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

FEBRUARY 2014 IMMIGRATION UPDATE

Posted on February 3, 2014 by Cyrus Mehta

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2. H-1B Alert: Filing Starts April 1 for Next Fiscal Year - This past fiscal year, H-1B numbers were exhausted within the first five days of filing. The Alliance of Business Immigration Lawyers (ABIL) anticipates that the numbers will run out quickly again this year.

3. Half a Million Companies Now Participate in E-Verify, USCIS Announces - E-Verify has experienced significant growth.

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5. Federal Judge Rules in Favor of Stanford Student on 'No-Fly' List - After a long legal battle, a federal judge ruled that a Malaysian Stanford student is entitled by due process to a remedy that requires the government to "cleanse and/or correct" its lists and records of mistaken information.

6. Is Immigration Reform Possible in 2014? - House Speaker John Boehner hopes to push immigration reform legislation forward in 2014, a year in which midterm elections will take place in November.

7. Visa Bulletin Shows Advancement in Several Categories - The Department of State's Visa Bulletin for February 2014 shows advancement in priority dates for several employment-based categories.

8. **DOL Releases 2014 Adverse Effect Wage Rates** - The AEWRs are the minimum hourly wage rates the Department has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment for a particular agricultural job and area.

9. **California Supreme Court Rules Undocumented Immigrant Can Receive Law License** - California's Supreme Court ruled that an undocumented immigrant who received a law degree and passed the state bar exam must be given his license to practice law in California.

10. **ABIL Global: Australia** - The Australian government has revised labor market testing requirements in the 457 visa program.

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Details:

1. USCIS Expands Site Visits To Review of L-1 Petitions

USCIS's Fraud Detection and National Security (FDNS) Directorate has expanded its employer site visits to include review of L-1 post-adjudication petitions. Recent reports indicate that the agency is reviewing extensions of L-1 petitions and L-1 job duties and salaries to determine whether they are consistent with the L-1's classification as an executive or manager (L-1A) or specialized knowledge worker (L-1B).

USCIS may conduct announced or unannounced site visits as part of the visa petition process. Employers have been reporting that the FDNS inspectors' queries are similar to those made in H-1B site visits, particularly about whether wages are appropriate for the visa application, visa category, work location, hours, job duties, title, and experience of the employee. The employee may be questioned directly about his or her job duties.

FDNS's site visits are funded by the $500 anti-fraud fee paid with H-1B and L-1 petitions. Until recently, such compliance audits have primarily involved H-1B employers. More than 17,000 such visits occurred in FY 2011, which was an increase over 2010.

USCIS's Office of Inspector General in August recommended, among other things, that USCIS make a site visit a requirement before extending a one-year new office L-1 petition. USCIS concurred and said it expected to begin conducting post-adjudication domestic L-1 compliance site visits in FY 2014. The report is

available at http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-107_Aug13.pdf.

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2. H-1B Alert: Filing Starts April 1 for Next Fiscal Year

Congress sets a limit on the number of H-1B visas available each year. This past fiscal year, H-1B numbers were exhausted within the first five days of filing. The Alliance of Business Immigration Lawyers (ABIL) anticipates that the numbers will run out quickly again this year.

If U.S. Citizenship and Immigration Services (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. USCIS did this last year. 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.

Every time an employer hires an individual for a specialty occupation, an H-1B number must be available. (An exception arises where the individual is already with another employer in H-1B status, but this employer cannot be a university/college or a nonprofit government research organization.) When numbers run out, the employer must wait until the next fiscal year to file for an H-1B. In some cases, there may be no other nonimmigrant visa option for the individual and the individual may have to leave the U.S. or, at least, not be able to work for the employer until a year later.

While the H-1B numbers for the next fiscal year do not become available again until October 1, 2014, employers may file petitions to request numbers as early as six months in advance, beginning on April 1, 2014. That date 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.

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.

ABIL encourages employers to review their hiring needs and determine whether they should initiate H-1B processing for anticipated hires, or even recent hires in other nonimmigrant status now.

