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

MARCH 2015 IMMIGRATION UPDATE

Posted on March 2, 2015 by Cyrus Mehta

Headlines:

1. Court Blocks Expanded DACA, DAPA; Obama Administration Appeals - The blocked programs include an expansion of Deferred Action for Childhood Arrivals, which had been set to start in February, and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which was scheduled to begin in May.

2. DHS Extends Eligibility for Work Authorization To Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking LPR Status - Starting May 26, 2015, certain H-4 dependent spouses of H-1B nonimmigrants may apply for work authorization. Over 100,000 spouses may benefit from this change.

3. Federal Jury Awards $14 Million To Five Trafficked Indian Guest Workers - In the first of a series of cases involving several hundred clients, a federal jury awarded five Indian guest workers $14 million in compensatory and punitive damages in a labor trafficking scheme.

4. Labor Dept. Publishes 2015 Allowable Charges for Agricultural Workers' Meals and Travel Reimbursements - The notice discusses requirements that the employer assume responsibility for certain costs associated with H-2A workers' meals, travel, and lodging.

5. H-2B Cap Reached for First Half of FY 2015 - USCIS said that it is rejecting new cap-subject H-2B petitions received after January 26 and that request an employment start date before April 1.

6. Nebraska Joins E-Verify RIDE Program - The RIDE program allows E-Verify to validate the authenticity of driver's licenses and state identification cards that employees present as identity documents for employment eligibility verification.

7. ABIL Submits Immigration Reform Proposals to USCIS - ABIL submitted comments on immigration policy to the U.S. Departments of State and Homeland Security in response to a Federal Register notice. ABIL included proposals on modernizing the U.S. immigrant and nonimmigrant visa system, including proposals for a right to counsel in person or electronically whenever an individual is interviewed by federal immigration authorities.

8. ABIL Pro Bono: Cyrus Mehta, Miller Mayer - The AAO recently sustained an appeal of an I-601 hardship waiver denial based in part on FGM claims made in a previous asylum application. Also, Miller Mayer is helping a Cornell University student group aid Iraqi refugees, including many military translators, in resettling and applying for visas to the United States.

9. ABIL Global: Belgium - Several developments have been announced, including the 2015 salary thresholds and related requirements, and a new mandatory fee for certain residence requests.

10. Firm In The News...
Details:

1. Court Blocks Expanded DACA, DAPA; Obama Administration Appeals

On February 23, 2015, the Department of Justice (DOJ) filed paperwork to seek a stay of a federal district court decision to block temporarily some of President Obama's latest executive actions on immigration. That decision was in response to a lawsuit by 26 states. The blocked programs include an expansion of Deferred Action for Childhood Arrivals (DACA), which had been set to start in February, and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which was scheduled to begin in May.

U.S. District Judge Andrew Hanen of the Federal District Court for the Southern District of Texas, in Brownsville, ruled in favor of blocking the programs on

February 16. Judge Hanen said the programs would impose major burdens on states and that the Obama administration exceeded its authority in changing federal rules.

The temporary injunction does not block the existing DACA program, only the expansion announced in November 2014. Individuals may continue to request initial grants or renewals of DACA under the guidelines established in 2012, Secretary of Homeland Security Jeh Johnson stated. He also noted that other actions announced in November 2014 were not affected by the ruling, including prioritizing enforcement efforts.

Secretary Johnson issued a statement on February 17 saying that he "strongly disagree" with the District Court's temporary injunction blocking the programs, but that his agency would not begin accepting requests for expanded DACA on February 18 as originally planned, and would suspend plans to accept DAPA requests until further notice. " The Department of Justice, legal scholars, immigration experts and even other courts have said that our actions are well within our legal authority. Our actions will also benefit the economy and promote law enforcement. We fully expect to ultimately prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do," he said.

Meanwhile, President Obama fielded immigration questions at a "town hall"-style meeting on February 25, 2015, conducted by MSNBC and Telemundo. Noting that the Senate had passed comprehensive immigration reform in 2013 but that House Republicans refused to bring the bill to the floor for a vote, he said he had decided to use his executive authority to "try to make sure that we are prioritizing our immigration system a lot smarter than we've been doing." He stressed the importance of voting to change related laws. He also noted that he would veto legislation intended to eliminate his executive actions.

The preliminary injunction is available at http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_U.S.%20news/US-news-PDFs/150216-Injunction.pdf. The Obama administration's statement on *Texas v. United States* is available at http://www.whitehouse.gov/the-press-office/2015/02/17/statement-press-secretary-state-texas-v-united-states-america.

