS will provide further guidance on when this accommodation will expire. At that time, H-2A petitioners will once again be required to submit the signed original of the certified TLC with their H-2A petition.

The notice is available at http://www.foreignlaborcert.doleta.gov/. USCIS'

related notice is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=47894061ca6e1410VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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2. EOIR Updates Guidance on Immigration Court Filings After Government Shutdown, Changes Zip Code

The Department of Justice's Executive Office for Immigration Review (EOIR) issued updated guidance on October 25, 2013, about immigration court filings following the U.S. government shutdown. The guidance notes that during the government shutdown (October 1-16, 2013), EOIR was operating in a limited capacity. Immigration courts nationwide continued to adjudicate "detained" cases but all other functions were suspended.

The guidance notes that any filing with the immigration court related to a "non-detained" case that was due October 1-16, 2013, will be considered timely filed if it is received by the appropriate court by November 8, 2013. No request for, or documentation supporting, an extension is required if the appropriate court receives the originally due filing before the close of business on November 8. EOIR said it will issue new notices of hearing for cases affected by the lapse in government funding. Cases will be scheduled for available dates on the docket, but will not be scheduled in a way Tthat would cause disruption to previously scheduled cases.y

EOIR also noted that the Board of Immigration Appeals (BIA) processed only filings related to detained cases during the lapse in government funding. The BIA accepted all filings during that period. Also, EOIR transitioned to zip code 20530 on October 1, 2013. Due to the convergence of those two events, the BIA said it will consider timely filed any filing that meets both of these criteria:

(1) the filing was due during the month of October 2013; and

(2) the BIA received the filing on or before November 1, 2013.

No request for, or documentation supporting, an extension is required for filings that arrive at the BIA by November 1, 2013. Filings that arrive after November 1, 2013, will be subject to normal filing deadlines. If timeliness is an issue for any filings that the BIA receives after November 1, 2013, the BIA

recommends consulting the *BIA Practice Manual*, available online at http://go.usa.gov/Wx7j.

EOIR said that the Office of the Chief Administrative Hearing Officer (OCAHO) maintained its ability to issue subpoenas and accept complaints required to be filed by statutory deadlines. OCAHO granted all requests for extensions of time or temporary stays of proceedings made during that period, and accepted all filings received. Future requests for extensions or stays will be decided on a case-by-case basis, EOIR said.

The notice is available at http://www.aila.org/content/default.aspx?docid=46240. The EOIRXs September zip code change was announced at http://www.justice.gov/eoir/press/2013/EOIRZipCodeChange09112013.html.

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3. E-Verify Issues Guidance for Employers on Technical Glitch Related to Documentation

U.S. Citizenship and Immigration Services disseminated an alert on October 24, 2013, noting that on October 22, 2013, E-Verify experienced some technical issues that now have been resolved. As a result, employees who provided U.S. Passports or Passport Cards were erroneously receiving Tentative Nonconfirmations. USCIS's instruction only applies to cases created on October 22, 2013, for employees who provided a U.S. Passport or Passport Card. It does not apply to other employees who provided other acceptable document(s) from the List of Acceptable Documents. USCIS sent the following guidance to E-Verify users:

If you created a case for an employee who provided a U.S. Passport or Passport Card and received a Tentative Nonconfirmation, close the case as "Invalid because the data entered is incorrect." You should then create a new case for the employee using the same U.S. Passport or Passport Card information provided for Form I-9.

Additionally, if you were unable to create a case, you should now create a new case for the employee using the same U.S. Passport or Passport Card information provided for Form I-9. If you created the new case on the same day as the technical issue (October 22, 2013), you must close that case as "Invalid because the data entered is incorrect" and create a new case.

If you are prompted to select or enter the reason why the case was not submitted within 3 business days of hire please select "Technical Problems" from the drop-down menu.

You must NOT ask the employee to provide a different document if the document(s) they provided, including the U.S. Passport or Passport Card, appear to be genuine and relate to the individual presenting it. You must NOT request that employees produce more documents than are required by Form I-9 to establish your employee's identity and employment authorization. Requiring that your employee present new or different documentation could be considered document abuse and is prohibited under the Immigration and Nationality Act.

We apologize for any inconvenience this may have caused. If you have any additional questions, please feel free to contact E-Verify at 888-464-4218. Customer service representatives are available Monday - Friday 8 AM - 5PM local time. You may also e-mail E-Verify at E-Verify@dhs.gov.

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4. USCIS Clarifies Eligibility Requirements for 17-Month Extension of Post-Completion OPT for F-1 STEM Students

On October 21, 2013, U.S. Citizenship and Immigration Services (USCIS) clarified eligibility requirements for a 17-month extension of post-completion optional practical training (OPT) for F-1 students enrolled in STEM (science, technology, engineering, and mathematics) programs.

USCIS said the issue is whether F-1 students engaging in post-completion OPT under 8 CFR ¤ 214.2(f)(10)(ii)(A) are eligible for the 17-month STEM extension under 8 CFR ¤ 214.2(f)(10)(ii)(C) if they have not yet completed their thesis requirement or equivalent for their STEM degree when applying for the STEM extension. USCIS said that F-1 students engaging in post-completion OPT are eligible for a 17-month STEM extension even if they have not yet completed the thesis requirement or equivalent for their STEM degree.

