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

MARCH 2014 IMMIGRATION UPDATE

Posted on March 3, 2014 by Cyrus Mehta

Headlines:

1. State Dept. Announces J-1 On-Site Inspections - DOS plans to conduct on-site inspections of J-1 internships and training programs.

2. State Dept. Predicts Visa Availability in the Coming Months; Visa Bulletin Moved - The Department of State's Visa Office has estimated visa availability in the coming months. Also, DOS has reorganized its website, moving the Visa Bulletin.

3. DOL Adds Q&A to FAQ Re Notification and Consideration of Laid-Off U.S. Workers for PERM Labor Certification Applications - An employer must make a reasonable, good-faith effort to notify each potentially qualified U.S. worker who has been laid off during the six months preceding a PERM application whenever a relevant job opening exists, and invite the worker to apply.

4. USCIS Releases Fact Sheet on Correcting Immigration Records After E-Verify Tentative Nonconfirmations - Correcting inaccuracies in immigration records can prevent future TNCs.

5. Third Circuit Rules That H-2B Regulation on Minimum Wage Is Valid - Among other things, the court noted that the Department of Labor is not required to consider employer hardship but instead must balance the interests of ensuring an adequate labor force with protecting the jobs of U.S. workers.

6. DOL Administrative Review Board Partly Affirms ALJ's Decision in H-1B Wage Complaint - The ARB ordered Greater Missouri Medical Pro-Care Providers, Inc., to pay thousands in back wages to 29
H-1B workers for various violations.

7. ICE Releases SEVP Guidance on Errors in Denials of STEM OPT Extensions - If a student's OPT STEM application was denied solely on the basis that he or she intended to work as a volunteer or unpaid intern, the student should contact the Service Center that issued the denial.

8. Grand Jury Indicts North Carolina Company for Visa Fraud Scheme - International Labor Management Corporation was indicted for alleged fraud in preparing and submitting petitions on behalf of client companies to the U.S. government for temporary workers under the H-2B visa program and the H-2A agricultural visa program.

9. USCIS Revises Naturalization Application - Applicants may use previous versions of the form until May 5, 2014.

10. Firm In The News

Details:

1. State Dept. Announces J-1 On-Site Inspections

The Department of State recently emailed J-1 exchange visitor sponsors to announce that it plans to conduct on-site inspections of J-1 internships and training programs. The visits may be both planned and unannounced. J-1 inspectors may want to speak with responsible officers, supervisors, employees, trainees, and interns, and to inspect facilities, housing, and health insurance arrangements. Inspectors also may review signed Forms DS-7002, Training/Internship Placement Plan, for interns or trainees.

The Alliance of Business Immigration Lawyers (ABIL) recommends that clients contact their ABIL attorneys for advice in specific situations.

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2. State Dept. Predicts Visa Availability in the Coming Months; Visa Bulletin Moved

Visa availability. In the Visa Bulletin for March 2014, the Department of State's Visa Office makes the following estimates of visa availability in the coming months:

EMPLOYMENT-based categories (potential monthly movement)

Employment First: Current

Employment Second:

Worldwide: Current

China: Three to five weeks

India: No forward movement

Employment Third:

Worldwide: This cut-off date has been advanced over four and one half years since last spring in an effort to generate new demand. After such a rapid advance of a cut-off date applicant demand for number use,

particularly for adjustment of status cases, can be expected to increase significantly. Once such demand begins to materialize at a greater rate it could have a significant impact on this cut-off date situation. Little if any forward movement of this cut-off date is likely during the next few months.

China: Will remain at the worldwide date

India: Little if any movement

Mexico: Will remain at the worldwide date

Philippines: Three to six weeks

Employment Fourth: Current

Employment Fifth: Current

The above projections for theЙEmployment categories are for what is likely to happen during each of the next several months based on current applicant demand patterns. Readers should never assume that recent trends in cut-off date movements are guaranteed for the future, or that "corrective" action will not be required at some point in an effort to maintain number use within the applicable annual limits. The determination of the actual monthly cut-off dates is subject to fluctuations in applicant demand and a number of other variables. Unless indicated, those categories with a "Current" projection will remain so for the foreseeable future.