Information on DAPA is available at http://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf.
Information on the recent executive actions on immigration is available at http://www.uscis.gov/immigrationaction. A February 11 FAQ is available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.
For a commentary on the decision, See David Isaacson's blog,http://blog.cyrusmehta.com/2015/02/ignoring-elephant-in-room-preliminary_18.html
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2. DHS Extends Eligibility for Work Authorization To Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking LPR Status

U.S. Citizenship and Immigration Services (USCIS) Director Leon Rodriguez announced on February 24, 2015, that effective May 26, 2015, the Department of Homeland Security (DHS) is extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status. DHS amended the regulations to allow these H-4 dependent spouses to accept employment in the United States.

Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who:

- Are the principal beneficiaries of an approved Form I-140, Immigrant Petition for Alien Worker;
- or Have been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act. The Act permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.

Under the rule, eligible H-4 dependent spouses must file Form I-765, Application for Employment Authorization, with supporting evidence and the required $380 fee to obtain employment authorization and receive a Form I-766, Employment Authorization Document (EAD). USCIS will begin accepting applications on May

26, 2015. Once USCIS approves the Form I-765 and the H-4 dependent spouse receives an EAD, he or she may begin working in the United States.

USCIS said it expects this change to "reduce the economic burdens and personal stresses H-1B nonimmigrants and their families may experience during the transition from nonimmigrant to lawful permanent resident status, and facilitate their integration into American society." As such, USCIS noted, the change "should reduce certain disincentives that currently lead H-1B nonimmigrants to abandon efforts to remain in the United States while seeking lawful permanent residence, which will minimize disruptions to U.S. businesses employing them." The agency noted that the change "should also support the U.S. economy because the contributions H-1B nonimmigrants make to entrepreneurship and science help promote economic growth and job creation." The rule also "will bring U.S. immigration policies more in line with those laws of other countries that compete to attract similar highly skilled workers," USCIS said.

USCIS estimates that the number of individuals eligible to apply for employment authorization under this rule could be as high as 179,600 in the first year and 55,000 annually in subsequent years. USCIS reminds those potentially eligible that this rule is not considered effective until May 26, 2015. Individuals should not submit an application to USCIS before the effective date, "and should avoid anyone who offers to assist in submitting an application to USCIS before the effective date," USCIS said.

The notice is available at http://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence. The final rule is available at https://www.federalregister.gov/articles/2015/02/25/2015-04042/employment-authorization-for-certain-h-4-dependent-spouses?utm_campaign=pi+subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

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3. Federal Jury Awards $14 Million To Five Trafficked Indian Guest Workers

In the first of a series of cases spearheaded by the Southern Poverty Law Center (SPLC) involving several hundred clients, a federal jury awarded five Indian guest workers $14 million in compensatory and punitive damages in a labor trafficking scheme. The cases were divided into five workers per case after a judge did not grant class action status. The SPLC is coordinating a legal collaboration bringing together almost a dozen of law firms and civil rights organizations to represent the workers on a pro bono basis, in what the organization is calling "one of the largest labor trafficking cases in U.S. history."

The workers had each paid recruiters and a lawyer for Signal International, a Gulf Coast marine services company, $10,000 to $20,000 or more to come to the United States on H-2B temporary worker visas after they were promised good jobs, green cards, and eventual permanent residence for themselves and their families. When the workers arrived at Signal shipyards in Pascagoula, Mississippi, they did not receive what they were promised and were forced to pay $1,050 per month to live in isolated, guarded labor camps. The workers, who were born in India, could not have obtained the promised green cards under the backlogged employment-based third preference within the time frame of the H-2B visas. The green card strategy was also incompatible with the temporary H-2B visa. As many as 24 men shared a space the size of a double-wide trailer, SPLC reported. Only Signal's Indian workers were required to live in the company housing. When some tried to find their own housing, they were told they would still be charged the housing fee, to be deducted from their pay. Company employees searched the worker's belongings and threatened those who complained with deportation. Many of the men in this series of cases had sold property or gone deeply into debt to come to the United States, and their families were at risk as a result.

SPLCXs co-counsel in this case were Crowell & Moring, LLP; the American Civil Liberties Union; the Asian American Legal Defense and Education Fund; Sahn Ward Coschignano & Baker; and the Louisiana Justice Institute. Alliance of Business Immigration Lawyers (ABIL) member Cyrus Mehta served as an expert witness for the plaintiffs. The immigration group at Fredrikson & Byron, another ABIL member law firm, is contributing its time pro bono to represent other Signal employees in a similar lawsuit.