USCIS explained that to be eligible for post-completion OPT under 8 CFR ¤ 214.2(f)(10)(ii)(A), F-1 students must have completed their course of study, or, for students in a bachelor's, master's, or doctoral degree program, the students must have completed all course requirements for their degree, excludingany applicable thesis requirement or equivalent.

USCIS said that with a narrow reading of 8 CFR ¤ 214.2(f)(10)(ii)(C)(1) and (2), one might conclude that F-1 students who have been granted post-completion OPT under 8 CFR ¤ 214.2(f)(10)(ii)(A) must have completed all course requirements for their STEM degrees, *including* any applicable thesis requirement or equivalent, to be eligible for the 17-month STEM extension (i.e., only after "earninga STEM degree"). However, 8 CFR ¤ 214.2(f)(10)(ii)(C)(1) and (2) cannot be read in isolation, USCIS said; they must be read in conjunction with 8 CFR ¤ 214.2(f)(10)(ii)(A)(3), which states that students need not necessarily have completed their thesis requirement or equivalent to be eligible for post-completion OPT. Because the 17-month STEM extension is merely an extension of a previously granted period of post-completion OPT, USCIS concluded that students who are applying for the STEM extension need not necessarily have completed their STEM degree thesis requirement or equivalent to be eligible for the extension. Such a reading "is made even more compelling from a policy perspective, given the nation's interest in attracting and retaining the world's best and brightest individuals," USCIS said. Moreover, USCIS noted, such a reading is consistent with the position taken by the Student and Exchange Visitor Program (SEVP) in policy guidance on this specific issue.

Additional details are available in USCIS's guidance, available at http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/OPT-STEM-Extension.pdf.

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5. Congress Extends Special Immigrant Visa Program for Iraqis

Congress has extended, and President Barack Obama has signed, legislation (H.R. 3233) extending the Special Immigrant Visa (SIV) program for Iraqi nationals who worked for or on behalf of the U.S. government. The President signed the legislation on October 4, 2013.

The law extends the authority of the Department of State (DOS) to issue SIVs to Iraqi nationals under the National Defense Authorization Act of 2008 until December 31, 2013. Visas may be issued to principal applicants under this program until that date. Approved visas are not affected by the end of the program.

The SIV program that has been extended covers Iraqi nationals who, between

March 20, 2003, and September 30, 2013, were employed by or on behalf of the U.S. government in Iraq for a period of at least one year. The program had expired with respect to principal applicants on September 30, 2013, but has now been extended. The extension permits USCIS to approve petitions or applications for visas or adjustment of status to lawful permanent residence in any eligible Iraqi SIV case that were pending with USCIS or with DOS when the program expired on September 30, 2013. USCIS may also approve an additional 2,000 cases as long as the initial applications to the DOS Chief of Mission in Iraq are made by December 31, 2013.

Also, DOS's authority to issue Special Immigrant Visas to Afghan nationals expired on September 30, 2014. DOS said it welcomed any actions by Congress to extend the Afghan SIV program and to further extend the Iraqi SIV program. "Across the U.S. government, every effort is being made to ensure qualified applicants are processed in a timely fashion before the Iraqi and Afghan programs' scheduled end dates," DOS said. It is unclear how the government shutdown may have affected processing.

The authority to grant derivative SIV status to spouses and children of principal Iraqi SIVs did not sunset on September 30, 2013, and is not numerically capped.

USCIS's announcement is available at http://content.govdelivery.com/bulletins/gd/USDHSCIS-8f1668. The Department of State's announcement is available at http://travel.state.gov/visa/immigrants/types/types_1326.html.

Information on a separate extension for translators/interpreters in Iraq or Afghanistan who worked with the U.S. Armed Forces or under Chief of Mission authority is available at http://travel.state.gov/visa/immigrants/info/info_3738.html.

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6. FY 2014 Limit Set for CNMI-Only Transitional Workers

The Department of Homeland Security (DHS) announced a limit of 14,000 nonimmigrants for fiscal year (FY) 2014 for the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) program.

Under the CW-1 program, employers in the CNMI can apply for temporary permission to employ foreign nationals who are ineligible for any existing

employment-based nonimmigrant category. The CW program is in effect until December 31, 2014. Before that date, the CNMI's nonresident worker program is being transitioned to the U.S. federal immigration system. This transition period was established by the Consolidated Natural Resources Act of 2008 (CNRA), which extended, for the first time, most provisions of U.S. immigration law to the CNMI.

The annual CNRA-required reduction in CW-1 workers will eliminate the CW nonimmigrant classification by the end of the transition period. DHS set the CW-1 limit for FY 2014 at 14,000 to meet the CNMI's existing labor market needs and provide opportunity for potential growth, while meeting a CNRA requirement to reduce the numerical limit each year. The CW program will end on December 31, 2014, unless it is extended by the DOL.

