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US IMMIGRATION & NATIONALITY LAW

APRIL 2015 IMMIGRATION UPDATE

Posted on April 1, 2015 by Cyrus Mehta

Headlines:

1. Reminder: File H-1B Petitions Early! - USCIS said it expects to receive more petitions than the H-1B cap during the first five business days of this year's program, which began on April 1.

2. USCIS Updates L-1B 'Specialized Knowledge' Guidance - The memo provides guidance on how L-1B petitioners may demonstrate that an employee has specialized knowledge.

3. USCIS Provides Guidance on Adjudication of H-1B Petitions for Nursing Occupations - The memorandum assists USCIS officers in determining whether a nursing position meets the definition of a specialty occupation.

4. NLRB Updates Procedures on Addressing Immigration Issues During Unfair Labor Practice Proceedings - The National Labor Relations Board's (NLRB) Office of the General Counsel recently updated its procedures for addressing immigration status issues arising during unfair labor practice (ULP) proceedings.

5. USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order - USCIS has temporarily suspended adjudication of Form I-129 H-2B petitions for temporary nonagricultural workers while the government considers the appropriate response to a court order. Also due to the order, the Department of Labor is no longer accepting or processing requests for prevailing wage determinations or applications for temporary labor certifications in the H-2B program. DOL is considering its options.

6. China EB-3 Visa Category Retrogresses Nearly 10 Months - Continued heavy demand by applicants with very early priority dates has required a retrogression of the cut-off date for the for the China EB-3 visa category for the

month of April, to January 1, 2011.

7. China EB-5 Visa Category to Retrogress by June; Two-Year Backlog Expected - The State Department predicts that it will establish a retrogression of the cut-off date for the China EB-5 category by June. The retrogression could create about a two-year backlog.

8. Obama Announces Enforcement Push on April 1, GOP Objects, As Per Usual - President Barack Obama announced on April Fool's Day that the U.S. borders and ports of entry (POEs) will henceforth be closed to all newcomers, and that this new executive action will be strictly enforced. Republicans objected.

9. ABIL Global: Turkey - There have been recent changes in Assembly, Maintenance and Service visas in Turkey.

10. Firm In The News...

Details:

1. Reminder: File H-1B Petitions Early!

On April 1, 2015, U.S. Citizenship and Immigration Services (USCIS) began accepting H-1B petitions subject to the fiscal year (FY) 2016 cap. USCIS said it expects to receive more petitions than the H-1B cap during the first five business days of this year's program. CDMA recommends filing during the first five business days in April.

If USCIS receives an excess of petitions during the first five business days, the agency will use a lottery system to randomly select the number of petitions required to meet the cap. USCIS will reject all unselected petitions that are subject to the cap as well as any petitions received after the cap has closed.

The USCIS announcement is available at http://www.uscis.gov/news/uscis-will-accept-h-1b-petitions-fiscal-year-2016-beginning-april-1-2015. USCIS has released an optional checklist for I-129 H-1B filings, available at http://www.uscis.gov/sites/default/files/files/form/m-735.pdf. USCIS encourages H-1B applicants to subscribe to the H-1B Cap Season email updates at http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2016-cap-season.

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2. USCIS Updates L-1B 'Specialized Knowledge' Guidance

U.S. Citizenship and Immigration Services (USCIS) has issued interim policy guidance on L-1B "specialized knowledge" adjudications that supersedes and rescinds certain prior L-1B memoranda. USCIS said it is issuing this memorandum now for public review and feedback. . USCIS will finalize the guidance effective August 31, 2015. The memo provides guidance on how L-1B petitioners may demonstrate that an employee has specialized knowledge. In the case of off-site employment, it also clarifies how to comply with the requirements of the L-1 Visa (Intracompany Transferee) Reform Act of 2004.

Among other things, the memo notes that a beneficiary must possess either special or advanced knowledge, or both. Determining whether a beneficiary has "special knowledge" requires review of the beneficiary's knowledge of how the company manufactures, produces, or develops its products, services, research, equipment, techniques, management, or other interests. Determinations concerning "advanced knowledge," on the other hand, require review of the beneficiary's knowledge of the specific employing company's processes and procedures, the memo states. While the beneficiary may have general knowledge of processes and procedures common to the industry, USCIS's focus is primarily on the processes and procedures used specifically by the beneficiary's employer. With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is not commonly held throughout the particular industry or within the petitioning employer. As discussed in detail in the memo, however, such knowledge need not be proprietary in nature or narrowly held within the employer's organization.