Additional details of the case are available at

http://www.splcenter.org/get-informed/news/federal-jury-in-splc-case-awards-14-million-to-indian-guest-workers-victimized-in-. See also http://www.splcenter.org/get-informed/case-docket?keys=Signal&agenda=22&landmark=All.

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4. Labor Dept. Publishes 2015 Allowable Charges for Agricultural Workers' Meals and Travel Reimbursements

On February 23, 2015, the Department of Labor (DOL) published allowable charges for H-2A agricultural workers' meals and travel subsistence reimbursement, including lodging.

DOL provides the methodology for determining the maximum amounts that H-2A agricultural employers may charge their U.S. and foreign workers for providing them with three meals per day during employment. This methodology provides for annual adjustments of the previous year's maximum allowable charge based upon updated Consumer Price Index (CPI) data. The maximum charge is adjusted by the same percentage as the 12-month percent change in the CPI for all Urban Consumers for Food (CPI-U for Food). The Office of Foreign Labor Certification's Certifying Officer may also permit an employer to charge workers a higher amount for providing them with three meals a day, if the higher amount is justified and sufficiently documented by the employer.

DOL has determined that the percentage change between December 2013 and December 2014 for the CPI-U for Food was 2.4 percent. Accordingly, the maximum an employer is allowed to charge is $11.86 per day, unless the OFLC Certifying Officer approves a higher charge for a specific employer.

The notice also discusses the requirement that the employer assume responsibility for reasonable costs associated with the worker's travel, including transportation, food, and, in those instances where it is necessary, lodging. The notice is available at https://www.federalregister.gov/articles/2015/02/23/2015-03596/labor-certification-process-for-the-temporary-employment-of-aliens-in-agriculture-in-the-united.

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5. H-2B Cap Reached for First Half of FY 2015

USCIS has received a sufficient number of petitions to reach the congressionally mandated limit, or cap, of 33,000 on the total number of foreign nationals who may seek a visa or otherwise obtain H-2B status (nonagricultural temporary workers) for the first half of fiscal year (FY) 2015. January 26, 2015 was the final receipt date for new H-2B worker petitions requesting an employment start date before April 1, 2015.

USCIS said that it is rejecting new cap-subject H-2B petitions received after January 26 and that request an employment start date before April 1. No cap numbers from the first half of FY 2015 will be available in the second half of FY 2015, which begins on April 1, 2015. The cap is 33,000 for the second half also.

USCIS will continue to accept H-2B petitions that are exempt from the congressionally mandated cap.

For more information on the cap count for H-2B nonimmigrants, see http://www.uscis.gov/working-united-states/temporary-workers/cap-count-h-2b-nonimmigrants.

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6. Nebraska Joins E-Verify RIDE Program

On February 1, 2015, Nebraska became the latest state to join E-Verify's Records and Information from DMVs (RIDE) program. The other participating states are Mississippi, Florida, Idaho, and Iowa. RIDE links E-Verify with state departments of motor vehicles and state public safety offices. The program allows E-Verify to validate the authenticity of driver's licenses and state identification cards that employees present as identity documents for Form I-9, Employment Eligibility Verification.

U.S. Citizenship and Immigration Services notes that driver's licenses and ID cards account for nearly 80 percent of the documents used as proof of identity by

employees for E-Verify.

Fact sheets on the state programs are available at http://www.uscis.gov/e-verify/employers/drivers-license-verification. The fact sheets include descriptions and images showing typical examples of driver's licenses in each participating state.

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7. ABIL Submits Immigration Reform Proposals to USCIS

The Alliance of Business Immigration Lawyers (ABIL) submitted comments on immigration policy on January 29, 2015, to the U.S. Departments of State (DOS) and Homeland Security (DHS). The comments, which respond to a notice published in 79 Fed. Reg. 78458 (Dec. 30, 2014), included proposals on modernizing the U.S. immigrant and nonimmigrant visa system. Cyrus Mehta and David Isaacson of CDMA also contributed.