U.S. Citizenship and Immigration Services said this announcement does not affect the status of current CW-1 workers unless their employers file for extensions of their current authorized periods of stay or they seek to change CW-1 employers. Approved petitions that request a work-start date in FY 2014 (between October 1, 2013, and September 30, 2014) will count toward the 14,000 limit. The numerical limit applies only to CW-1 principals, USCIS noted. It does not directly affect persons currently holding CW-2 status, which is for spouses and minor children of CW-1 nonimmigrants. However, CW-2 nonimmigrants may be indirectly affected because their status depends upon that of the principal CW-1.

A numerical limit of 15,000 CW-1s was set for FY 2013. As of August 13, 2013, employers in the CNMI filed petitions for at least 7,323 transitional workers.

USCIS's announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6a29b14e78551410VgnVCM100000082ca60aRCRD&vgnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD. The DHS's Federal Register notice is available at https://www.federalregister.gov/articles/2013/09/25/2013-23289/commonwealth-of-the-northern-mariana-islands-cnmi-only-transitional-worker-numerical-limitation-for.

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7. SEVP Sought Feedback on Draft Guidance re Vacations, Temporary

Absences, and Timely Filings

The Student and Exchange Visitor Program (SEVP) periodically requests feedback from the public on draft guidance affecting F and M students. The program accepted until October 23, 2013, feedback on guidance regarding vacations, temporary absences, and timely filings:

- Vacations: This document gives the SEVP interpretation of the F-1 student annual vacation regulation to guide adjudicators (http://studyinthestates.dhs.gov/assets/images/content/PG.1306-02-Annual-Vacation.pdf).
- Temporary absences: This document gives SEVP's interpretation of the temporary absence regulation to guide adjudicators and addresses the concept of authorized early withdrawal as it relates to temporary absence (http://studyinthestates.dhs.gov/assets/images/content/PG.1306-07-Temporary-Absence.pdf).
- Timely filings: SEVP notes that it is committed to the use of electronic reporting technology. Communications between SEVP and the academic community that previously depended upon the U.S. Postal Service and private-sector delivery companies are now conducted solely through electronic means. This guidance adjusts the allowable time for school officials and those who represent the schools to respond to SEVP notices. (http://studyinthestates.dhs.gov/assets/images/content/PG.1308-02-Timely-Filing.pdf).

Links to the draft guidance listed above are available in SEVP's notice at http://studyinthestates.dhs.gov/draft-guidance. The e-mail address for submitting feedback is SEVPFeedback@ice.dhs.gov (include the title of the guidance in the subject line).

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8. ABIL Global: Schengen Area

A new European regulation clarifies the calculation of the authorized length of short-term stays in the European Union (new "90-day rule,") and amends other rules.

Short-term stay is defined by European Union (EU) legislation as residence up

to "three months during the six months following the date of first entry." This wording has led to interpretation problems.

A recent European Regulation of June 26, 2013 (hereafter "Regulation 610/2013") amended the Schengen Borders Code and the Schengen Agreement by replacing the reference to "three months during the six months following the date of first entry" by "90 days in any 180-day period." The aim of the new wording is to install "clear, simple and harmonized rules" with regard to the "calculation of the authorized length of short-term stays in the ."

One of the amended articles is article 5, para. 1, introductory part, of the Schengen Borders Code. In this same article a new para. 1a is inserted:

1. For intended stays on the territory of the Member States of a duration of no more than 90 days in any 180-day period, which entails considering the 180-day period preceding each day of stay, the entry conditions for third-country nationals shall be the following:

1a. For the purposes of implementing paragraph 1, the date of entry shall be considered as the first day of stay on the territory of the Member States and the date of exit shall be considered as the last day of stay on the territory of the Member States. Periods of stay authorized under a residence permit or a long-stay visa shall not be taken into account in the calculation of the duration of stay on the territory of the Member States." (Emphasis added.)

All amended articles with regard to the new 90-day rule took effect on October 18, 2013.

Regulation 610/2013 has also amended other rules, already effective as of July 19, 2013. One of these rules is article 5, para. 1(a) of the Schengen Borders Code, pursuant to which the short-term stay entry conditions relating to a valid travel document have been modified. Under the new rules, the required valid travel document not only must entitle the holder to cross the border, but also must (i) be valid "at least three months after the intended date of departure from the territory of the Member States" (this requirement may be waived in "a justified case of emergency") and (ii) "have been issued within the previous 10 years."

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9. Firm In The News

Cyrus Mehta spoke on "U.S. Immigration and Tax Rules For Global Professionals" at the North American South Asian Bar Association's (NASABA) Tax & Immigration Webinar, October 24, 2013. For details, see http://www.nasaba.com/events/event_details.asp?id=356514.

Mr. Mehta also spoke on "Immigration Reform and Ethics" at the Statewide Meeting of the New York State Association of Disciplinary Attorneys, New York Country Lawyers' Association, in New York City on October 25, 2013.

Cora-Ann V. Pestaina spoke on PERMs at the monthly meeting of the AILA NY Chapter in New York, NY on October 7, 2008.

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