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US IMMIGRATION & NATIONALITY LAW

SEPTEMBER 2014 IMMIGRATION UPDATE

Posted on September 3, 2014 by Cyrus Mehta

Headlines:

1. DOS Announces Major Developments in Availability of China EB-5 Visa Numbers - Effective immediately, the EB-5 category is "unavailable" for investors born in China. Visa numbers will become available again when the new federal fiscal year starts on October 1, 2014.

2. DOS Changes Fees for Visa and Citizenship Services - DOS is amending the Schedule of Fees for Consular Services for certain nonimmigrant visa application processing fees, certain immigrant visa application processing and special visa services fees, and certain citizenship services fees.

3. Visa Bulletin for September Advances India EB-2 Cut-Off Date, Announces Numerical Limits for FY 2014 - The India employment-based second preference cut-off date to advance very rapidly in recent months, although further advancements cannot be guaranteed.

4. DOS Makes 'Significant Progress' in Bringing Visa Processing Back Online and Clearing Backlogs - DOS said it has caught up with issuances for most of the worldwide backlog of nonimmigrant visa cases and is working to bring the system back to full operational capacity.

5. CBP Responds to I-94 Web Portal and ESTA Questions - A recent teleconference focused on issues with the I-94 Web portal and travel history information. Topics included incomplete or inaccurate data on the portal, redress for falsely recorded departures, and automated I-94 corrections.

6. USCIS Clarifies Policy on Using Expedited Delivery Services - USCIS has clarified aspects of its recent notice announcing that certain applicants and petitioners may select expedited delivery service to receive certain documents.

7. USCIS Advises on Ebola-Related Relief for Nationals of Guinea, Liberia, and Sierra Leone in the United States - USCIS is offering relief measures to nationals of those three countries who are currently in the United States.

8. International Employee Recruiter Sentenced to Two Years for Visa Fraud - A U.S. District Judge recently sentenced a Bulgarian national residing in Maryland to two years in prison for visa fraud, and ordered him to forfeit $100,000.

9. CBP Announces New Mobile Passport Control App -The Mobile Passport Control app will allow eligible travelers to submit their passport information and customs declaration forms via a smartphone or tablet computer before CBP inspection.

10. OSC Advises on How to Proceed After Over-Documenting Employees - OSC cannot advise on specific facts but offers general guidance, including "free webinar training by our office or distribution of educational materials to staff."

11. DOS Extends Special Immigrant Visas for Afghans - In addition to the 3,000 visas for Afghan principal applicants originally allocated for use in fiscal year 2014, another 1,000 SIVs may be issued until December 31, 2014. The program will end on that date unless Congress further extends it.

12. Firm In The News-

Details:

1. DOS Announces Major Developments in Availability of China EB-5 Visa Numbers

At an immigration law conference sponsored by the American Immigration Lawyers Association on August 23, 2014, Charles Oppenheim of the U.S. Department of State (DOS) announced that effective immediately, the employment-based fifth preference category (EB-5) is "unavailable" for investors born in China. Visa numbers will become available again when the new federal fiscal year starts on October 1, 2014.

The practical implications of this announcement are quite minimal for Chinese investors who are on track to complete the immigrant visa process within the

next few months. EB-5 applicants from China who have already been scheduled for their initial immigrant visa interviews in August and September 2014 will still attend and may be issued visas. U.S. Citizenship and Immigration Services (USCIS) will still accept I-485 applications to adjust status for EB-5 applicants in the United States.

Long-term implications for EB-5 investors from China are more consequential. Mr. Oppenheim advised that in the spring of 2015, DOS will probably establish a cut-off date for EB-5 China, meaning that the category will "retrogress." Mr. Oppenheim estimated that the initial backlog will be about two years. Based on the number of I-526 EB-5 petitions currently pending at USCIS (approximately 10,300), the current I-526 approval rate of 77%, and the speed and rate of adjudication (13 to 16 months), predictions are that the EB-5 cut-off date for China may quickly increase to three years, given the substantial number of cases already in process.

The DOS announcement does not affect EB-5 investors from other countries.

These developments are expected to significantly affect the EB-5 program as a whole, given that investors from China make up more than 80% of all EB-5 cases. Investors from China will have to wait longer to obtain their visas. The delays will also affect U.S. developers who rely on EB-5 money in their projects. If you are an EB-5 investor or project developer, contact your Alliance of Business Immigration Lawyers attorney for more detailed advice.