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

Visa Bulletin moved. The Department of State has redesigned and reorganized its website at http://www.travel.state.gov. The Visa Bulletin is now found under "Law and Policy" in the Visas section of the website. Visitors to the website have several ways to access the Visa Bulletin.

From the homepage

- Click on the link for usvisas.state.gov, located on the upper right side of the

main graphic, or the link "U.S. Visas" located at the bottom of the page. These links will take you to the Visas section of the website.
- Once in the Visas section, scroll down the page to the "We Want You to Know" section.
- Click on the icon, "Check the Visa Bulletin," or click on the link for the Visa Bulletin in the Law and Policy box.
- Alternately, once in the Visas section of the website, hover over the "Immigrate" icon along the top of the page. A drop-down menu will appear with a link to the Visa Bulletin.

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3. DOL Adds Q&A to FAQ Re Notification and Consideration of Laid-Off U.S. Workers for PERM Labor Certification Applications

The Department of Labor's Employment and Training Administration has added a new question and answer (Q&A) to its frequently asked questions (FAQ). The new Q&A concerns notification and consideration of laid-off U.S. workers for PERM labor certification applications.

The new Q&A asks, "How does an employer demonstrate that it notified and considered laid-off U.S. workers for the job opportunity listed on the ETA Form 9089?" The answer notes that some employers have misconstrued the regulations to require only that they inform workers when laid off that the employer may have future positions and inviting the worker to monitor the employer's job postings and apply, rather than their actively notifying and considering the laid-off workers. In fact, the Q&A notes, misapplication of the regulatory requirements will result in denial of a PERM application. The employer must make a reasonable, good-faith effort to notify each potentially qualified worker who has been laid off during the six months preceding the application whenever a relevant job opening exists and invite the worker to apply.
The Q&A notes that an employer who files multiple labor certifications can satisfy its responsibilities under the relevant regulation by notifying each laid-off worker (in the manner chosen by the worker) at least once a month that a list of current relevant job openings is maintained electronically on a website operated by the employer. "Simply informing a laid-off worker to monitor the employer's website for future openings and inviting the worker, if interested, to apply for those openings, will not satisfy the employer's regulatory obligation to notify all of its potentially qualified laid-off U.S. workers of the job opportunity," the Q&A states.

The Q&A adds that an employer must maintain documentation showing that it has met its notice and consideration requirements, including copies of all relevant letters, e-mails, faxes, Web pages (including those listing details of the relevant job openings and applications by laid-off workers for those openings), and other contemporaneous documents that show when and how notice and consideration was given. In addition, an employer must obtain and maintain written documentation that a laid-off worker has declined to receive notices, requested discontinuation of the notices, or refused to give or update contact information.

The new Q&A is available at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#recrep2.

For a commentary, *See* DOL POLICY ON LAID-OFF U.S. WORKERS FOR PERM LABOR CERTIFICATION APPLICATIONS, by Cyrus D. Mehta, available at http://blog.cyrusmehta.com/2014/02/dol-policy-on-laid-off-us-workers-for.html

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4. USCIS Releases Fact Sheet on Correcting Immigration Records After E-Verify Tentative Nonconfirmations

U.S. Citizenship and Immigration Services (USCIS) has released a fact sheet on how to correct immigration records after resolving a Tentative Nonconfirmation (TNC) in E-Verify. USCIS noted that an employer may receive a TNC because immigration records are inaccurate. Correcting them can prevent future TNCs.

The fact sheet, which includes several ways immigration records can be corrected, is available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/FactSheet-How-to-correct-your-immigration-records.pdf.

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5. Third Circuit Rules That H-2B Regulation on Minimum Wage Is Valid

The U.S. Court of Appeals for the Third Circuit ruled February 5, 2014, that a Department of Labor (DOL) regulation on the minimum wage required under the H-2B temporary worker visa program was validly promulgated.

