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US IMMIGRATION & NATIONALITY LAW

AUGUST 2014 IMMIGRATION UPDATE

Posted on August 1, 2014 by Cyrus Mehta

Headlines

1. **Consular Visa/Passport System Crashes** - The Department of State's Consular Consolidated Database, used to print and approve visas and passports, has been having significant problems, including outages. Backlogs have ensued.

2. **August Visa Bulletin Shows Advances in China and 'Other Workers' EB-3 Preference Categories, India EB-2 Preference** - Cut-off dates for the China-mainland born employment third preference, and third preference "Other Workers," have advanced for the month of August and could do so again for September. The India employment second preference cut-off date also has advanced very rapidly.

3. **Congress Stalls on White House Request for $3.7 Billion for Border Crisis** - As the United States continues to grapple with an influx of undocumented children and others along the southern border, as of press time, Congress had not yet voted on President Barack Obama's July 8, 2014, request for a $3.7 billion supplemental appropriation to fund related activities. Republicans vowed to continue working into the weekend on a measure to deal with the border crisis.

4. **USCIS Issues Policy Memo on Adjudication of H-1B Petitions for Nursing Occupations** - The memo, which supersedes prior guidance, assists USCIS officers in determining whether a nursing position meets the definition of a specialty occupation.

5. **CBP Seeks Comments on International Travel Improvements, Closes Border Crossing** - CBP seeks comments on proposed improvements in the entry process and airport-specific plans for international travelers to the United States. Also, as of August 21, 2014, CBP is closing the Jamieson Line, New

York, border crossing in Burke.

6. EOIR Interim Rule Addresses 'Largest Caseload' in U.S. History With Temporary IJs - EOIR published an interim rule effective July 11, 2014, allowing the agency to designate or select temporary immigration judges with the Attorney General's approval.

7. Leon Rodriguez Sworn In as USCIS Director - Leon Rodriguez was sworn in on July 9, 2014, as the new director of USCIS. The agency has nearly 18,000 employees.

8. ABIL Global: Peru - This article provides an update on visas in Peru for short-term assignments.

Details

1. Consular Visa/Passport System Crashes

According to reports, the Department of State's Consular Consolidated Database (CCD), used to print and approve visas and passports, has been having significant problems, including outages, since July 19, 2014. The CCD is back up and running in a limited capacity, the Department said, but the Bureau of Consular Affairs is still working through the resulting backlogs. The problems are worldwide and not confined to any particular category.

Marie Harf, deputy spokesperson, said, "We apologize to applicants and recognize this may cause hardship to applicants waiting on visas and passports." The database is one of the largest in the world with 100 million visa case records.

At a press briefing on July 24, Ms. Hart noted, "We do not believe there was any malicious action or anything untoward here. This was a technical issue, and again, we are working to correct it and should be fully operational again soon. WeXre operating at a little bit of limited capacity right now, though, so we're trying not to overload the system."

The press briefing transcript, which includes related information among other topics, is available at http://www.state.gov/r/pa/prs/dpb/2014/07/229752.htm#DEPARTMENT.

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2. August Visa Bulletin Shows Advances in China and 'Other Workers' EB-3 Preference Categories, India EB-2 Preference

The Department of State's Visa Bulletin for August 2014 notes that cut-off dates for the China-mainland born employment third preference, and third preference "Other Workers," categories have advanced for the month of August and could do so again for September.

The bulletin notes two reasons for this advance: (1) a decline during the past two months in heavy demand by applicants with priority dates significantly (years) earlier than the previous cut-off date, and (2) declining number use in the family preferences during May and June, combined with updated estimates of such number use through the end of the fiscal year. These developments have resulted in the availability of several hundred numbers for use in the China-mainland born employment third preference category.

During the past two months, the India employment second preference cut-off date also has advanced very rapidly based on the projected availability of "otherwise unused" numbers under the worldwide preference limit. The bulletin notes that it must not be assumed that this cut-off date will continue to advance at the same pace during the coming months. "A cut-off date does not mean that everyone with a priority date before such cut-off date has already been processed to conclusion. It remains to be seen how heavy the demand for visa numbers by applicants will be in the coming months, and what the priority dates of such applicants may be," the bulletin states. Heavy demand by applicants with priority dates significantly earlier than the established cut-off date is expected to materialize within the next several months, the bulletin notes, at which time the cut-off date is likely to retrogress significantly.