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2. DOS Changes Fees for Visa and Citizenship Services

Effective September 6, 2014, the Department of State is amending the Schedule of Fees for Consular Services for certain nonimmigrant visa application processing fees, certain immigrant visa application processing and special visa services fees, and certain citizenship services fees. Included are two categories of petition-based nonimmigrant visas and the tiered application processing fees for immigrant visas. The interim final rule also amends the security surcharge for immigrant visa services and the fees for certain immigrant visa services. Lastly, the rule raises the application processing fee for renunciation of U.S. citizenship and lowers the hourly consular officer time charge. The Department of State said it is adjusting the fees in light of the findings of a recent Cost of Service study to ensure that the fees for consular services better align with the costs of providing

those services.

Some of the changes include:

The processing fee for E treaty trader and treaty investor visa applications will decrease from $270 to $205.

- The processing fee for an employment-based visa application (based on an approved. I-140 alien worker or I-526 alien entrepreneur petition) will decrease from $405 to $345.
- Other immigrant visa application fees (including for I-360 self-petitioners, special immigrant visa applicants, and all others) will decrease from $220 to $205.
- Certain qualifying Iraqi and Afghan special immigrant visa applicants are statutorily exempt from paying any visa-related fees.
- The Immigrant Visa Security Surcharge, paid by all applicants except those who are statutorily exempted from paying fees, will increase from $75 to $100.
- The fee for processing an application for waiver of the two-year residence requirement for J-1 exchange visitors will decrease from $215 to $120.
- The affidavit of support fee will increase from $88 to $120.
- The fee for processing renunciation of U.S. citizenship requests will increase from $450 to $2,350.

Comments on the interim final rule, which was published in the Federal Register on August 28, 2014, are due by October 21, 2014. The rule, which includes information on additional fee changes and the rationale for the changes, is available at https://www.federalregister.gov/articles/2014/08/28/2014-20516/schedule-of-fees-for-consular-services-department-of-state-and-overseas-embassies-and.

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3. Visa Bulletin for September Advances India EB-2 Cut-Off Date, Announces Numerical Limits for FY 2014

The Department of State's Visa Bulletin for September 2014 noted that the use of potentially "otherwise unused" employment visa numbers prescribed by ¤ 202(a)(5) of the Immigration and Nationality Act (INA) has allowed the India employment-based second preference cut-off date to advance very rapidly in recent months. The Visa Bulletin warned, however, that continued forward

movement of this cut-off date during the upcoming months cannot be guaranteed, and said that no assumptions should be made until the dates are formally announced. Once there is a significant increase in India employment second preference demand, it will be necessary for DOS to retrogress the cut-off date, "possibly as early as November," to hold number use within the fiscal year 2015 annual limit, the agency said.

The Visa Bulletin for September also notes that DOS has determined the numerical limits for fiscal year 2014. The Worldwide employment-based preference limit is 150,241; the family-sponsored preference limit is 226,000; and the per-country limit is 26,337. The dependent area limit is 7,525.

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

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4. DOS Makes 'Significant Progress' in Bringing Visa Processing Back Online and Clearing Backlogs

The Department of State (DOS) announced that it has made "significant progress" in bringing back online the Consular Consolidated Database (CCD), used to print and approve visas and passports. The system had crashed in July 2014 and has continued to experience outages, resulting in processing backlogs. DOS said it has caught up with issuances for most of the worldwide backlog of nonimmigrant visa cases and is working to bring the CCD back to full operational capacity. "We continue to prioritize immigrant visas, adoption cases, and emergency nonimmigrant visa cases. We are printing visas for these cases and all cases with very few delays," a DOS statement noted. For information on specific cases, the agency advises checking with the embassy or consulate where the person will apply or has scheduled an interview.

DOS noted that the problems started shortly after a software update on July 20, 2014, although the agency has not been able to identify a "root cause." DOS said current efforts are focused on bringing the system back to normal operations. Once that has been accomplished, DOS will investigate the cause, and the agency also has been working with Oracle and Microsoft to implement system changes aimed at optimizing performance and addressing ongoing issues. DOS is also bringing additional servers online to increase capacity and response time.

DOS noted that it has experienced minor outages in the past, but not of this magnitude.

The agency says visa applicants should "expect delays as we process pending cases," but that it remains able "to quickly process emergency cases to completion." DOS estimates that visa issuances may be delayed 10 to 14 days until the system is restored to full functionality and pending applications are printed.

