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

NOVEMBER 2015 IMMIGRATION UPDATE

Posted on November 2, 2015 by Cyrus Mehta

Headlines:

1. DHS Proposes Rule on Expanding F-1 STEM OPT - Among other things, the proposal would allow F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months.

2. Update on 'Visagate' Filing Date Fiasco: Temporary Restraining Order Denied - On October 7, 2015, a judge rejected a petition for a temporary restraining order (TRO) in a class action challenging a new change to the October Visa Bulletin.

3. Labor Dept. Publishes Final Rule on Temporary Employment of H-2A Workers in Herding or Production of Livestock on the Range - Among the issues addressed are the qualifying criteria, preparing job orders, program obligations of employers, filing H-2A applications requesting temporary labor certification for range occupations, recruiting U.S. workers, determining the minimum offered wage rate, and meeting minimum standards for housing used on the range.

4. USCIS Reports Satisfaction With Filing for Replacement Green Cards Online - More than 93 percent of applicants who filed for a replacement green card online had a positive experience, and more than 95 percent would recommend online filing to others.

5. USCIS Reminds Those Affected by South Carolina Floods of Immigration Relief Options - USCIS said that requestors should explain how

the flooding created a need for the requested relief.

6. Congress Extends Four Immigration Programs Until December 11 - Congress has extended the EB-5, E-Verify, Conrad state 30 (physician J-1 waiver), and religious workers programs until December 11, 2015, as part of congressional passage of a continuing resolution to fund the government.

7. Registration Opens for Diversity Visa 2017 Program - Registration is open until noon, eastern time, on November 3, 2015.

8. USCIS Announces New Direct Filing Address for Certain I-140 Petitions, Workload Rebalancing - The direct filing address has changed for I-140 (Immigrant Petition for Alien Worker) petitions submitted together with I-907 (Request for Premium Processing) petitions with a worksite location in Maryland, New Jersey, New York, or Pennsylvania.

9. H-1B, L-1 Additional Fees Expire - The expired fee was $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions.

10. USCIS Will Close Vienna Field Office in December - The last day the office will be open to the public and accept applications is November 30, 2015.

11. DHS Sets FY 2016 Limit for CNMI-Only Transitional Workers - DHS will allow up to 12,999 nonimmigrants in fiscal year (FY) 2016 for the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) program.

12. ABIL Global: Peru - On September 26, 2015, a new Aliens Law in Peru was published in the official gazette, El Peruano. Selected highlights are discussed.

13. Firm In The News

Details:

1. DHS Proposes Rule on Expanding F-1 STEM OPT

On October 19, 2015, the Department of Homeland Security (DHS) published a new proposed rule on expanding F-1 science, technology, engineering, and

mathematics (STEM) optional practical training (OPT). Specifically, the proposal would allow F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months (STEM OPT extension). This 24-month extension would effectively replace the 17-month STEM OPT extension currently available to certain STEM students. The rule also increases oversight of STEM OPT extensions by, among other things, requiring the implementation of formal mentoring and training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students with degrees from accredited schools.

As with the current 17-month STEM OPT extension, the proposed rule would authorize STEM OPT extensions only for students employed by employers enrolled in U.S. Citizenship and Immigration Services' (USCIS) E-Verify employment eligibility verification program. The proposal also includes the "cap-gap" relief first introduced in 2008 for any F-1 student with a timely filed H-1B petition and request for change of status. DHS said that the cap-gap relief allows such students to automatically extend the duration of F-1 status and any current employment authorization until October 1 of the fiscal year for which such an H-1B visa is being requested.

