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

NOVEMBER 2014 IMMIGRATION UPDATE

Posted on November 3, 2014 by Cyrus Mehta

Headlines:

1. Labor Cert News: Atlanta NPC No Longer Forwarding to BALCA All PERM Requests for Reconsideration; Statistical Updates for FY 2014 Q4; H-1B Legacy Docs No Longer Available - The Department of Labor's Office of Foreign Labor Certification (OFLC) recently announced news on several topics.

2. U.S. Court of Appeals for D.C. Circuit Reverses District Court in Specialized Knowledge Case - The U.S. Court of Appeals for the District of Columbia Circuit recently reversed and remanded the district court's grant of summary judgment to the government in *Fogo de Chao (Holdings) Inc. v. U.S. Department of Homeland Security.*

3. USCIS To Implement Haitian Family Reunification Parole Program - USCIS will offer certain eligible Haitian beneficiaries of already approved family-based immigrant visa petitions, who are currently in Haiti, an opportunity to come to the United States up to approximately two years before their immigrant visa priority dates become current.

4. USCIS Extends TPS for Honduras, Nicaragua - For those who have already been granted TPS under the Honduras or Nicaragua designations, the 60-day re-registration period ends on December 15, 2014.

5. SEC Charges Immigration Attorneys With Defrauding Investors Seeking U.S. Residence; SEC-USCIS Issue Joint Alert - SEC and USCIS caution potential EB-5 investors about phony regional centers posing as legitimate investment opportunities.

6. Justice Dept. Settles Lawsuit Against Texas Bus Company for Discrimination - The lawsuit alleged that the company discriminated against U.S. workers by preferring to hire workers on temporary H-2B visas for its bus driver positions.

7. President Extends Staggered Crossings of Seafood Workers Through December 11, 2014 - No staggered entry of H-2B workers after December 11, 2014, will be permitted absent further legislative extensions.

8. USCIS Issues Instructions for DED Liberians on Applying for 24-Month Extension of Work Authorization - USCIS published a notice in the Federal Register providing instructions for eligible Liberians on how to apply for the full

24-month extension of employment authorization through September 30, 2016.

9. ABIL Global: France - The government has finalized its draft of the Law on the Rights of Foreigners in France. Also, France has adopted a law to combat fraud in the framework of posted workers.

10. Firm In The News...

Details:

1. Labor Cert News: Atlanta NPC No Longer Forwarding to BALCA All PERM Requests for Reconsideration; Statistical Updates for FY 2014 Q4; H-1B Legacy Docs No Longer Available

The Department of Labor's Office of Foreign Labor Certification (OFLC) recently announced the following news:

Atlanta NPC change in process. As of October 27, 2014, the Atlanta National Processing Center is no longer automatically forwarding to the Board of Alien Labor Certification Appeals (BALCA) all PERM Requests for Reconsideration where the original case decision was upheld. Rather, a Notice of Decision will be issued when the case is upheld, and the employer must affirmatively request review before BALCA no later than 30 calendar days after the date the Notice of Decision is issued.

The announcement is available at http://www.foreignlaborcert.doleta.gov/.

Statistical updates for FY 2014 Q4. OFLC has issued updated program fact sheets with selected statistics for the permanent labor certification program, prevailing wage determination program, H-1B temporary visa program, H-2A temporary agricultural visa program, and H-2B temporary nonagricultural visa program. Reports were derived from program data as of September 30, 2014. The updated fact sheets are available at http://www.foreignlaborcert.doleta.gov/performancedata.cfm#stat.

H-1B legacy records no longer available. On July 8, 2013, the National Archives and Records Administration (NARA) approved OFLC's revised retention schedule following a 30-day period of public notice and review. NARA determined that employer applications for labor certification and supporting documentation, whether retained in paper or electronic form, are temporary records and subject to destruction. The OFLC-approved disposition schedule authorizes the retention of records for five years after the date a final determination letter is issued or final action occurs, such as a withdrawn application, subject to an active investigation or litigation hold.

The records NARA identified as permanent records are the annual disclosure data files at http://www.flcdatacenter.com, as well as the quarterly disclosure data files and the OFLC Annual Reports on the OFLC Performance page at http://www.foreignlaborcert.doleta.gov/performancedata.cfm.