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

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3. Congress Stalls on White House Request for $3.7 Billion for Border Crisis

As the United States continues to grapple with an influx of undocumented children and others along the southern border, as of press time on August 1, 2014, Congress had not yet voted on President Barack Obama's July 8 request for a $3.7 billion supplemental appropriation to fund activities at the Departments of Homeland Security (DHS), Justice (DOJ), State (DOS), and Health and Human

Services (HHS). Some House Republicans continued to work on a possible measure to address the border crisis, and said they'd work through the weekend if necessary. Rep. Tom Cole (R-Okla.) reportedly said that Republicans had not yet left for their August recess and were still working as of August 1: " conference was essentially unanimous that it needs to stay. It did not want to go home. If we have to work longer through the weekend, I think there is a genuine desire to do that."

In its request to Congress, the Obama administration said the money would be used for four main efforts: (1) deterrence, including increased detentions and removals of adults with children and increased immigration court capacity to speed cases; (2) enforcement, including enhanced interdiction and prosecution of criminal networks, increased surveillance, and expanded collaborative law enforcement task force activities; (3) foreign cooperation, including improved repatriation and reintegration, stepped-up public information campaigns, and efforts to address the root causes of undocumented migration; and (4) capacity, including increased detention, care, and transportation of unaccompanied children.

Of the total, $45.4 million would be used to hire approximately 40 additional immigration judge teams, including those anticipated to be hired on a temporary basis. This funding would also expand courtroom capacity, including additional video conferencing and other equipment in support of the additional immigration judge teams. These additional resources, when combined with the FY 2015 budget request for 35 additional teams, "would provide sufficient capacity to process an additional 55,000 to 75,000 cases annually," the Obama administration said. In addition, $15 million would provide direct legal representation services to children in immigration proceedings, and $1.1 million would be used to hire additional immigration litigation attorneys to support federal agencies involved in detainee admission, regulation, and removal actions.

Also, $295 million would support efforts to repatriate the migrants and reintegrate them in Central America, to help the governments in the region better control their borders, and to address the "underlying root causes" driving the migrations, such as by "creating the economic, social, governance, and citizen security conditions to address factors that are contributing to significant increases in migration to the United States." Beyond initial assistance, continued funding for repatriation and reintegration activities will be contingent on sustained progress and cooperation by the Central American countries, the

administration said.

The supplemental appropriations request notes that separately, the administration plans to continue to work with Congress, following up on President Obama's letter to congressional leadership on June 30, 2014, "to ensure that we have the legal authorities to maximize the impact of our efforts," including "providing the Secretary of Homeland Security additional authority to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador," and "increasing penalties for those who smuggle vulnerable migrants, like children."

The Senate Committee on Appropriations held a related hearing on July 10, 2014. Witnesses included Hon. Jeh Johnson, Secretary, DHS; Hon. Sylvia Mathews Burwell, Secretary, HHS; Hon. Thomas A. Shannon, Jr., Counselor, DOS; and Juan P. Osuna, Director, Executive Office for Immigration Review.

The supplemental appropriations request is available at http://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/emergency-supplemental-request-to-congress-07082014.pdf. A related White House fact sheet is available at http://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu. Senate hearing testimony (written and webcast) is available at http://www.appropriations.senate.gov/hearings-and-testimony/full-committee-review-presidents-supplemental-request

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4. USCIS Issues Policy Memo on Adjudication of H-1B Petitions for Nursing Occupations

On July 11, 2014, U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum providing guidance on the adjudication of H-1B petitions for nursing positions. The memo assists USCIS officers in determining whether a nursing position meets the definition of a specialty occupation. The memo states that it supersedes any prior guidance on the subject and is binding on all USCIS employees unless specifically exempted. USCIS noted that about 12 years have passed since USCIS issued guidance on determining whether a nursing position is a specialty occupation. USCIS decided it was time to update this guidance.

As background, the memo notes that the H-1B visa classification allows a U.S.

employer to petition for a temporary worker in a specialty occupation. Most registered nurse (RN) positions do not qualify as specialty occupations because they do not normally require a U.S. bachelor's or higher degree in nursing (or its equivalent) as the minimum for entry into those positions. In some situations, however, a petitioner may be able to show that a nursing position qualifies as a specialty occupation, the memo states. For example, certain advanced practice registered nurse (APRN) positions normally require a U.S. bachelor's or higher degree in a specialty as the minimum for entry.

The updated guidance notes that the private sector "is increasingly showing a preference for more highly educated nurses." Among other influences, the American Nurses Credentialing Center's (ANCC) Magnet Recognition Program recognizes health-care organizations that advance nursing excellence and leadership. Achieving Magnet status indicates that an institution's nursing workforce has attained a number of high standards, with an emphasis on bachelor's degrees.