ABIL proposed several general administrative reforms to reduce the complexity of the immigration system, promote program integrity and transparency, and stem fraud and abuse, including:

- creating a single administrative tribunal for all immigration appeals, to harmonize and reconcile the "crazy quilt" of immigration legal interpretations issued by various administrative tribunals;
- expanding access to legal counsel whenever an individual is interviewed by federal immigration authorities;
- eliminating the systemic penalties and consequences of regulations that chill the right of administrative and judicial appeal;
- adopting an expansive definition of immigration successorship in interest;
- creating an agency to support and protect the economic benefits of immigration within the Department of Commerce or another cabinet department;
- creating explicit immigration protections and benefits for small businesses;
- establishing an IRS-style "private-letter-ruling" procedure for immigration stakeholders;
- developing a streamlined, fast-track process for immigration guidance; and

- deferring I-9 and IRCA enforcement when employees intend to file for DACA or DAPA.

ABIL also addressed various questions DOS and DHS posed. In response to a query about the most important policy and operational changes that would streamline and improve the processing of visas at U.S. embassies and consulates, ABIL recommended expanding the I-601 provisional waiver program and allowing consular reviewability on a pilot basis for immigrant visas and specific employment-based nonimmigrant visa categories, and expanding the nonimmigrant visa reissuance program. To streamline and improve USCIS processing of visa petitions, ABIL recommended clarifying L-1B adjudications; establishing more predictability in E-2 adjudications; granting work authorization to more nonimmigrant spouses; extending the H-1B cap gap fix to J-1 exchange visitors; and allocating national interest waiver green cards to qualifying regions to stimulate the U.S. economy.

Among other things, DOS and DHS also asked what policy and operational changes would attract the world's most talented entrepreneurs who want to start and grow businesses in the United States. ABIL recommended that DHS partner with states that wish to attract talented entrepreneurs from overseas. ABIL noted, for example, that Massachusetts has launched a "Global Entrepreneur in Residence" (GEIR) program. The GEIR facilitates partnerships with institutions of higher education to provide part-time work opportunities to foreign graduates who are entrepreneurs and want to grow their companies but cannot remain in the United States due to the H-1B visa cap. A university, as a cap-exempt employer, can sponsor a foreign national who will not be counted toward the numerical limitations. Nonprofit affiliates to institutions of higher education can also qualify as cap-exempt employers.

ABIL also suggested that USCIS make the H-1B visa process easier for entrepreneurs who have founded their own startups. Instead of requiring separate ownership and control over the entrepreneur, which may require an entrepreneur "who has given sweat and tears in organizing a startupЙto cede all control in exchange for the H-1B visa," USCIS should follow decisions that recognize the separate existence of a corporation as a distinct legal entity. As such, a corporation, even if it is owned and operated by a single person, may hire that person, and the parties will be in an employer-employee relationship.

ABIL's recommendations on the EB-5 immigrant investor visa process included reducing processing times for EB-5 project applications; expediting I-526 processing for investors in an approved project; processing all I-526s in the same project together; implementing a separate processing queue for investors subject to quota retrogression; and having a separate processing line for direct EB-5 investors.

Finally, ABIL recommended substantially revamping the information technology infrastructure used for immigration benefits, including achieving interoperability of separate online databases maintained by disparate federal immigration agencies. ABIL also said that all electronic forms should include data fields that allow unlimited entry of text, since many questions cannot be answered fully with just "yes" or "no."

The comments, which contain additional recommendations and details, are available at http://www.abil.com/files/ABIL_Immigration_Policy_Response.pdf.

A separate comment by Gary Endelman and Cyrus D. Mehta that was submitted in connection with the visa modernization request can be found here: http://blog.cyrusmehta.com/2015/02/myth-or-reality-is-dhs-truly-serious_2.html

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8. Pro Bono Victory

U.S. Citizenship and Immigration Services (USCIS)' Administrative Appeals Office (AAO) recently sustained CDMA's appeal of an I-601 hardship waiver denial. The applicant, a native and citizen of C™te d'Ivoire, was found to be inadmissible to the United States for procuring admission through fraud or misrepresentation. She is the beneficiary of an approved green card petition based on her marriage to a U.S. citizen and sought a waiver of inadmissibility to remain in the United States with her spouse and children. The District Director found that the applicant failed to establish that her qualifying relative would experience extreme hardship as a consequence of her inadmissibility and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601).

On appeal, the applicant contended that USCIS erred in concluding that she had not proven extreme hardship. Among other things, she noted that she had fled C™te d'Ivoire due to civil war and ethnic conflict and used an assumed name with a genuine passport to flee and obtain a B-1 visa to enter the United States. She also submitted medical documentation certifying that she was subjected to female genital mutilation (FGM).