Labor Condition Applications (LCAs) retained in the LCA Online System are all beyond the retention period of five years from a date of final determination or final action. Therefore, effective October 17, 2014, the LCA Online System at http://www.lca.doleta.gov has been decommissioned.

The OFLC said it is no longer responding to inquiries to search for records in response to Freedom of Information Act requests, or providing information for requests for duplicate certifications for LCA applications processed in the LCA Online System, in keeping with the OFLC records schedule.

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2. U.S. Court of Appeals for D.C. Circuit Reverses District Court in Specialized Knowledge Case

The U.S. Court of Appeals for the District of Columbia Circuit recently reversed and remanded the district court's grant of summary judgment to the government in *Fogo de Chao (Holdings) Inc. v. U.S. Department of Homeland Security.*

The court noted that Fogo de Chao owns numerous Brazilian steakhouses that focus on the *churrasco*, a traditional festive style of preparing and serving meat derived from the gaucho culture of the Rio Grande do Sul region of southern Brazil. Following its success in Brazil, Fogo de Chao entered the U.S. market in 1997 and now has restaurants in 16 cities in the United States.

From 1997 to 2006, the Department of Homeland Security granted Fogo de Chao more than 200 L-1B visas for its *churrasqueiro* chefs to work in its U.S. restaurants. In 2010, Fogo de Chao sought to transfer another such chef, Rones Gasparetto, to the United States, reasoning that his distinctive cultural background and extensive experience cooking and serving meals in the *churrasco* style constituted "specialized knowledge." The Administrative Appeals Office (AAO) concluded, however, that Mr. Gasparetto's cultural background, knowledge, and training did not constitute specialized knowledge as a matter of law.

The D.C. Circuit held that it was unable to discern either a "sufficiently reasoned path" in the AAO's strict bar against culturally based skills or "substantial evidence supporting its factual finding" that Mr. Gasparetto did not complete the company training program. The court also referred to the government's dismissal of Fogo de Chao's argument that it would suffer economic hardship if it had to train another employee to perform the chef's duties. The court noted: "Consideration of evidence of this type provides some predictability to a comparative analysis otherwise relatively devoid of settled guideposts.That specialized knowledge may ultimately be a 'relative and empty idea which cannot have plain meaning'...is not a feature to be celebrated and certainly not a license for the government to apply a sliding scale of specialness that varies from petition to petition without explanation. Suddenly departing from policy guidance and rejecting outright the relevance of Fogo de Chao's evidence of economic inconvenience threatens just that."

The appeals court generally noted, among other things, that deference is generally due to an agency's interpretation of a statute it administers and its own

implementing regulations. No deference was due here, however, because the agency's "specialized knowledge" regulation merely restated the statute and added nothing of its own in which to ground an interpretation to which a court might defer. The AAO's decision, and any legal interpretations contained within it, "were the product of informal adjudication within rather than a formal adjudication or notice-and-comment rulemaking." Finally, the court did not find the government's arguments persuasive and agreed with Fogo de Chao that the agency's conclusion regarding the categorical irrelevance of culturally acquired knowledge was insufficiently reasoned to be sustained.

The D.C. Circuit's decision is available at http://www.cadc.uscourts.gov/internet/opinions.nsf/49B2B863D721339885257D78004DF1D6/$file/13-5301-1518126.pdf.

Form CDMA's commentary on the decision, *See* Cyrus D. Mehta, ***Fogo De Chao v. DHS:* A Significant Decision For L-1B Specialized Foreign Chefs And Beyond,** available at http://blog.cyrusmehta.com/2014/10/fogo-de-chao-v-dhs-significan-decision.html

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3. USCIS To Implement Haitian Family Reunification Parole Program

Starting in early 2015, U.S. Citizenship and Immigration Services (USCIS) will begin implementing the Haitian Family Reunification Parole (HFRP) Program to expedite family reunification for certain eligible Haitian family members of U.S. citizens and lawful permanent residents and to promote safe, legal, and orderly migration from Haiti to the United States.

Under this program, USCIS will offer certain eligible Haitian beneficiaries of already approved family-based immigrant visa petitions, who are currently in Haiti, an opportunity to come to the United States up to approximately two years before their immigrant visa priority dates become current.

