



# OCTOBER 2015 IMMIGRATION UPDATE

*Posted on October 2, 2015 by Cyrus Mehta*

## Headlines

### **1. State Dept. Moves Many Filing Dates Back From Previously Released October Visa Bulletin; Lawsuit Filed**

- On September 24, 2015, the Department of State issued an update that supersedes the previously released October Visa Bulletin. By moving many filing dates back, the update radically changed the recently announced benefit offered by a revised procedure for determining immigrant visa availability and filing adjustment of status applications. A lawsuit is challenging the change.

### **2. USCIS Resumes Final Adjudications of Employment-Based Adjustment Applications After Brief Suspension**

- USCIS resumed final adjudication of employment-based adjustment applications on October 1, 2015, when visa numbers were again available.

### **3. White House Announces New Measures Under Citizenship Initiative**

- Among other things, USCIS began accepting and processing credit card payments for the naturalization application and biometrics fee. USCIS also said it is entering into a formal partnership with the U.S. Department of Agriculture to provide temporary office space for USCIS officers in agricultural and rural communities that have significant numbers of immigrants but are not located near a USCIS office.

### **4. CBP Redesigns ESTA Website for Visa Waiver Program**

- Some of the new features include access to frequently asked questions at any time during the application process; a mobile-friendly design that allows VWP visitors to apply and check the status of their ESTA applications using a smartphone; translation capability at any point in the application by choosing one of 23 languages; and availability of the Group feature at the beginning of the application process to

make it easier for families and groups to submit their applications at the same time.

**5. United States Announces 'Trusted Traveler' Trilateral Agreement With Canada and Mexico** - The new agreement outlines the first steps toward the creation of a North American Trusted Traveler network. The agreement is expected to make it easier for eligible travelers in the United States, Mexico, and Canada to apply for expedited screening programs.

**6. DHS Designates Yemen for Temporary Protected Status** -The 180-day TPS registration period began on September 3, 2015, and runs through March 1, 2016. The TPS designation for Yemen is effective September 3, 2015, through March 3, 2017.

**7. ABIL Global: Netherlands** - The Dutch government introduced the Startup Visa in 2015; requirements and early experiences are discussed.

## **8. Firm In The News...**

### **Details:**

#### **1. State Dept. Moves Many Filing Dates Back From Previously Released October Visa Bulletin; Lawsuit Filed**

On September 24, 2015, the Department of State issued an update that supersedes the previously released October Visa Bulletin. By moving many filing dates back, the update radically changed the recently announced benefit offered by a revised procedure for determining immigrant visa availability and filing adjustment of status applications. The revised process allows foreign nationals who have immigrant visa petitions based on family or employment to file adjustment of status applications once their priority dates are listed on a separate chart on the monthly Visa Bulletin, "Dates for Filing Applications." In the prior version of the October Visa Bulletin, these dates were significantly earlier than the priority dates available for final adjudications.

With the latest change for October, the Department of State moved the dates back substantially. In a statement announcing the change, U.S. Citizenship and Immigration Services explained that following consultations with the Department of Homeland Security, the dates for filing applications for some categories in the family-sponsored and employment-based preferences were adjusted "to better reflect a timeframe justifying immediate action in the application process."

The change means that potentially thousands of applicants who had already gathered documents, prepared applications, paid for medical examinations, and incurred other costs based on the previous dates now may have to wait many months to take the next steps in their green card cases, unless the situation changes. An informal survey of immigration lawyers revealed that about 80-90% of people who were eligible to apply for adjustment of status under the original Visa Bulletin were adversely affected by the changes announced by USCIS and DOS.