The memo lists some of the nursing positions that may qualify as specialty occupations. The memo notes that having a bachelor's degree is not, by itself, sufficient to qualify for H-1B classification. A critical factor, the memo states, is whether a bachelor's or higher degree is normally required for the position. A beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. USCIS noted that it must "follow long-standing legal standards and determine whether the proffered position qualifies as a specialty occupation, and whether a beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed."

Among other things, the memo notes that if a state requires at least a bachelor's degree in nursing to obtain a nursing license, a registered nurse position in that state would generally be considered a specialty occupation. No state currently requires a bachelor's degree in nursing for licensure, the memo notes.

The memo outlines the evidence needed to establish that a position qualifies as a specialty occupation under the "preponderance of the evidence" standard. Among other things, documentation submitted by petitioners often includes the nature of the petitioner's business; industry practices; a detailed description of the duties to be performed; advanced certification requirements; ANCC "Magnet Recognized" status; clinical experience requirements; training in the specialty requirements; and wage rate relative to others within the occupation.

USCIS recognizes the Department of Labor's *Occupational Outlook Handbook* (OOH) as an authoritative source on duties and educational requirements. However, the memo notes that it is not always determinative and other authoritative and/or persuasive sources provided by the petitioner will also be considered.

The new guidance memo is available at http://www.uscis.gov/sites/default/files/files/nativedocuments/2014-0711_EIR_Nursing_PM_Effective.pdf. Information on registered nurses is available at http://www.bls.gov/ooh/healthcare/registered-nurses.htm. The guidance indicates that advanced practice nursing positions include nurse anesthetists, nurse midwives, and nurse practitioners. Further information on these specialties is available at http://www.bls.gov/ooh/healthcare/nurse-anesthetists-nurse-midwives-and-nurse-practitioners.htm.

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5. CBP Seeks Comments on International Travel Improvements, Closes Border Crossing

The following are recent developments from the U.S. Customs and Border Patrol (CBP):

International travel improvements. CBP seeks comments by August 15, 2014, on proposed improvements in the entry process and airport-specific plans for international travelers to the United States. On May 22, 2014, President Obama directed the Secretaries of Commerce and Homeland Security to lead an interagency team over the next 120 days, in close partnership with industry, to develop a national goal and airport-specific plans to enhance the entry process for international travelers to the United States. The measures the administration is taking to expedite the arrivals process are intended to enhance security by focusing officer time on the highest-risk passengers and facilitating the process for the vast majority of legitimate travelers. The notice seeks comments on a list of questions. The questions ask for suggestions for improvement in the international arrival experience, technology, passport and baggage inspections, and related issues.

Jamieson Line, New York, border crossing closes. As of August 21, 2014, CBP is closing the Jamieson Line, New York, border crossing in Burke. CBP said the

primary reason was the Canada Border Services Agency's closing of the adjacent port of entry in QuЋbec, Canada. Other factors included very limited usage (less than six privately owned vehicles per day); alternative ports located at Trout River, New York, and Chateaugay, New York; lack of sufficient infrastructure at the border; and the cost of renovations if the port were to remain open.

The Federal Register notice announcing the proposed improvements in international travel is available at https://www.federalregister.gov/articles/2014/07/22/2014-17215/opportunity-to-comment-on-presidential-memorandum-calling-for-improving-the-entry-process-and. The Federal Register notice announcing the closure is available at https://www.federalregister.gov/articles/2014/07/22/2014-17190/closing-of-the-jamieson-line-new-york-border-crossing#h-7.

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6. EOIR Interim Rule Addresses 'Largest Caseload' in U.S. History With Temporary IJs

Following the Obama administration's decision to increase the number of immigration judges deployed to handle cases related to the influx of undocumented migrants in the U.S. southern border area, the Department of Justice's Executive Office for Immigration Review (EOIR) published an interim rule effective July 11, 2014, allowing the agency to designate or select temporary immigration judges, with the Attorney General's approval.

The interim rule notes that EOIR "is currently managing the largest caseload the immigration court system has ever seen." This is due to "attrition in the immigration judge corps and continuing budgetary restrictions" along with a large number of pending cases, the interim rule notes. Allowing the designation of temporary immigration judges will provide flexibility "in responding to the increased challenges facing the immigration courts."

A new TRAC report finds that as of the end of June 2014, the number of cases pending in the immigration courts is at an all-time high of 375,503. TRAC's preliminary figures indicated that the number of cases involving juveniles was 41,640, with more arriving daily. "As of the end of June 2014, the court backlog for juveniles from Guatemala is the largest with 12,841 cases, closely followed by Honduras (12,696) and El Salvador (12,162)," TRAC noted. According to the TRAC report, the average time for a pending case before an immigration judge is

now 587 days.