Deputy Secretary of Homeland Security Alejandro Mayorkas noted, TThe United States strongly discourages individuals in Haiti from undertaking life-threatening and illegal maritime journeys to the United States. Such individuals will not qualify for the HFRP program and if located at sea may be returned to Haiti.У

USCIS noted that legal authority for the HFRP program is provided under the Immigration and Nationality Act, which authorizes the Secretary of Homeland Security to parole into the United States certain individuals, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit. This is the same legal authority used to establish the Cuban Family Reunification Parole

program in 2007.

USCIS is not accepting HFRP program applications now, and the agency said that potential beneficiaries should not take any action at this time. USCIS said it will provide full program details before the end of this calendar year, and stakeholder engagements will take place shortly thereafter. In early 2015, the Department of State's National Visa Center (NVC) will begin contacting certain U.S. citizens or lawful permanent residents with approved petitions for Haitian family members, offer them the opportunity to apply for the program, and provide instructions. Only individuals who receive a written notice of program eligibility from NVC will be eligible to apply.

Under the Haitian Family Reunification Parole program, Haitians authorized parole will be allowed to enter the United States and apply for work permits but will not receive permanent resident status any earlier.

The notice is available at http://www.uscis.gov/news/dhs-implement-haitian-family-reunification-parole-program.

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4. USCIS Extends TPS for Honduras, Nicaragua

U.S. Citizenship and Immigration Services has announced that the designations of Honduras and Nicaragua for temporary protected status (TPS) have been extended for 18 months, from January 6, 2015, through July 5, 2016.

For those who have already been granted TPS under the Honduras or Nicaragua designations, the 60-day re-registration period ends on December 15, 2014. USCIS will issue new employment authorization documents (EADs) with a July 5, 2016, expiration date to eligible Honduras and Nicaragua TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the time frames involved with processing TPS re-registration applications, USCIS recognizes that not all re-registrants will receive new EADs before their current EADs expire on January 5, 2015. Accordingly, USCIS is automatically extending the validity of EADs issued under the TPS designation of Honduras and Nicaragua for six months, through July 5, 2015. The Federal Register notices explain how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on the employment eligibility

verification (Form I-9) and E-Verify processes.

USCIS also set forth procedures necessary for nationals of Honduras or Nicaragua (or those having no nationality who last habitually resided in Honduras or Nicaragua) to re-register for TPS and to apply for renewal of their EADs with USCIS. Re-registration is limited to persons who have previously registered for TPS under the designation of Honduras or Nicaragua and whose applications have been granted. Certain nationals of Honduras and Nicaragua (or those having no nationality who last habitually resided in Honduras or Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) at least one of the late initial filing criteria; and (2) all TPS eligibility criteria, including continuous residence in the United States since December 30, 1998, and continuous physical presence in the United States since January 5, 1999.

The Honduras notice is available at https://www.federalregister.gov/articles/2014/10/16/2014-24559/extension-of-the-designation-of-honduras-for-temporary-protected-status. The Nicaragua notice is available at https://www.federalregister.gov/articles/2014/10/16/2014-24560/extension-of-the-designation-of-nicaragua-for-temporary-protected-status.

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5. SEC Charges Immigration Attorneys With Defrauding Investors Seeking U.S. Residence; SEC-USCIS Issue Joint Alert

The Securities and Exchange Commission recently charged a Los Angeles, California-based immigration attorney, his wife, and his law firm partner with conducting an investment scheme to defraud foreign investors trying to come to the United States through the EB-5 Immigrant Investor Program.

The SEC alleges that Justin Moongyu Lee, Rebecca Taewon Lee, and Thomas Edward Kent raised nearly $11.5 million from two dozen investors seeking to participate in the EB-5 program. The Lees and Mr. Kent informed investors that they would be EB-5-eligible if they invested in an ethanol production plant that they would build and operate in Ulysses, Kansas. However, they misappropriated the investors' money for other uses instead. They never built the plant and never created the promised jobs, and the Lees and Kent continued to misrepresent to investors that the project was ongoing.

In a parallel action, the U.S. Attorney's Office for the Central District of California announced criminal charges against Justin Lee.