A class action challenging the new change was filed in the U.S. District Court for the Western District of Washington at Seattle on September 28, 2015. The complaint notes that in the absence of relief, plaintiffs and class members, "who have spent thousands of hours and millions of dollars preparing adjustment applications in reasonable reliance on the binding agency policy statements DOS published, will be irreparably harmed and left without any remedy for Defendants' unlawful actions." The complaint asks the court to declare, among other things, that the September 24 revision of the October 2015 Visa Bulletin constitutes unlawful agency action in violation of the Administrative Procedure Act. The Alliance of Business Immigration Lawyers (ABIL) filed a declaration supporting the complaint, and individual ABIL lawyers including Cyrus Mehta, also filed declarations as experts. ABIL also plans to file an amicus brief in the litigation.

Below are a few examples of the extreme changes:

- EB-2 China: Moved from 5/1/2014 to 1/1/2013 (1 year 5 months)
- EB-2 India: Moved from 7/1/2011 to 7/1/2009 (2 years)
- EB-3 Philippines: Moved from 1/1/2015 to 1/1/2010 (5 years)
- FB-1 Mexico: Moved from 7/1/1995 to 4/1/1995 (3 months)
- FB-3 Mexico: Moved from 10/1/1996 to 5/1/1995 (1 year 5 months)

The Visa Bulletin indicates when immigrant visas are available based on priority date. The priority date is the date on which the applicant's relative or employer filed the immigrant visa petition on the applicant's behalf. In case of employer sponsorship through labor certification, the priority date is the date the labor certification was filed with the Department of Labor. Certain immigrants may also "recapture" earlier priority dates established by other immigrant visa petitions on their behalf.

The class action documents are at

<http://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2015/10/01/visagate2015-litigation-update-oct-1-2015-mehta-v-dos.aspx>. Cyrus

Mehta's Declaration is at

<http://www.slideshare.net/gskiskind/declaration-of-cyrus-mehta>. The USCIS

announcement is at

<http://www.uscis.gov/news/dos-publishes-updated-visa-bulletin-october-2015>. The

latest chart, along with information on when to file, is available at

<http://www.uscis.gov/visabulletininfo>.

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## **2. USCIS Resumes Final Adjudications of Employment-Based Adjustment Applications After Brief Suspension**

U.S. Citizenship and Immigration Services (USCIS) announced on September 24, 2015, that it had suspended through September 30, 2015, the adjudication of all employment-based Form I-485 (Application to Register Permanent Residence or Adjust Status) adjustment applications pending with USCIS through that date, because the Department of State reported that the statutory cap was reached for the employment-based preference categories for fiscal year (FY) 2015.

USCIS resumed final adjudication of employment-based adjustment applications on October 1, 2015, when visa numbers were again available. USCIS noted that applicants filing an I-485 on or after October 1 should review the "When to File" section on the Visa Bulletin Info Web page to determine whether they are eligible.

The announcement is at <http://www.uscis.gov/news/alerts/uscis-suspends-final-adjudication-employment-based-adjustment-applications-remainder-fy-2015>. The Visa Bulletin Info Web page is at <http://www.uscis.gov/visabulletininfo>.

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## **3. White House Announces New Measures Under Citizenship Initiative**

The Obama administration recently announced several new measures as part of its citizenship initiative. For example, on September 19, 2015, U.S. Citizenship and Immigration Services (USCIS) began accepting and processing credit card payments for the naturalization application and biometrics fee. Previously, the fees could only be paid with a check or money order.

USCIS also said it is entering into a formal partnership with the U.S. Department of Agriculture for the Farm Service Agency to provide temporary office space for USCIS officers in agricultural and rural communities that have significant numbers of immigrants but are not located near a USCIS office. Services under this pilot program will include biometrics collection, interviews for applications or petitions, informational appointments, and general presentations on immigration benefits.

USCIS also has begun live question-and-answer sessions on Twitter with USCIS experts answering non-case-specific questions.

The Department of Homeland Security's Office of Immigration Statistics estimates that 8.8 million permanent residents (green card holders) are eligible to apply for citizenship. A recent analysis showed that the median time spent as a permanent resident before becoming a U.S. citizen was seven years. USCIS noted that green card holders who meet all eligibility requirements may apply for citizenship after five years, or after three years if they are married to a U.S. citizen.