You should consider filing an H-1B petition this April if:

- You want to hire an individual who is not in H-1B status already.
- You are hiring an individual who is already in H-1B status but is currently employed with a college/university (this situation requires a new H-1B number).
- You are hiring an individual who is already in H-1B status but is with a nonprofit government research organization (this situation requires a new H-1B number).
- Your employee is in F-1 student status.
- Your employee is in L-1B status and is considering seeking legal permanent residence in the United States.
- Your employee is in another nonimmigrant status and may want to seek legal permanent residence in the United States.

ABIL recommends that clients keep their ABIL attorney (Cyrus D. Mehta, PLLC is a member of ABIL) 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. Contact your ABIL attorney now if you have any questions or would like to file an H-1B petition.

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3. Half a Million Companies Now Participate in E-Verify, USCIS Announces

U.S. Citizenship and Immigration Services (USCIS) announced on January 23, 2014, that more than 500,000 companies now use E-Verify. Employers use the online E-Verify system to check an employee's work authorization status. USCIS said that 98.8 percent of work-authorized employees are confirmed "instantly or within 24 hours, requiring no further employee or employer action."

USCIS noted that its efforts to enhance the system's security include agreements

with select states' departments of motor vehicles to ensure the authenticity of driver's licenses that employees use as identity documents; Self Check, which allows workers to look up their own employment eligibility status and correct their records before they seek employment; and a program that locks Social Security numbers suspected of being misused for employment eligibility verification.

E-Verify has experienced significant growth since its establishment in 1996. Annual enrollments increased tenfold during the program's first 16 years, from 11,474 in fiscal year (FY) 1996 to 111,671 in FY 2012. During FY 2013, employers used E-Verify more than 25 million times.

To commemorate the half-million-participant milestone, USCIS released "E-Verify for Business Leaders," a video that introduces the program to prospective users. USCIS also updated its
E-Verify website with "plain-language" content and easy-to-follow graphics.

The announcement is available at http://www.uscis.gov/news/news-releases/half-million-companies-now-participate-e-verify-0. The video is available at http://www.uscis.gov/videos/video-e-verify-business-leaders. The website is available at http://www.uscis.gov/e-verify.

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4. USCIS Adds Countries To Participate in H-2A and H-2B Programs

U.S. Citizenship and Immigration Services (USCIS) announced that the Department of Homeland Security, in consultation with the Department of State, has added Austria, Italy, Panama, and Thailand to the list of countries whose nationals are eligible to participate in the H-2A and H-2B visa programs for the coming year.

The notice listing the 63 eligible countries was published January 17, 2014, in the Federal Register. See https://www.federalregister.gov/articles/2014/01/17/2014-00331/identification-of-foreign-countries-whose-nationals-are-eligible-to-participate-in-the-h-2a-and-h-2b.

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5. Federal Judge Rules in Favor of Stanford Student on 'No-Fly' List

U.S. District Judge William Alsup of San Francisco, California, recently ruled that a

Malaysian Stanford student's legal rights were violated because she was wrongly put on the "no-fly" list nine years ago. The judge noted that the "government concedes that the plaintiff is not a threat to national security." He said she is "entitled by due process to a ... remedy that requires the government to cleanse and/or correct its lists and records of the mistaken information."

Rahinah Ibrahim attempted to board a flight in 2005 to Hawaii from San Francisco International Airport, but was told she was on the no-fly list. After a two-hour ordeal at the airport, during which she was questioned and denied any connection to terrorism, an agent of the Department of Homeland Security told her that her name had been removed from the no-fly list and she was free to fly to Hawaii. She then flew from Hawaii for a visit home to Malaysia. But when she tried to return via Kuala Lumpur International Airport two months later, she was stopped and the U.S. Embassy said her U.S. student visa was cancelled due to a suspected connection to terrorism. An eight-year legal battle followed, during which she was unable to return to the United States. She finished her Stanford education remotely.

Her attorneys filed suit seven years ago against several agencies, including the Federal Bureau of Investigation and the Department of Homeland Security. Government attorneys have been secretive, citing national security issues, Judge Alsup noted, and it was difficult to gain access to information. "It has gone so far as even to redact from its table of authorities some of the reported case law on which it relies! This is too hard to swallow," Judge Alsup noted.