According to the SEC's complaint filed in U.S. District Court for the Central District of California, the investors defrauded by the Lees and Kent were primarily of Chinese and Korean descent. Justin Lee and Mr. Kent applied to U.S. Citizenship and Immigration Services (USCIS) in 2006 for designation as a regional center under the EB-5 program. They claimed there would be "substantial economic benefit" and "thousands" of new jobs for the area in southwest Kansas. However, by mid-2008, construction of an ethanol plant at the site was no longer economically feasible, and the Lees and Mr. Kent concealed their failure to generate the jobs required by the EB-5 program by submitting false documents to USCIS.

In the meantime, the SEC alleges, when Justin Lee was running low on cash and having difficulty obtaining financing, he took money out of investor escrow accounts without the investors' knowledge before the approval of their applications for U.S. residence. Mr. Lee and his wife subsequently misused several million dollars raised from the ethanol plant investors for other undisclosed purposes, such as financing an iron ore project in the Philippines and repaying investors in other unrelated offerings.

According to the SEC's complaint, the Lees set up and conducted investor seminars in Los Angeles at which the purported ethanol plant project was the main focus of the presentation, despite the halt of construction in 2008. Mr. Kent, who visited the site frequently in 2008 and 2009 and knew no construction was taking place, also participated in the seminars. Investors continued to be misled that the proceeds from their investment were being used to construct an ethanol plant. In particular, the business plan updated in June 2010 and distributed to investors falsely represented that construction was "ongoing" and that the plant would be in operation before November 2011.

The SEC's complaint charges the Lees, Mr. Kent, and five companies founded and controlled by Justin Lee (American Immigrant Investment Fund I, Biofuel Venture IV, Biofuel Venture V, Nexland Investment Group, and Nexsun Ethanol) with violations of ¤¤ 17(a)(1), (2), and (3) of the Securities Act of 1933 and ¤ 10(b) of the Securities and Exchange Act of 1934 as well as Rule 10b-5(a) and (c). Justin Lee, Mr. Kent, and the entities also are charged with violating Rule 10b-5(b). The SEC's complaint seeks disgorgement, prejudgment interest, and penalties along

with permanent injunctions.

The Association to Invest In the USA (IIUSA), a trade association representing more than 200 EB-5 regional centers, released a statement supporting the SEC's actions in this case.

SEC-USCIS joint alert. In response to similar cases, in 2014 SEC and USCIS issued a joint alert cautioning potential EB-5 investors about phony regional centers posing as legitimate investment opportunities. The joint alert includes information about steps to take to research any offering that purports to be affiliated with the EB-5 program. For example, would-be investors should:

- Confirm that the regional center has been designated by USCIS;
- Obtain copies of documents provided to USCIS;
- Request investment information in writing;
- Ask if promoters are being paid;
- Seek independent verification;
- Examine structural risk;
- Consider the developer's incentives; and
- Look for warning signs of fraud.

The joint alert notes that hallmarks of fraud may include:

- Promises of a visa or becoming a lawful permanent resident—investing through EB-5 makes a person eligible to apply for a conditional visa, but there is no guarantee that USCIS will grant a conditional visa or subsequently remove the conditions on lawful permanent residence. USCIS noted that it carefully reviews each case and denies cases where eligibility rules are not met. "Guarantees of the receipt or timing of a visa or green card are warning signs of fraud," the alert notes;
- Guaranteed investment returns or no investment risk;
- Overly consistent high investment returns;
- Unregistered investments;
- Unlicensed sellers; and
- Layers of companies run by the same individuals.

The SEC's announcement is available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542843452#.VDnK4JDD-71. The SEC's complaint is available at

http://www.sec.gov/litigation/complaints/2014/comp-pr2014-184.pdf. IIUSA's statement is available at https://iiusa.org/blog/category/press-room/press-releases/. The SEC-USCIS joint alert is available at http://www.sec.gov/investor/alerts/ia_immigrant.htm.

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6. **Justice Dept. Settles Lawsuit Against Texas Bus Company for Discrimination**

The Department of Justice (DOJ) recently reached a settlement with Autobuses Ejecutivos LLC, doing business as Omnibus Express, a bus company based in Houston, Texas. The settlement resolved a lawsuit filed in August 2013 by the DOJ under the Immigration and Nationality Act's (INA) antidiscrimination provision. The lawsuit alleged that the company discriminated against U.S. workers by preferring to hire workers on temporary H-2B visas for its bus driver positions.