The interim rule states that temporary immigration judges may include former Board members, former immigration judges, administrative law judges employed within or retired from EOIR, and administrative law judges from other Executive Branch agencies to act as temporary immigration judges for renewable six-month terms. Administrative law judges from other agencies must have the consent of their agencies to be designated as temporary immigration judges. In addition, the Director of EOIR will be able to designate, with the approval of the Attorney General, attorneys who have at least 10 years of legal experience in the field of immigration law and are currently employed by the Department of Justice to act as temporary immigration judges for renewable six- month terms. The 10 years of experience must be gained after admission to the bar and may be gained through employment by the federal, state, or local government, the private sector, universities, non-governmental organizations, or a combination of such experience.

Characteristics that would qualify a candidate for designation as a temporary immigration judge include the ability to demonstrate the appropriate temperament to serve as a judge; knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; and knowledge of practices and procedures.

EOIR will provide the training necessary for temporary immigration judges to perform the assigned duties. The Chief Immigration Judge may choose to specify particular types of matters for which each temporary immigration judge will be assigned, consistent with the individualXs training and experience.

The interim rule is available at http://www.gpo.gov/fdsys/pkg/FR-2014-07-11/pdf/2014-16279.pdf. The TRAC report is available at http://trac.syr.edu/whatsnew/email.140710.html.

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7. **Leon Rodriguez Sworn In as USCIS Director**

Leon Rodriguez was sworn in on July 9, 2014, as the new director of U.S. Citizenship and Immigration Services (USCIS). The agency has nearly 18,000 employees.

The Senate confirmed Mr. Rodriguez in June 2014. He previously served as the director of the Office for Civil Rights at the U.S. Department of Health and Human Services, a position he held from 2011 to 2014. From 2010 to 2011, he served as chief of staff and deputy assistant attorney general for civil rights at the Department of Justice (DOJ). Previously, Mr. Rodriguez was county attorney for Montgomery County, Maryland, from 2007 to 2010. He was a principal at Ober, Kaler, Grimes & Shriver in Washington, DC, from 2001 to 2007.

Mr. Rodriguez served in the U.S. Attorney's Office for the Western District of Pennsylvania from 1997 to 2001, first as chief of the White Collar Crimes Section from 1998 to 1999 and then as first assistant U.S. Attorney until his departure. Before joining the U.S. Attorney's Office, Mr. Rodriguez was a trial attorney in the Civil Rights Division at DOJ from 1994 to 1997 and a senior assistant district attorney at the Kings County District Attorney's Office in New York from 1988 to 1994. He received a B.A. from Brown University and a J.D. from Boston College Law School.

The announcement is available at http://www.uscis.gov/news/news-releases/leon-rodriguez-sworn-uscis-director.

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8. **ABIL Global: Peru**

This article provides an update on visas in Peru for short-term assignments.

The Peruvian immigration authority (MIGRACIONES) has no specific visa that may be obtained quickly for short-term assignments. When technical workers, for example, are coming to work in Peru, they must obtain work permits, which take approximately 30 to 45 days. The work permit may be either a temporary worker visa (for foreign workers on a local company's payroll) or an appointed worker temporary visa (for workers who are not staff of the local company).

Appointed workers are those who come to Peru with no intention of establishing a residence to carry out labor activities assigned by their foreign employers for limited and defined terms to perform specific tasks or duties, or to perform work that requires professional, commercial, or technical knowledge or any other type of highly specialized knowledge. This category applies to consultants or advisors. Although they are paid by a company abroad, they must pay taxes in Peru.

To obtain this type of visa (*Visa Temporal de Trabajador Designado*), the following documents must be legalized by a Peruvian consulate abroad or certified by apostille abroad:

- A Service Agreement or Technical Service Agreement (TSA) executed by the foreign entity that will provide the services (Provider) and the local entity receiving the services (Beneficiary Company).
- An appointment letter issued by the Provider appointing the foreign consultant who will come to Peru under the Service Agreement.
- A letter from the Beneficiary Company confirming that it will be the recipient of the services that the foreign consultant will provide.
- A Certificate of Specialization of the foreign consultant issued by the Provider.
- The assignee's original passport in the case of in-country processing before MICRACIONES. If processing before a consul abroad, then a copy of the passport will be duly legalized by the Peruvian consulate abroad or certified by apostille and the consultant will remain abroad for processing.
- Other documentation of the assignee and the local company as required. The processing time from the date of filing of the application with all required documents is 30 working days for "Obtaining Visa Proceeding," and 60 working days for in-country processing, according to the rules. At present, however, in-country processing is taking less time.
- The holder of this type of visa cannot open a bank account in Peru, obtain a credit card, or obtain a driver's license, because he or she is not considered a resident.
- Translations of the documents must be made in Peru by an official public translator.

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