The memo notes the following non-exhaustive list of factors USCIS may consider when determining whether a beneficiary's knowledge is specialized:

- The beneficiary is qualified to contribute to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge not generally found in the industry or the petitioning organization's U.S. operations.

- The beneficiary possesses knowledge that is particularly beneficial to the employer's competitiveness in the marketplace.

- The beneficiary has been employed abroad in a capacity involving assignments that have significantly enhanced the employer's productivity, competitiveness, image, or financial position.

- The beneficiary's claimed specialized knowledge normally can be gained only through prior experience with that employer.

- The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual without significant economic cost or inconvenience (because, for example, such knowledge may require substantial training, work experience, or education).

- The beneficiary has knowledge of a process or a product that either is sophisticated or complex, or of a highly technical nature, although not necessarily unique to the firm.

The memo notes that specialized knowledge cannot be easily imparted to other individuals.

Commentary. We note that some language on page 14 of the memo could still snare L-1Bs working at third-party clients, and this will continue to plague Indian-heritage IT companies.

Workers at third-party sites must be implementing the specialized knowledge of the petitioner's unique products or services. Specialized knowledge derived from customized products or services rendered to the client may complement but cannot substitute for specialized knowledge of the petitioner's products, services, or methodologies. Sometimes the specialized knowledge is intertwined. For example, the petitioner customized the product or application for the client, and the L-1B is being sent to the United States to upgrade it. Even though the product or application was rendered to the client, the beneficiary possesses specialized knowledge of the product that was customized for the client. This fact pattern could potentially cause problems.

The memo, which includes details on types of evidence to present and information on off-site employment, is available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf. Comments are due to USCIS by May 8.

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3. USCIS Provides Guidance on Adjudication of H-1B Petitions for Nursing Occupations

U.S. Citizenship and Immigration Services (USCIS) recently released guidance on

the adjudication of H-1B petitions for nursing position. The memorandum assists USCIS officers in determining whether a nursing position meets the definition of a specialty occupation. The memo supersedes any previous guidance on the subject.

The memo notes that the private sector is increasingly showing a preference for more highly educated nurses. Registered nurses' (RN) duties and titles often depend on where they work and the patients with whom they work. Nursing work can focus on specific areas, such as addiction, cardiovascular, critical care, emergency room, genetics, neonatology, nephrology, oncology, pediatric, operating room, and rehabilitation. The memo states that depending on the facts of the case, some of these RN positions may qualify as specialty occupations.

An advanced practice registered nurse (APRN) defines a level of nursing practice that uses extended and expanded skills, experience, and knowledge in assessment, planning, implementation, diagnosis, and evaluation of the care required. Positions that require certified APRNs "will generally be specialty occupations due to the advanced level of education and training required for certification." Having a degree is not by itself sufficient to qualify a position as an H-1B, the memo notes. The burden is on the petitioner to establish eligibility, but the memo provided a non-exhaustive list of APRN occupations that may satisfy the requirements for a specialty occupation, including Certified Nurse-Midwife, Certified Clinical Nurse Specialist, Certified Nurse Practitioner, and Certified Registered Nurse Anesthetist.

Evidence submitted by a petitioner may include the nature of the petitioner's business; a description of industry practices; a detailed description of the duties to be performed within the petitioner's business operations; advanced certification requirements; American Nurses Credentialing Center Magnet Recognized status (explained in the memo); clinical experience requirements; training in the specialty requirements; and wage rate relative to others within the occupation.

The memo, which includes additional details, is available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218_EIR_Nursing_PM_Effective.pdf.

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4. NLRB Updates Procedures on Addressing Immigration Issues During

Unfair Labor Practice Proceedings

The National Labor Relations Board's (NLRB) Office of the General Counsel recently updated its procedures for addressing immigration status issues arising during unfair labor practice (ULP) proceedings. In a memorandum released February 27, 2015, to the field, Richard F. Griffin, Jr., NLRB General Counsel, noted that although the National Labor Relations Act (NLRA) protects all covered employees regardless of immigration status, related issues may affect remedies and present obstacles to enforcing the NLRA.

The new memo provides updated procedures that apply when immigration status issues are raised during NLRB investigations and proceedings. The new procedures require that regions immediately contact the assigned representative(s) in the Division of Operations-Management as soon as they become aware that immigration status issues may affect the ability to remedy or litigate a potential ULP violation. Operations-Management will: (1) provide technical assistance; (2) determine whether interagency engagement could assist in effectuating the NLRA; (3) discuss with the region and/or ask the region to submit to advice on whether it may be appropriate to seek certain additional remedies; and (4) coordinate the agency's response to these issues.