The American Civil Liberties Union has filed suit in a similar case, representing 13 U.S. citizens who were blocked from air travel after a failed bombing attempt on Christmas Day 2009. The 13 citizens were not told why they were blocked or how to remove their names from the list. ACLU attorney Nusrat Choudhury said, "The Constitution prohibits the government from smearing people as suspected terrorists due to an entirely secret process, then not giving them a fair chance to defend themselves."

For background on the Ibrahim case and similar cases, see http://alumni.stanford.edu/get/page/magazine/article/?article_id=66231.

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6. Is Immigration Reform Possible in 2014?

U.S. House of Representatives Speaker John Boehner reportedly hopes to push

immigration reform legislation forward in 2014, a year in which midterm elections will take place in November. He faces competing pressures: on one side are those advising that immigration reform efforts could help Republicans win the Hispanic vote; on the other side are anti-immigration conservatives and Tea Party members who would prefer no action other than enforcement.

Observers expect that Mr. Boehner will act piece-by-piece rather than trying to advance one comprehensive immigration reform bill. He may wait until after Republican primaries occur this spring. "There are a lot of private conversations underway to try to figure out how do we best move on a common-sense, step-by-step basis to address this," he said. At a recent news conference, he noted, "The only way to make sure immigration reform works this time is to address these complicated issues one step at a time."

Meanwhile, Thomas Donohue, the president and CEO of the U.S. Chamber of Commerce, said in his "State of American Business 2014" remarks on January 8, 2014, that "the pundits will tell you it’s going to be hard to accomplish much of anything in an election year. We hope to turn that assumption on its ear by turning the upcoming elections into a motivator for change. It's based on a simple theory—if you can’t make them see the light, then at least make them feel some heat." Speaking generally on immigration issues, he added, "we’re determined to make 2014 the year that immigration reform is finally enacted. The Chamber will pull out all the stops—through grassroots lobbying, communications, politics, and partnerships with unions, faith organizations, law enforcement and others—to get it done."

The big question is whether immigration reform legislation can move forward in a midterm election year in which all 435 House seats are up for grabs, along with 33 of the 100 Senate seats, 38 state and territorial governorships, and numerous state and local elections. Given recent hyper-partisan experience in Congress, some say continued gridlock is likely. "I can’t imagine Congress doing much more than nominations and appropriations bills," said Jim Manley, a former aide to Senate Majority Leader Harry Reid (D-Nev.). However, major legislation has passed in election years, often after primary season. "For many members , they'd be more comfortable when their primaries are over," said California Rep. Darrell Issa.

Mr. Donohue's remarks are available at
https://www.uschamber.com/speech/state-american-business-2014-remarks-th

omas-j-donohue-president-and-ceo.

For a commentary on the new GOP immigration principals, see "GOP Principles On Immigration – A Path To Legal Status," by Gary Endelman and Cyrus D. Mehta, see http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus20141318756&Month=&From=Menu&Page=1&Year=All

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7. Visa Bulletin Shows Advancement in Several Categories

The Department of State's Visa Bulletin for February 2014 shows advancement in priority dates for several employment-based categories.

The employment-based third preference "Worldwide" and "Other Workers" categories both advanced two months, from April 1, 2012, to June 1, 2012. The China-mainland born employment-based second preference category moved ahead one month, from December 8, 2008, to January 8, 2009. The India second preference stayed put at November 15, 2004, as did Mexico and the Philippines, which both remained Current for the second preference. The employment-based third preference "Other Workers" category moved ahead by two months for every category except India, which remained at September 1, 2003. Other categories remained Current.

The Visa Bulletin for February 2014 is available at http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-february-2014.html.

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8. DOL Releases 2014 Adverse Effect Wage Rates

The Department of Labor has published a notice in the Federal Register announcing new Adverse Effect Wage Rates (AEWRs) in calendar year 2014 for each state, based on the Farm Labor Survey conducted by the U.S. Department of Agriculture. The AEWRs are the minimum hourly wage rates the Department has determined must be offered and paid by employers to H-2A temporary agricultural workers so that the wages of similarly employed U.S. workers will not be adversely affected.