Under the settlement agreement, Omnibus Express will establish a $208,000 fund to compensate victims of its discriminatory practices, pay $37,800 in civil penalties to the United States, and be subject to monitoring of its hiring and recruiting practices for a two-year period.

The announcement is available at http://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-texas-bus-company-discriminating-against-us.

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7. **President Extends Staggered Crossings of Seafood Workers Through December 11, 2014**

On January 17, 2014, President Barack Obama signed into law the Consolidated Appropriations Act of 2014, which included a provision permitting the staggered entry of H-2B workers employed by seafood industry employers under certain conditions. Following passage of the Continuing Appropriations Resolution, 2015, this provision was extended to December 11, 2014. Accordingly, no staggered entry of H-2B workers after December 11, 2014, will be permitted absent further legislative extensions.

To use the "staggered crossing" provision, seafood industry employers must download, complete, and sign the official attestation and provide it to the H-2B

nonimmigrant worker for presentation, upon request, to Department of State consular officers and/or the Department of Homeland Security's Customs and Border Protection officers.

According to a related FAQ, all employers submitting an H-2B application for temporary employment certification must accurately indicate their temporary need, including the starting and ending dates of need for the period in which they intend to employ H-2B nonimmigrant workers. However, the 2014 Appropriations Act permits employers in the seafood industry to bring into the United States, in accordance with an approved H-2B petition, nonimmigrant workers at any time during the 120-day period on or after the employer's certified start date of need, if certain conditions are met.

The 2014 Appropriations Act contained two primary conditions that employers must meet. First, the rule applies only to employers engaged in a business in the seafood industry that permit or require their H-2B nonimmigrant workers to enter the United States up to 120 days after the certified start date of need. Second, any seafood industry employer that permits or requires its H-2B nonimmigrant workers to enter the United States between 90 and 120 days after the certified start date of need must complete a new assessment of the local labor market during the period that begins at least 45 days after the certified start date of need and ends before the 90th day after the certified start date of need.

Seafood industry employers who conduct the additional recruitment required by the 2014 Appropriations Act should not submit proof of the additional recruitment to the Office of Foreign Labor Certification. Instead, they must retain the additional recruitment documentation, along with their pre-filing recruitment documentation, for three years from the date of certification.

The announcement is available at http://www.foreignlaborcert.doleta.gov/news.cfm. The official attestation form is available at http://www.foreignlaborcert.doleta.gov/form.cfm. The FAQ is available at http://www.foreignlaborcert.doleta.gov/pdf/FAQs_Seafood_Staggering_2014_Approps_final_040114.pdf.

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8. **USCIS Issues Instructions for DED Liberians on Applying for 24-Month**

Extension of Work Authorization

On September 26, 2014, U.S. Citizenship and Immigration Services (USCIS) extended for an additional 24 months the deferred enforced departure (DED) of certain Liberians and provided for work authorization during that period. The DED extension began on October 1, 2014, and runs through September 30, 2016. USCIS published a notice in the Federal Register on October 1, 2014, providing instructions for eligible Liberians on how to apply for the full 24-month extension of employment authorization. The notice also provides instructions for DED-eligible Liberians on how to apply for permission to travel outside the United States during the 24-month DED period.

USCIS said it will issue new employment authorization documents (EADs) with a September 30, 2016, expiration date to Liberians whose DED has been extended under the Presidential Memorandum of September 26, 2014, and who apply for EADs under this extension. Given the time frames involved with processing EAD applications, the Department of Homeland Security (DHS) said it recognized that not all DED-eligible Liberians would have received new EADs before their current EADs expired on September 30, 2014. Accordingly, the notice also automatically extends for six months (through March 30, 2015) the validity of DED-related EADs that had an expiration date of September 30, 2014, and explains how Liberians covered under DED and their employers may determine which EADs are automatically extended and their impact on employment eligibility verification (Form I-9) and E-Verify processes.

The notice is available at https://www.federalregister.gov/articles/2014/10/01/2014-23507/filing-procedures-for-employment-authorization-and-automatic-extension-of-existing-employment.