DOS says it understands the importance to international students and exchange visitors, their families, and their U.S. host institutions of timely visa issuance to facilitate travel and to ensure that all students and exchange visitors may begin their programs on time. "We are committed to issuing visas to all qualified students and exchange visitors. Student and exchange visitor visa applicants should submit their applications well in advance of expected travel dates. We will make every effort to ensure timely visa issuance," DOS said. The agency added that in situations where a student won't be able to arrive at school on time, "tudents should contact their educational institution's Designated School Official (F and M visas) or designated U.S. sponsor's Responsible Officer (J visas) and discuss with them what arrangements they can provide for you to begin your program after the start date on your Form I-20 (F and M visas) or Form DS 2019 (J visas)."

Regarding the diversity visa (DV) program, the agency noted that immigrant visa processing, including diversity visas, "continues and remains a high priority. The Department expects to have used all numbers for DV-2014 when the program year ends on September 30, 2014."

Some individuals would like to have their passports returned before their U.S. visas are printed. DOS said it is working with posts around the world to develop procedures to manage these requests. Each embassy and consulate will post contact information on its website for applicants with questions about the status of their cases.

DOS noted that those traveling under the Visa Waiver Program, and those whose previously issued visas remain valid, are not affected. DOS routinely advises visa applicants to make appointments well in advance of planned travel, and not to book travel until they have their printed visas in hand.

DOS said it plans to upgrade the CCD again to a newer version of the Oracle

commercial database software by the end of 2014. The announcement is available at http://travel.state.gov/content/visas/english.html. A related FAQ is available at http://travel.state.gov/content/travel/english/news/ccd-performance-issues.html.

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5. CBP Responds to I-94 Web Portal and ESTA Questions

The American Immigration Lawyers Association (AILA) held a teleconference with Suzanne Shepherd, Director of the Electronic System for Travel Authorization (ESTA) at U.S. Customs and Border Protection, on August 6, 2014, on issues with the I-94 Web portal and travel history information. Topics included incomplete or inaccurate data on the portal, redress for falsely recorded departures, and automated I-94 corrections.

According to AILA's teleconference minutes, Ms. Shepherd said that the information on the I-94 website is taken from the I-94 database, not from any other databases related to a travelerXs admissions/departures. CBP has plans to create a crossing history for U.S. lawful permanent residents and U.S. citizens. Ms. Shepherd said this will be a difficult task, however. CBP will need to determine how to query and retrieve data, and resolve privacy issues. CBP does not have a launch date or a set plan yet.

Ms. Shepherd noted that CBP has reached out to U.S. Citizenship and Immigration Services (USCIS) regarding USCIS denials based only on I-94 database information. She said USCIS is training its service center adjudicators not to use I-94 database information alone to make any decisions. Ms. Shepherd asked that examples of USCIS issuing decisions based on I-94 database information alone be sent to CBP through the AILA liaison.

In response to questions about inaccuracies in the system, Ms. Shepherd noted that data entry error can result in a no-match. Matching algorithms should alleviate this problem, she said. For example, if a traveler's name is spelled wrong on one or more occasions, a different travel history may be created under the alternate spelling. She said that if this happens, the ESTA office or a Deferred Inspection office can correct this by combining the two data sets.
Regarding those whose travel histories are unavailable or unlisted in the online system, Ms. Shepherd noted that the online records include only instances in which an actual I-94, whether paper or electronic, was issued. Therefore,

Canadians entering at a land border will not have a crossing history, nor will anyone not issued an I-94 before the electronic I-94 system was implemented.

Ms. Shepherd said that if someone needs a complete travel history, including data that is not reported online, a Freedom of Information Act (FOIA) request is still the way to request a complete report.

In response to a question about whether non-controlled admissions records for Canadians are available in the online system, Ms. Shepherd noted that if a traveler is issued or has surrendered an I-94, the information will be available. If not, it will not be available. She pointed out that this may result in oddities in records. For example, at the land border, if a traveler surrendered an old I-94 at the time of admission rather than upon the previous departure, and was issued a new I-94 on same day, the I-94 website will show the departure and arrival on same day.

Several AILA members have reported instances in which people who had purchased plane tickets to depart the United States but then never used the ticket to depart nevertheless were recorded as having departed. In one of those cases, the person went to Deferred Inspection office, and the officer there, upon viewing the unused plane ticket that corresponded with the incorrectly recorded departure date, was able to correct the I-94 record to delete the erroneous departure.

In the event of a discrepancy between the information in the entry-exit database and either a paper I-94 or an admission stamp (e.g., they show different expiration dates), Ms. Shepherd said that most of the time this will be due to CBP officer error and that Deferred Inspection is an appropriate way to attempt to resolve such an inconsistency.