The Federal Register notice is available at http://www.gpo.gov/fdsys/pkg/FR-2014-01-06/pdf/2013-31555.pdf.

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9. California Supreme Court Rules Undocumented Immigrant Can Receive Law License

California's Supreme Court ruled on January 2, 2014, that Sergio Garcia, an undocumented immigrant who received a law degree and passed the state bar exam in 2009, must be given his license to practice law in California. Mr. Garcia came to the United States from Mexico when he was 17 months old.

Mr. Garcia lived in California until 1986 (when he was 9 years old) and then he and his parents moved back to Mexico. In 1994, when Garcia was 17 years old, he and his parents returned to California; again he entered the country without documentation. His father obtained U.S. citizenship in 1999. His father has filed a green card petition for Mr. Garcia, but it remains stuck in a long backlog.

The court noted that in response to questions on the California state bar's application for determination of moral character, Mr. Garcia stated that he is not a United States citizen and that his immigration status was "pending." A bar committee conducted an extensive investigation of Garcia's background, employment history, and past activities; received numerous reference letters supporting Garcia's application and attesting to his outstanding moral character and significant contributions to the community; and determined that Mr. Garcia possessed the requisite good moral character to qualify for admission to the state bar. The committee told the California Supreme Court that, to its knowledge, "this is a case of first impression, as we are not aware of any other jurisdiction that has ever knowingly admitted an undocumented alien to the practice of law."

"I never in my life imagined it would take me longer to win my right to practice than it took to actually get my degree. I'm glad California is moving forward and I think we're setting a good example for the rest of the country," Mr. Garcia said after the decision.

California's legislature passed a law in 2013 stating that undocumented immigrants could obtain legal licenses, and Governor Jerry Brown signed it. Similar cases are pending in New York and Florida.

The California Supreme Court's decision is available at http://www.courts.ca.gov/opinions/documents/S202512.PDF.

For a commentary, see “Can An Undocumented Lawyer Practice Immigration Law” http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2013913103327 by Cyrus D. Mehta.

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10. ABIL Global: Australia

In June 2013, the previous government of Australia decided to undo decades of progressive reform and introduce Labour Market Testing (LMT) into the 457 program. That government was defeated in September 2013 and the new government has substantially watered down the LMT regime with amendments passed on November 23.

The subclass 457 visa is the most commonly used visa to sponsor overseas skilled workers to work in Australia temporarily. Subclass 457 is uncapped and driven by employer demand. This generally means that employers will sponsor overseas workers more in times of high economic growth and low unemployment.

An application for approval of sponsorship must be accompanied by evidence in relation to LMT, unless the employer is exempt from doing so. Legislation specifies the manner in which such testing is to be carried out as well as the period in which LMT must have been undertaken. It also sets requirements relating to the sponsor's attempts to recruit local labor. However, the November amendments provide for substantial exemptions from the LMT requirements.

The first such exemption provides that LMT is not required if it would be inconsistent with Australia's international trade obligations, which fall into two categories:

- World Trade Organization General Agreement on Trade in Services (WTO-GATS) commitments
- Free trade agreement commitments

Consequently, sponsorship of citizens from WTO member countries would not require LMT. Similarly, intra-company transferees to Australia from a business established in a WTO country are exempt from LMT.

In addition to exemptions based on international trade agreements,

sponsorship of executives and senior managers are exempt, as are specialists with two years of employment in Australia. Sponsors are also exempt from LMT for employees in positions that require tertiary qualifications. However, certain occupations cannot be exempted. The current list of occupations in that category includes a range of highly qualified engineers and nurses.

Finally, a sponsor may be exempt from LMT in the case of major disaster in Australia.

A fact sheet on the 457 visa is available at http://www.immi.gov.au/media/fact-sheets/48b-temporary-business-visa.htm.

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11. Firm In the News

Cyrus Mehta was a Speaker, *Forming Your Own Startup In The US And Visa Options*, Product Nation and iSpirit, Mumbai, India, January 3, 2014. Mr.Mehta was also a Discussion Leader, *Nonimmigrant Investor Options,* AILA 2014 Midyear/Winter Conference, Grand Cayman, Cayman Islands, January 24, 2014.

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