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9. **Pro Bono Success Story: Miller Mayer Helps Nuns Obtain R-1 Religious Visa**

Alliance of Business Immigration Lawyers member firm Miller Mayer in Ithaca, New York, represented a religious organization of nuns in its religious worker (R-1) nonimmigrant visa petition on behalf of a foreign national nun who serves at churches in upstate New York. This was the organization's first successful R-1 petition with U.S. Citizenship and Immigration Services (USCIS), which required

Miller Mayer to prepare the sisters for a USCIS fraud detection site visit. Miller Mayer performed the work pro bono.

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10. **ABIL Global: France**

The government has finalized its draft of the Law on the Rights of Foreigners in France. Also, France has adopted a law to combat fraud in the framework of posted workers.

Draft Law on Rights of Foreigners

The government has finalized and published its draft of the Law on the Rights of Foreigners in France, which is a significant overhaul of the Code of Entry and Stay of Foreigners and of Asylum (CESEDA). The new law would increase the use of multi-annual permits to stay, create new immigration categories, and eliminate the work permit requirement for assignments of less than three months.

Below are highlights of the major changes of interest to human resource and mobility managers. The draft law is not yet scheduled for parliamentary debate, which is expected to occur in upcoming months.

Purpose of the Draft Law

The government aims to reduce the workload for civil servants and the compliance burden on business, and to attract qualified foreign nationals and investments to France. The draft law achieves these three goals by: (1) increasing the use of multi-annual permits to stay, thus reducing the renewals of the current one-year permit to stay (*Carte de Séjour Temporaire)*; (2) creating a new multi-annual "supra" category, the Talent Passport, which overhauls many existing categories and creates some new ones that will be of interest to business; and (3) eliminating the temporary work permit (*APT*) requirement for foreigners assigned to France for less than three months.

Increased Use of Multi-Annual Permits

Currently, most third-country nationals are issued a one-year renewable permit to stay. The renewal process requires multiple personal appearances and issuance of temporary documents (*récépissés*).

The draft law provides for the issuance of multi-annual permits with a

maximum validity of four years, after the expiration of the initial one-year permit, to the extent the third-country national has demonstrated his or her willingness to adhere to French cultural and republican values.

The draft law provides that trainees, self-employed professionals, and visitors will not benefit from the multi-annual permit.

Talent Passport

Currently, there are several categories to attract talent and investment. The draft law merges the existing categories into the Talent Passport. This "supra" category includes a total of nine categories with a maximum validity of four years:

1. Young Qualified Graduate (*jeune diplômé qualifié*): Requires: (i) a master's or doctorate-level degree earned in France or sponsorship by an employer qualified as an Innovating Start-Up *(jeune entreprise innovante*) by the Fiscal Code; (ii) a French employment contract; and (iii) a threshold salary determined by decree. This is a new category.
2. Highly Qualified Worker (*travailleur hautement qualifié*): Requires: (i) a three-year university degree or five years of experience; (ii) a French employment contract of at least 12 months; and (iii) a threshold salary determined by decree. This category absorbs the previous European Blue Card without substantial change.
3. Inter-Company Transferee (ICT) (*salarié en mission*): Requires: (i) an intra-group transfer; (ii) a three-month prior employment; and (iii) a threshold salary determined by decree. Under the existing scheme, the three-month prior employment is not required when the ICT becomes a French employee. This category absorbs the previous ICT category without any other substantial change.
4. Scientist (*chercheur*): Requires: (i) a master's level or higher degree; (ii) tasks of research or teaching at the university level; and (iii) an agreement with a government-approved body. This category absorbs the previous Scientist category, with no significant change.
5. Entrepreneur (*créateur d'entreprise*): Requires: (i) a master's-level degree or five years of experience; and (ii) creation of an enterprise in accordance with criteria to be determined by government decree. This is a new category.
6. Investor (*investisseur)*: Requires a direct investment in infrastructure, as

determined by government decree. This category absorbs the previous Exceptional Economic Contribution. The amount of investment is expected to be lowered from €10,000,000 to €500,000 and the number of jobs to be created from 50 to 10.

7. Executive Officer (*mandataire social*): Requires: (i) nomination of a legal representative or executive officer of an entity registered in France; and (ii) a threshold income to be defined by decree. This category was previously covered under Competence and Talent and does not change substantially.
8. Artist (*artiste*): Requires: (i) a contract approved by the cultural (*DRAC*) or labor (*SMOE*) authorities for an artistic or cultural activity; and (ii) threshold compensation to be defined by decree. This preexisting category is being merged here without substantial change.
9. Foreigner Renowned Internationally in a scientific, literary, intellectual, educational, or sports domain (*étranger ayant une renommée internationale dans un domaine scientifique, littéraire, intellectuel, éducatif, ou sportif*): Requires: (i) international fame; and (ii) an activity in France in one of the stated areas. This pre-existing category is being merged here with changes to be determined by implementing regulations.