The memo states that in cases where immigration status issues may affect the NLRB's ability to remedy or litigate a potential ULP violation, Operations-Management will work with the region to determine whether:

Γ potential discriminatee(s) and/or witness(es) could be eligible for a U or T visa, or for deferred action, and whether the NLRB should certify and/or facilitate this process;

Γ it is appropriate to refer the case to the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices pursuant to the NLRB-OSC's Memorandum of Understanding;

Γ it is appropriate to engage with the Department of Homeland Security regarding their enforcement operations.

In meritorious cases, Operations-Management and, where appropriate, the Division of Advice will consider whether additional remedies should be sought to address potential limitations on back pay and reinstatement that may arise. The memo states that in this regard, the region should also explore and bring to the attention of Operations-Management any alternative remedies the region seeks

and/or that a charging party advances as necessary or appropriate.

The memo is available at http://www.nlrb.gov/reports-guidance/general-counsel-memos (scroll down to GC 15-03, "Updated Procedures in Addressing Immigration Status Issues That Arise During ULP Proceedings," February 27, 2015).

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5. USCIS Temporarily Suspends Adjudication of H-2B Petitions Following Court Order

As of March 5, 2015, U.S. Citizenship and Immigration Services (USCIS) has temporarily suspended adjudication of Form I-129 H-2B petitions for temporary nonagricultural workers while the government considers the appropriate response to a court order entered March 4, 2015, in *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015).

USCIS noted that due to this decision, as of March 4, the Department of Labor (DOL) is no longer accepting or processing requests for prevailing wage determinations or applications for temporary labor certifications in the H-2B program. DOL is considering its options in light of the courtXs decision.

Because H-2B petitions require temporary labor certifications issued by DOL, USCIS has temporarily suspended adjudication of H-2B petitions. USCIS will continue adjudicating H-2B petitions for nonagricultural temporary workers on Guam if the petitions are accompanied by temporary labor certifications issued by the Guam Department of Labor.

As of March 6, 2015, USCIS has also suspended premium processing for all H-2B petitions until further notice. If a petitioner has already filed H-2B petitions using the premium processing service and the agency did not act on the case within the 15-calendar-day period, USCIS will issue a refund.

DOL has released frequently asked questions (FAQs) regarding its implementation of the decision in *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Perez,* 774 F.3d 173, 191 (3d Cir. 2014). Following the court's decision, DOL ceased issuing prevailing wage determinations in the H-2B program based on employer-provided wage surveys and can no longer issue H-2B temporary employment certifications based on employer-provided wage surveys.

USCIS's notice on *Perez v. Perez* is available at

http://www.uscis.gov/news/uscis-temporarily-suspends-adjudication-h-2b-petitions-following-court-order. DOL's notices on Perez v. Perez and Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Perez are available at http://www.foreignlaborcert.doleta.gov/.

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6. China EB-3 Visa Category Retrogresses Nearly 10 Months

The Department of State's Visa Bulletin for April 2015 notes that continued heavy demand by applicants with very early priority dates has required a retrogression of the cut-off date for the China EB-3 visa category for the month of April, to January 1, 2011, to hold number use within the annual numerical limit. The Visa Office advanced the China EB-3 visa category very rapidly during the past seven months, in an attempt to generate demand to ensure that all numbers under the annual limit could be made available.

Potential forward movement of this cut-off date during the remainder of the fiscal year will depend on the demand received for applicants with very early priority dates.

The bulletin is available at http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-april-2015.html.

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7. China EB-5 Visa Category To Retrogress by June; Two-Year Backlog Expected

The Department of State's Visa Bulletin for April 2015 notes that continued heavy demand by EB-5 immigrant investor applicants will require a retrogression of the cut-off date for the China EB-5 visa category by June 2015 to hold number use within the annual numerical limit. Informed sources predict that the initial retrogression is expected to be about two years.

The bulletin is available at http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-april-2015.html.

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8. Obama Announces Enforcement Push on April 1; GOP Objects, As Per

Usual

President Barack Obama announced on April 1, 2015, that the U.S. borders and ports of entry (POEs) will henceforth be closed to all newcomers, and that this new executive action will be strictly enforced. He explained that this was to enhance enforcement and counterterrorism efforts, to keep the country safe from the "wrong element," and to protect American jobs. He added that he finally "gets" that it's simply the manly man thing to do and he wants to appear more forceful. "I get it," he said. "We can't be weak, just letting people in willy-nilly."