The appellants were a group of associations representing employers in nonagricultural industries. Joining them was another group of individuals and organizations representing foreign and U.S. workers affected by the H-2B

program who had successfully challenged a predecessor to the current regulation. The appellants argued that the DOL exceeded its authority by enacting the regulation, which governs the calculation of the minimum wage a U.S. employer must offer to recruit foreign workers under the H-2B program. The employers stood to face higher labor costs as a result of the regulation. The District Court granted summary judgment for the DOL and its codefendants (the Secretary of Labor, the Department of Homeland Security (DHS), and the Secretary of Homeland Security).

Among other things, the court noted that the DOL is not required to consider employer hardship but instead must balance the interests of ensuring an adequate labor force with protecting the jobs of U.S. workers. The court also disagreed with appellants' contention that the DOL must use a four-tier wage methodology from the H-1B program as the prevailing wage calculation mechanism in the H-2B program. The court found the actions of the DOL and DHS reasonable with respect to application of their respective authorities regarding the H-2B program and what constitutes permissible consultation between agencies. The court also noted that the DOL promulgated the wage rule after "reasoned analysis," which is required. The court noted that the DOL had discussed the 300 comments submitted in an entire section of the final rule.

The related regulations and litigation have a complicated history that is summarized in the Third Circuit's decision. Among other things, the effective date of the 2011 regulation was moved forward and backward, and its implementation was defunded by Congress. As a result, the DOL fell back on an earlier 2008 rule that a district court had found procedurally invalid. That court had ordered the DOL to vacate the earlier rule and come into compliance. The DOL issued a final interim rule in April 2013, effective immediately, which made some changes to the 2011 rule. Congress later lifted the appropriations ban on the 2011 rule as of January 17, 2014.

The regulation recently declared valid by the Third Circuit was published at 76 Fed. Reg. 3452 (Jan. 19, 2011) (20 C.F.R. § 655.10), available at https://www.federalregister.gov/articles/2011/01/19/2011-1117/wage-methodology-for-the-temporary-non-agricultural-employment-h-2b-program. The decision, *Louisiana Forestry Association v. Secretary of Labor*, is available at http://www.splcenter.org/sites/default/files/downloads/case/third_circuit_decision_in_louisiana_forestry.pdf. Additional litigation continues regarding whether

the DOL has the authority to issue supplemental prevailing wage determinations under the 2013 interim final rule.

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6. DOL Administrative Review Board Partly Affirms ALJ's Decision in H-1B Wage Complaint

In a recent case decided by the Department of Labor's Administrative Review Board (ARB) on January 29, 2014, the ARB affirmed an administrative law judge's (ALJ) finding that the scope of a Wage and Hour Division investigation initiated in response to a complaint is not limited to the allegations in that complaint. The ARB also affirmed the ALJ's evidentiary ruling on the availability of pre- and post-judgment interest on awards in H-1B cases. The ARB reversed the ALJ's finding that discrete violations occurring outside a 12-month period before the filing of a complaint are actionable. The deputy chief administrative appeals judge concurred in part and dissented in part, agreeing with the majority's ruling in the case of the initial complainant but dissenting from the majority's ruling in all other respects.

The ARB ordered Greater Missouri Medical Pro-Care Providers, Inc., to pay thousands of dollars in back wages for various violations to 29 H-1B workers. The case started when an H-1B nonimmigrant employee filed a complaint in 2006 alleging that Greater Missouri failed to pay her the required wages under its labor condition application for time off due to a decision by the employer, had illegally made deductions from her wages, and had required her to pay an illegal penalty for stopping work before an agreed-upon date.

The decision is available at http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/LCA/12_015.LCAP.PDF.

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7. ICE Releases SEVP Guidance on Errors in Denials of STEM OPT Extensions

U.S. Citizenship and Immigration Services (USCIS) announced on February 6, 2014, that some optional practical training (OPT) science, technology, engineering and math (STEM) extension applications were denied in error. USCIS said they were not adjudicated in accordance with applicable

Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP) OPT policy guidance. USCIS sent the alert to notify affected designated school officials and to provide instructions.