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#### **4. CBP Redesigns ESTA Website for Visa Waiver Program**

U.S. Customs and Border Protection launched a redesigned Electronic System for Travel Authorization (ESTA) website for Visa Waiver Program (VWP) participants on September 10, 2015.

Some of the new features include access to frequently asked questions at any time during the application process; a mobile-friendly design that allows VWP visitors to apply and check the status of their ESTA applications using a smartphone; translation capability at any point in the application by choosing one of 23 languages; and availability of the Group feature at the beginning of the application process to make it easier for families and groups to submit their applications at the same time.

CBP said it conducted focus groups as part of the redesign process to better understand how to improve the website for the more than 19 million VWP visitors who use it each year. VWP visitors who have already applied for ESTA will be able to access their accounts on the new site. Travelers with valid ESTAs will not have to reapply for new ones until their current ESTAs expire or they receive new passports.

CBP noted that the VWP enables nationals of 38 designated countries to travel to the United States for tourism or business for stays of up to 90 days without first obtaining a visa. All nationals or citizens of VWP countries must have an approved ESTA before boarding a carrier to travel by air or sea to the United States under the VWP. ESTA applications should be submitted at least 72 hours before travel. Once approved, the ESTA is generally valid for up to two years or until the applicant's passport expires. Authorizations are valid for multiple entries.

CBP's announcement of the redesign is at <http://www.cbp.gov/newsroom/national-media-release/2015-09-10-000000/cbp-launches-redesigned-esta-website-visa-waiver>. The redesigned ESTA application website is at <https://esta.cbp.dhs.gov/esta/>.

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## **5. United States Announces 'Trusted Traveler' Trilateral Agreement With Canada and Mexico**

The Department of Homeland Security (DHS) has joined Public Safety Canada and the Secretariat of Governance of Mexico in a trilateral agreement to expand "trusted traveler" programs. The new agreement, signed on July 10, 2015, outlines the first steps toward the creation of a North American Trusted Traveler network. The agreement is expected to make it easier for eligible travelers in the United States, Mexico, and Canada to apply for expedited screening programs.

As part of the agreement, Mexican nationals who are members of Mexico's *Viajero Confiable* program will be able to apply for the U.S.-Canada NEXUS trusted traveler program, making them eligible for expedited screening benefits upon arrival at international airports in the United States and Canada. The arrangement will also allow Canadian citizens who are members of NEXUS to apply for *Viajero Confiable*, making them eligible for expedited screening benefits upon arrival at select international airports in Mexico. U.S. citizens are currently eligible to apply for the NEXUS and *Viajero Confiable* trusted traveler programs through existing partnerships between U.S. Customs and Border Protection (CBP), Public Safety Canada, and Mexico's National Institute of Migration. Eligible travelers will be able to apply for each program beginning in 2016.

At the 2014 North American Leaders Summit in Toluca, Mexico, the leaders of the United States, Canada, and Mexico committed to the development of a trilateral

trusted traveler network to facilitate air travel in North America. Facilitating secure air travel within North America is also a goal of the U.S.-Canada Beyond the Border initiative, the U.S.-Mexico 21<sup>st</sup> Century Border Management Initiative, and the U.S.-Mexico High-Level Economic Dialogue.

The announcement is at <http://www.dhs.gov/news/2015/08/05/united-states-announces-trilateral-agreement-canada-and-mexico-expand-trusted>.

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## **6. DHS Designates Yemen for Temporary Protected Status**

The Department of Homeland Security (DHS) has designated Yemen for temporary protected status (TPS) for 18 months due to the ongoing armed conflict within the country. Eligible nationals of Yemen residing in the United States may apply for TPS with U.S. Citizenship and Immigration Services (USCIS). The 180-day TPS registration period began on September 3, 2015, and runs through March 1, 2016. The TPS designation for Yemen is effective September 3, 2015, through March 3, 2017.