Among other things, in an emergency budget allocation, Obama reallocated $852 billion to erect a very large (huge, actually) fence along the southern border and send border patrol agents with scowls on their faces and big, impressive weapons still smoking from other operations to defend the border 24-7, taking potshots at anything that moves. "My final gift to America," he said. He sat back and waited for Republicans to congratulate him. "Now I've got 'em. They can't possibly object to this!" he reportedly whispered gleefully to Vice President Joe Biden while the mic was still on.

Immediately after the press conference announcing the new executive actions, however, Republicans in Congress objected, stating that this was just a gimmick and we should be more welcoming. "President Obama seems to have forgotten that this is a nation of immigrants," new presidential candidate Sen. Ted Cruz announced. "I myself was born to a Cuban father. Mitt Romney was born in Mexico, and John McCain was born in Panama. President Obama and the Democrats need to get their heads out of the heartland. He needs to stop being a cowboy, and a weak tyrant, or something. He just doesn't get it. Imagine a country where people can flourish, regardless of where they come from." President Obama pleaded, "But I thought enforcement is what you wanted all along. That's what you all kept saying. 'Enforcement this, enforcement that,' right?? I'm just trying to meet you halfway. Okay, 200 percent of the way. Whatever." Retorted House Speaker John Boehner, "That was yesterday. This is today, and this means war!"

Republicans shortly afterward filed a lawsuit challenging the new actions, stating that President Obama is simply too American and just doesn't get it. Radio personality Rush Limbaugh huffed and puffed and said we should blow that fence down. Donald Trump, remarking that it had suddenly gotten very windy across America, held onto his toupee. The WTOP Radio meteorologist issued a toupee

and comb-over alert. Sarah Palin noted that Obama has gone all "forcy-forcy. Actually, I kinda like it! Got it? You betcha," she said.

Happy April Fool's Day!

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9. ABIL Global: Turkey

There have been recent changes in Assembly, Maintenance and Service visas in Turkey.

Turkey amended its work permit regulations in January 2015 with respect to Assembly, Maintenance and Service (AMS) visas. An AMS visa is a short-term (90-day) technical work visa for foreign employees, under certain conditions, to engage in assembly, maintenance, service, or technical training work for the benefit of a Turkish company without the need for a work permit. This visa is a very practical category for many companies in the technology, construction, and energy sectors because it generally has a very low documentary burden and is adjudicated solely at the consular post, most often within a few days.

Historically, the problem with this visa category was twofold: (1) the 90-day period was calculated consecutively within a year and (2) the visas were generally issued as single entry. Therefore, unless an assignee remained in Turkey for the entire 90-day period uninterrupted, the full 90 days per year could not be used.

On January 22, 2015, the work permit regulations were changed to now state that AMS visa holders can remain for up to three months *in total* within a year. And the regulations now allow foreigners with an AMS visa to enter Turkey on multiple occasions provided that they do not remain in Turkey more than three months in total within a year.

The change in the wording of the regulation appears to convey that the 90-day period will now be calculated *cumulatively* over the period of a year, not consecutively. It also states that these visa holders should be granted multiple entries, which is welcome news regardless of the calculation of the 90 days, particularly since the vast majority of consular posts issue single-entry AMS visas.

In the meantime, it is best practice to provide a copy of the legal changes to the consular post when applying for an AMS visa in order to insist that consular

posts follow this regulatory change and grant one-year multiple-entry AMS visas. However, the calculation of the 90-day period (cumulative vs. consecutive), is in the hands of the passport officers at entry points to confer later entries for AMS visa holders whose period is beyond 90 days consecutively (yet have not been present in Turkey for 90 days cumulatively). AMS visa holders should anticipate that some consular officers and passport officers will not have full awareness or knowledge of this legal change for some time.

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10. Firm In the News

Cyrus Mehta spoke at the following events:

- Panelist, "Ethical and Practical Issues in Representing Children in Immigration Cases," American Immigration Lawyers Association (AILA) Philadelphia Chapter's 2015 CLE Conference, Philadelphia, Pennsylvania, March 27, 2015.
- Program Chair, "Basic Immigration Law 2015," Practising Law Institute, New York City and live webcast, March 12, 2015.
- Panelist, "Alternatives to H-1B," 2015 Midwest Regional Conference, AILA, Chicago, Illinois, March 9, 2015.

Cora-Ann V. Pestaina was a Speaker at "Basic Immigration Law 2015," Practising Law Institute, New York City and live webcast, March 12, 2015.

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