The applicant and her spouse expressed fears that if she were to be required to return to Cote d'Ivoire, she could suffer retribution because of her ethnicity and because she opposes FGM, and her daughter could be forced to undergo FGM also. A psychological evaluation observed that the spouse was in "the severe range of depression and anxiety." The AAP found that the record established that the applicant's spouse would suffer extreme hardship as a consequence of being separated from the applicant and having sole care of the children if they remained in the United States, and due to his length of residence in the United States. The spouse had received asylum in 2000 after having escaped from C™te d'Ivoire, making his possible return impractical and possibly dangerous. Although the applicant's immigration violations were serious, the AAO found that the record established that the positive factors outweighed the negative factors and a favorable exercise of discretion was warranted.
Cyrus Mehta, counsel for the applicant, noted: "What is interesting about this case is that many of the compelling hardship arguments that won the day were derived from the applicant's asylum claim based on FGM, which she did not pursue after removal hearings were terminated based on her marriage to a U.S. citizen spouse." Mr. Mehta handled this matter on a pro bono basis.
The decision in this case is available at https://drive.google.com/file/d/0B_6gbFPjVDoxSmF1NjdHVGhoOExwTFRHU1V2UkpiVlk2Sldv/edit?pli=1.

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9. **ABIL Global: Belgium**

Several developments have been announced.

2015 salary thresholds and requirements. Belgium has established 2015 salary thresholds for fast-track work permits B and the European Union (EU) Blue Card. One of the requirements for some Belgian fast-track work permits B and

for the Blue Card is a salary threshold: the annual gross remuneration must exceed an amount that is adjusted on a yearly basis. Work permits are processed by the Belgian Regions: Flanders, Brussels, and Wallonia.

The new salary thresholds effective January 1, 2015, are:

- for highly skilled work permits: €39,802 in all 3 Regions (€39,422 for 2014);
- for executive level work permits: €66,406 in Flanders and €66,405 in Brussels and Wallonia (€65,771 for 2014);
- for Blue Cards: €51,466 in all three Regions (€50,974 for 2014).

Wallonia and Brussels have adopted legislation confirming that the salary must be paid in exchange for labor, and that the salary amount must be certain/fixed before the start of the employment in Belgium. Flanders applies the same rule.

The ministries issue a fast-track work permit B for highly skilled labor only if it is clear that the employee's salary will exceed the threshold. The ministries take into account only amounts that will definitely be paid. A discretionary bonus cannot be considered when processing a work permit application.

Mandatory fee for some residence requests. The Belgian federal government has introduced a mandatory "contribution to the administrative costs" (mostly referred to in the press as a "foreigners' tax") with regard to some requests for residence authorization by foreigners. The government said this measure is in response to the continuing increase in the number of such applications and the resulting workload.

The federal government agreed to this measure on November 27, 2014. A government bill, also including several other measures, was filed in the Belgian Parliament on November 28, 2014, and the law was approved on December 19, 2014. Before the fee can become effective, it must be implemented by means of a Royal Decree. The fee will probably amount to €215 for work permit holders and €160 for family members.

Most foreigners will need to pay the fixed amount to file an application for residence authorization, either in Belgium or abroad through a Belgian embassy or consulate. If the fee is not paid, the application will be considered inadmissible. The fee will be paid by, among others, work permit holders and their family members; students; some researchers; and Blue Card applicants.

Members of the European Economic Area, Swiss citizens and their family

members, asylum seekers and recognized refugees, victims of human trafficking, and unaccompanied minors will be exempt from the new fee.

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10. **Firm In the News**

Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm) has had several recent speaking engagements:

- Speaker, "Immigration Executive Action and LGBT Americans/South Asians—What's Good, What's Left Out, And Our Next Steps," National Queer Asian Pacific Islander Alliance, New York City, February 12, 2015.
- Plenary Session—"Overview of Recent Developments in Immigration Law" and Discussion Leader, "Life With No H-1B Visa," 36th Annual Immigration Law Update South Beach, American Immigration Lawyers Association (AILA) South Florida Chapter, February 5 and 6, 2015.
- Speaker, "Discussion of Ethics and President Obama's Immigration Accountability Executive Action," Ethics 101 CLE, AILA-New York Chapter, January 21, 2015.

Mr. Mehta was interviewed on BBC World News about President Obama's executive actions on immigration. The video is available at https://www.youtube.com/watch?v=yD0spRisCl8&feature=youtu.be.

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