Ms. Shepherd asked AILA to provide specific examples of any difficulties with correcting erroneous information or with Deferred Inspection.

More information on ESTA is available at https://esta.cbp.dhs.gov/esta/.

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6. **USCIS Clarifies Policy on Using Expedited Delivery Services**

U.S. Citizenship and Immigration Services (USCIS) has clarified aspects of its recent notice announcing that certain applicants and petitioners may select expedited delivery service to receive certain documents.

USCIS noted that those whose petitions or applications are processed at a USCIS Service Center or the National Benefits Center who wish to receive certain documents by overnight delivery service must include a valid prepaid air bill or shipping label with their filing. The agency also noted that this option is only available for receiving the following types of documents from certain USCIS facilities:

USCIS Service Centers or the National Benefits Center: Advance parole documents (not including the combination Employment Authorization Document/Advance Parole Card), re-entry permits, and refugee travel documents.

USCIS Service Centers only: Approval notices and notices of denial.

To ensure that overnight delivery requests are not delayed, USCIS advises:

- Including a valid prepaid air bill or shipping label when submitting an application, petition, or response to a request for evidence. "Providing a prepaid shipping label directly from the delivery service is the best way to avoid delivery errors. You will not need to write in an account number if you use a shipping label," USCIS noted.
- Entering the name in both the "to" and "from" fields on the air bill or shipping label.
- Never listing USCIS as the sender and not marking "bill to sender."
- Paying all delivery costs in advance, and including the prepaid air bill or shipping label with the submission (as noted above).USCIS's clarifying announcement is available at http://www.uscis.gov/news/alerts/clarification-uscis-customers-can-select-delivery-service-receive-certain-documents.
- USCIS said it will not honor shipping labels sent after the initial filing. "If the delivery costs are not paid in full, or if you do not choose to send us a prepaid air bill or shipping label, we will send the documents to you by regular U.S. mail," USCIS said. Also, the agency noted that using a prepaid air bill or shipping label does not speed up adjudication and will not always result in faster delivery of the notice.

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7. **USCIS Advises on Ebola-Related Relief for Nationals of Guinea, Liberia, and Sierra Leone in the United States**

U.S. Citizenship and Immigration Services (USCIS) announced that it is closely monitoring the Ebola disease outbreak in West Africa and is offering relief measures to nationals of those three countries who are currently in the United States. Immigration relief measures that "may be available if requested" include:

- Change or extension of nonimmigrant status for an individual currently in the United States, even if the request is filed after the authorized period of admission has expired;
- Extension of certain grants of parole made by USCIS;
- Expedited adjudication and approval, where possible, of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship;
- Expedited processing of immigrant petitions for immediate relatives (currently in the United States) of U.S. citizens;
- Expedited adjudication of employment authorization applications, where appropriate; and
- Consideration for waiver of fees associated with USCIS benefit applications.
- The announcement is available at http://www.uscis.gov/news/alerts/ebola-outbreak-related-immigration-relief-measures-nationals-guinea-liberia-and-sierra-leone-currently-united-states. For more information about similar measures for those affected by unforeseen circumstances in their home countries, see http://www.uscis.gov/humanitarian/special-situations.

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8. **International Employee Recruiter Sentenced to Two Years for Visa Fraud**

U.S. District Judge Paul W. Grimm recently sentenced Milen Radomirski, a Bulgarian national residing in Germantown, Maryland, to two years in prison for visa fraud. Judge Grimm also ordered Radomirski to forfeit $100,000.

"American businesses are permitted to sponsor foreign workers to enter the United States lawfully under the H-2B visa program, but Milen Radomirski undermined that program by falsely vouching for hundreds of aliens who were not expected to comply with the terms of the visa," said U.S. Attorney Rod J.

Rosenstein.

According to the USCIS announcement, from 2003 to August 2013, Mr. Radomirski worked for a pool service company in Maryland that provided lifeguards and pool maintenance in the Washington, DC, metropolitan area. As part of his employment, Mr. Radomirski recruited international workers that his company could sponsor to work in the United States on H-2B visas and other short-term visas. Mr. Radomirski admitted that he fraudulently obtained more than 100 H-2B temporary worker visas.

From 2006 through 2011, Mr. Radomirski's company submitted applications for approximately 789 H-2B visas. His company certified to the U.S. Department of Labor that it had not sought or received payment from the workers to obtain the visas, and specified to USCIS the jobs in which the foreign nationals would be employed. Sponsored workers could not be employed by any other company. The company was required to notify DHS if any H-2B workers failed to report to work within five days after their specified start dates or if workers absconded or were terminated.