Activities 1, 2, 3, 8, and 9 may be exercised without a separate work permit. In case of involuntary loss of employment, the permit will be extended for one year. Beyond that, the validity will be limited to the remaining period of unemployment benefits.

The accompanying spouse and minor children reaching majority will be issued a multi-annual permit for the duration of the validity of the principal holder of the Talent Passport. Such derivative permit will allow work.

Elimination of the Temporary Work Permit (APT)

The draft law proposes the elimination of the temporary work permit currently required for assignments of less than three months. The impact study accompanying the draft law states that short assignments need to be declared under existing regulations, which are adequate tools to verify *a posteriori* the legality of such assignments. The elimination of the temporary work permit is a controversial proposition and will be debated in the months to come.

New Law to Combat Fraud in Framework of Posted Workers

A posted worker is one sent by a company in one EU member state to provide short-term services for a company (client or affiliate) in the host EU member state. France's Act of July 10, 2014 (Act) against unfair social competition translates into French law a directive of the European Union (EU) of May 15, 2014, laying down a set of mechanisms to prevent and punish any violation or circumvention of posting procedures in the EU.

Most of these provisions are incorporated into the code of labor with immediate application.

Declaration of Posting

The Act strengthens the compulsory nature of the posting declaration, which was already required by Articles R. 1263-3 and the Labor Code. The employer sends a statement of detachment to the labor inspectorate having jurisdiction over the work site. The user or the client who contracts with the foreign service provider must ensure that a compliant declaration has been made. In the absence of a compliant declaration, the end user and contracting parties may be jointly and severally liable for payment of an administrative fine of up to €2,000 per posted employee. This penalty may be increased to €4,000 in case of repeated violations. The total amount of the fine may not exceed €10,000. The Act provides that the declaration of posting must be recorded in the statutory register of personnel of the company that hosts posted workers.

Due Diligence and Financial Responsibility of the Payer

The Act strengthens due diligence and accountability of the user or client. The user or client has an obligation of "vigilance" with respect to the collective housing conditions of employees of the provider. In case of failure, the user or client may be required to defray the costs of the collective accommodations of employees.

The required diligence of the user or client also applies to compliance by all contractual parties with labor laws. In case of noncompliance, the user or client must order the other party to comply and, if the noncompliance persists, inform the public authorities. If the user or client breaches these obligations, it is subject to a penalty prescribed by decree of the *Conseil d'Etat*. In case of noncompliance with payment of minimum wages or if the user or client has failed to fulfill its obligations to order compliance and inform the authorities of noncompliance if it persists, it may be held jointly and severally liable for

payment of salaries, allowances, and charges.

Online Publication of Sentences

The Act provides for the publication of court penalty sentences for a period of up to two years on a dedicated website.

Unions' Right to Sue

The Act creates the right of union representatives to defend before the courts the rights of a posted employee without having to show a power of attorney from that employee. It is sufficient that the employee be informed and not object within 15 days. The employee can always intervene in the proceedings initiated by the union and stop them at any time.

Consequences for Foreign Employers of Posted Employees

These new control mechanisms and sanctions apply to all foreign employers of employees posted to France. The foreign employer posting employees as part of a service to a client in France should therefore ensure its compliance with labor laws applicable in France, including regulations on collective accommodations. In the event of noncompliance, the foreign employer may receive an order from the user or French client to stop the offense. Moreover, if the user or client does not issue a compliance order when appropriate or inform the authorities of persistent noncompliance, such user or client company may itself be penalized in France and be held severally liable for the cost of collective accommodations or payment of salaries, allowances, and expenses payable as compensation to the posted worker.

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11. **Firm In the News**

Cyrus D. Mehta was a Panelist on *Ethical Issues, Unauthorized Practice of Law, and Professional Responsibility When Delving Into the Other Side,* at the Canada/U.S. Northern Border Annual Immigration Fall Conference, Buffalo, NY, October 17, 2014.

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