USCIS said that some OPT STEM extension applications were denied in error because the student applicants intended to work as volunteers or unpaid interns during their extension periods. To prevent this problem from happening again, USCIS's Service Center Operations (SCOPS) instructed all USCIS Service Centers to follow ICE SEVP's policy guidance regarding work as a volunteer or unpaid intern.

The alert notes that SEVP's OPT 2010 policy guidance states that a student may work as a volunteer or unpaid intern for at least 20 hours per week. The alert says that if a student's OPT STEM application was denied solely on the basis that he or she intended to work as a volunteer or unpaid intern, the student should contact the Service Center that issued the denial by emailing the applicable dedicated student emailbox. The student should provide his or her full name and the USCIS receipt number relating to the denied application. The email addresses are:

California Service Center: CSC.StudentEAD@uscis.dhs.gov

Vermont Service Center: VSC.Schools@uscis.dhs.gov

Texas Service Center: TSC.Schools@uscis.dhs.gov

Nebraska Service Center: NSC.Schools@uscis.dhs.gov

The alert is available at http://www.kidambi.com/resources/OPT_Volunteer.pdf.

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8. Grand Jury Indicts North Carolina Company for Visa Fraud Scheme

A grand jury recently indicted International Labor Management Corporation (ILMC) of North Carolina on 41 counts relating to visa fraud. ILMC was in the business of preparing and submitting petitions on behalf of client companies to the U.S. government for temporary workers under the H-2B visa program and the H-2A agricultural visa program.

Among other things, the indictment alleges that the ILMC owners falsely petitioned for and obtained extra H-2B visas beyond the actual needs of their client employers to create pools of extra visas. This pool allowed employers

who could not otherwise obtain H-2B visas due to the cap to use them to bring workers into the United States under the pretense that they were going to work for the employer for whom the H-2B visas had been approved, and by allowing ILMC to obtain H-2B visas before the cap was reached using inaccurate start dates, thereby denying such H-2B visas to other employers or competing agents. The ILMC owners then used those workers who entered the United States under false pretenses for other employers or otherwise to benefit themselves. In some cases, they agreed with a client to create fictitious companies for this purpose. An ILMC owner also instructed at least one client employer to obtain temporary workers by falsely claiming that such workers were needed for H-2A agricultural work, to avoid the H-2B cap.

The indictment is available at http://www.wral.com/asset/news/local/2014/02/04/13358381/ILMC_indictment.pdf.

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9. USCIS Revises Naturalization Application

As part of its forms improvement initiative, U.S. Citizenship and Immigration Services (USCIS) released a revised Form N-400, Application for Naturalization, on February 4, 2014. The eligibility requirements for naturalization have not changed.

The revised N-400 includes additional questions relating to good moral character and to security, to conform with the Intelligence Reform and Terrorism Prevention Act of 2004 and the Child Soldier Prevention Act of 2008; "clearer and more comprehensive" instructions that highlight general eligibility requirements and provide specifics on how to complete each part of the application; and 2D barcode technology at the bottom of each page to enable USCIS to scan data for direct input into USCIS systems.

Applicants may use previous versions of the form until May 5, 2014, at which time USCIS will begin rejecting and returning previous versions of the N-400.

USCIS will hold a stakeholder engagement on February 20, 2014, about the revised form. For more information on the teleconference, see http://www.uscis.gov/outreach/revised-form-n-400-application-naturalization.

The announcement, which includes a link to a related video, is available at

http://www.uscis.gov/news/alerts/uscis-revises-form-n-400-application-naturalization. The revised form is at http://www.uscis.gov/n-400. Information on USCIS's forms improvement initiative is available at http://www.uscis.gov/forms/forms-updates/uscis-form-improvements-initiative.

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10. Firm In The News

Cora-Ann V. Pestaina was a Speaker on the panel of *Business Visas*, at the AILA NY-Chapter monthly meeting on February 26, 2014.

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