Mr. Radomirski admitted that he charged visa beneficiaries money in exchange for including them on his company's petitions for H-2B visas. He knew that many of the visa beneficiaries would not work for his company at all, would only work at his company for a short period of time, or would work for other employers in addition to his company.

The announcement is available at http://www.uscis.gov/news/news-releases/international-employee-recruiter-sentenced-two-years-prison-visa-fraud.

9. **CBP Announces New Mobile Passport Control App**

U.S. Customs and Border Protection (CBP) announced the launch of the first authorized "app" (mobile application) to expedite a traveler's entry process into the United States. Mobile Passport Control (MPC) will allow eligible travelers to submit their passport information and customs declaration forms via a smartphone or tablet computer before CBP inspection.

Airside Mobile and Airports Council International-North America (ACI-NA) developed the app in partnership with CBP as part of a pilot program at the Hartsfield-Jackson Atlanta International Airport. MPC is expected to expand to more airports later this year and to Android smartphone users in the future.

Currently, iPhone and iPad users can download the app for free from Apple's App Store.

CBP Commissioner R. Gil Kerlikowske said, "By offering this app to passengers, we hope to build upon the success we have already experienced with Automated Passport Control, which has resulted in decreases in wait times as much as 25-40 percent, even with continued growth in international arrivals." The app does not require pre-approval and does not collect any new information on travelers.

ACI-NA contracted with Airside Mobile for MPC's technical development. ACI-NA President and CEO Kevin M. Burke said, "We look forward to continuing our collaboration with CBP as Mobile Passport begins its roll-out at U.S. airports later this year."

There are five steps to MPC:

- Download the Mobile Passport Control App from the Apple App Store before arriving;
- Create a profile with the passport information;
- Complete the "New Trip" section upon arrival in the United States;
- Submit the customs declaration form through the app to receive an electronic receipt with an Encrypted Quick Response (QR) code (the receipt will expire four hours after being issued); and
- Bring the passport and smartphone or tablet with the digital bar-coded receipt to a CBP officer.

The announcement is available at http://www.cbp.gov/newsroom/national-media-release/2014-08-11-000000/new-mobile-passport-control-app-available. Information about Mobile Passport, including how to download, user eligibility, and other frequently asked questions, is available at http://www.cbp.gov/travel/us-citizens/mobilepassportcontrol and http://mobilepassport.us/.

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10. **OSC Advises on How to Proceed After Over-Documenting Employees**

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) recently responded to a request for

guidance on how to proceed after discovering that a company had accepted more documentation than necessary for Form I-9 employment verification purposes in a few cases.

OSC noted that it is unaware of any publicly available guidance issued by any agency regarding steps an employer should take if it accepts too many documents during the I-9 process. However, OSC pointed out that an employer may violate the Immigration and Nationality Act if it requests more or different documents than required, or rejects "reasonably genuine-looking documents" on the basis of citizenship or immigration status or on the basis of national origin during the I-9 process. OSC also noted that although an employer should correct its practices upon learning that it may have violated the antidiscrimination provision of the INA, an employee who believes that he or she was the victim of discriminatory I-9 practices has up to 180 days from the date of the practice to file a charge with the OSC. OSC advised the inquiring employer to see http://www.justice.gov/crt/about/osc or call its toll-free employer hotline at 1-800-255-8155 to learn about resources available to assist human resources staff in complying with the provision in the future, including "free webinar training by our office or distribution of educational materials to your staff." The OSC noted that it cannot provide an advisory opinion on any specific case or set of facts.

The OSC response is available at http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2014/181.pdf.

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11. **DOS Extends Special Immigrant Visas for Afghans**

The Department of State announced that its authority to issue special immigrant visas (SIVs) to certain Afghan nationals under the Afghan Allies Protection Act of 2009, as amended, has been extended. In addition to the 3,000 visas for Afghan principal applicants originally allocated for use in fiscal year 2014, another 1,000 SIVs may be issued until December 31, 2014. The program will end on that date unless Congress further extends it.

The announcement is available at http://travel.state.gov/content/visas/english/news/Afghan-SIV-Program-Extended.html.

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12. **Firm In the News**

Cyrus Mehta was a speaker at the 2014 EB-5 Investors & Regional Centers CLE Conference on August 22, 2014, in Chicago, IL where he spoke on ethical issues in EB-5 practice. Mr. Mehta also spoke on ethical issues in removal proceedings at a Removal Defense conference of the Practising Law Institute in New York City on August 11, 2014.

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