DHS noted that Yemen "is experiencing widespread conflict and a resulting severe humanitarian emergency, and requiring Yemeni nationals in the United States to return to Yemen would pose a serious threat to their personal safety." The designation means that during the designated period, eligible nationals of Yemen (and people without nationality who last habitually resided in Yemen) who are approved for TPS will not be removed from the United States and may receive an Employment Authorization Document (EAD).

To be eligible for TPS, applicants must demonstrate that they satisfy all eligibility criteria, including that they have been both "continuously physically present" and "continuously residing" in the United States since September 3, 2015. Applicants will also undergo thorough security checks. Those with certain criminal records or who pose a threat to national security are not eligible for TPS.

The USCIS announcement is at

<http://www.uscis.gov/news/dhs-announces-temporary-protected-status-designation-yemen> (English) and

<http://www.uscis.gov/news/news-releases/tln-dr-lmn-lwtny-tkhsys-status-hmy-mwqt> (Arabic). The Federal Register notice designating Yemen for TPS, and providing

additional details about registering and eligibility, is at <http://www.gpo.gov/fdsys/pkg/FR-2015-09-03/html/2015-21881.htm>.

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## **7. ABIL Global: Netherlands**

*The Dutch government introduced the Startup Visa in 2015; requirements and early experiences are discussed.*

On January 1, 2015, the Dutch government introduced a residence permit scheme for start-up companies. What are the requirements and what are the first experiences with this new permit scheme?

### **General**

The Dutch government is keen on enhancing the ecosystem for startup companies with the goal of becoming a top-three startup hub within Europe. One of the instruments is a facilitated residence permit scheme for the owners of startup companies.

The general scheme for entrepreneurs has proven inadequate to accommodate the visa and residence needs of this category of businesses, mainly because of too-severe requirements in terms of capital demands and (forecasted) financial results. For startup companies, these demands often are hard to meet. A specific visa has been introduced where these demands don't apply. The "startup visa" can be issued to the owners of startup companies that have been selected by, and have signed a contract with, a Dutch facilitator; i.e., a company that offers professional support for setting up and growing startup businesses.

### **Requirements**

To sponsor a startup visa application, the facilitator must prove its expertise and reliability. This is assessed by the Ministry of Economic Affairs (MEA) upon request of the Immigration and Naturalization Service (IND). The main requirements are a proven track record of accompanying startups for at least two years, and a solid financial position.

The applying startup entrepreneur must substantiate that the product or service that is being developed is innovative, and that he or she will likely qualify for a permit based on the general points system within one year. This aspect is also assessed by MEA. The startup must provide a detailed milestone



plan that includes:

- the role the applicant fulfills in the startup;
- the concept of the product or service the startup will deliver;
- the innovativeness of the product or service; and
- the milestones that need to be reached throughout the first year to take the startup from a mere concept to an actual undertaking.

The contract between the startup and the facilitator must describe:

- the nature of the accompaniment and advice from the facilitator;
- the conditions under which the accompaniment is offered; and
- the stake that the facilitator has in the startup, if any.

### **Other Aspects**

The startup visa is granted for one year and cannot be renewed. All persons participating in the startup company (e.g., as shareholders) are eligible for startup visas.

The anticipated total processing time is approximately four weeks. The first application was made on January 1, 2015, and was granted within five weeks. During that time, first the facilitator's track record was approved, and subsequently the innovativeness of the startup was assessed. In essence, both the MEA and the IND proved to be able to move very fast under this scheme.

### **Results So Far**

Since the introduction of the scheme, about 10 permits have been granted, and about 50 applications are still pending or have been denied. Although this could relate to "startup" problems and is not necessarily a reflection on the new scheme, the government's special envoy for the improvement of the startup ecosystem, Neelie Kroes, has reportedly said that the number of visas granted should have been much higher by now, and that the new scheme is "a failure."

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### **8. Firm In The News**

**Cyrus Mehta** was a Speaker, *Ethics In Immigration Law Practice*, Immigration Justice Corps Training, New York, NY, September 18, 2015.

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