The proposed rule also responds to a court decision that vacated a 2008 DHS regulation on procedural grounds. The proposed rule includes changes to the policies announced in the 2008 rule to further enhance the academic benefit provided by STEM OPT extensions and increase oversight. DHS noted that "hese on-the-job educational experiences would be obtained only with those employers that commit to developing students' knowledge and skills through practical application. The proposed changes would also help ensure that the nation's colleges and universities remain globally competitive in attracting international STEM students to study and lawfully remain in the United States."
The proposed rule is available at https://www.federalregister.gov/articles/2015/10/19/2015-26395/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and. Additional background on the issues is at http://www.nafsa.org/Find_Resources/Supporting_International_Students_And_Scholars/ISS_Issues/Issues/Focus_On_STEM_OPT/. A related November 2014 memo from Secretary Jeh Johnson is at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actio

ns.pdf. The August 2015 opinion is at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0529-43.

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2. Update on 'Visagate' Filing Date Fiasco: Temporary Restraining Order Denied

On October 7, 2015, a judge rejected a petition for a temporary restraining order (TRO) in a class action challenging a new change to the October Visa Bulletin. By moving many filing dates back, the update to the bulletin radically restricted a previously announced benefit offered by a revised procedure for determining immigrant visa availability and filing adjustment of status applications. The class action was filed in the U.S. District Court for the Western District of Washington at Seattle on September 28, 2015.

The complaint noted 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 also filed declarations as experts including Cyrus Mehta. ABIL also plans to file an amicus brief in the litigation.

Varied explanations for the latest change, which some are calling "Visagate," were floated. For example, in a statement announcing the change, U.S. Citizenship and Immigration Services (USCIS) 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." USCIS also reportedly said that the agency was correcting a mistake and there was no way it could comply with the law without fixing the bulletin. USCIS also said that a retrogression in cut-off dates was not

accounted for when the first October bulletin was issued.

Attorneys for the plaintiffs have set up a Facebook page to track the litigation at https://www.facebook.com/VisagateLitigation2015. The order denying the TRO is at http://www.scribd.com/doc/283960048/Mehta-v-DOS-ORDER-Denying-Ps-Mtn-for-TRO-10-7-15. The class action complaint is at http://2hqyh93y2sj32lqbnw40aoj0.wpengine.netdna-cdn.com/wp-content/uploads/1-0.Complaint.pdf. 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. The November Visa Bulletin is at http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_November2015.pdf. For a commentary on Visagatge October 2015 See Cyrus D. Mehta, http://blog.cyrusmehta.com/2015/10/when-is-visa-immediately-available-for.html.

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3. Labor Dept. Publishes Final Rule on Temporary Employment of H-2A Workers in Herding or Production of Livestock on the Range

The Department of Labor (DOL) has published a final rule establishing standards and procedures for employers seeking to hire foreign temporary agricultural workers for jobs in herding and production of livestock on the range. Among the issues addressed are the qualifying criteria, preparing job orders, program obligations of employers, filing H-2A applications requesting temporary labor certification for range occupations, recruiting U.S. workers, determining the minimum offered wage rate, and meeting minimum standards for housing used on the range. The regulations establish a single set of standards and procedures applicable to employers seeking to hire foreign temporary agricultural workers for sheep and goat herding and range production of livestock.

Among other things, DOL noted the need to address "inadequate wage methodology" that has contributed to herder wage stagnation. Instead of using inaccurate, outdated surveys, DOL decided to use the federal minimum wage rate, currently $7.25 per hour, multiplied by 48 hours per week to set the

monthly wage rate.

The final rule is at https://www.federalregister.gov/articles/2015/10/16/2015-26252/temporary-agricultural-employment-of-h-2a-foreign-workers-in-the-herding-or-production-of-livestock.

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4. USCIS Reports Satisfaction With Filing for Replacement Green Cards Online

U.S. Citizenship and Immigration Services (USCIS) recently announced that more than 93 percent of applicants who filed for a replacement green card (Form I-90, Application to Replace Permanent Resident Card) online had a positive experience, and more than 95 percent would recommend online filing to others.

USCIS noted that since the agency introduced the electronic I-90 in March 2015, more than 168,000 applications were filed that way. Online I-90 filings now account for 47 percent of all I-90 applications filed. USCIS said it still accepts paper I-90 applications, but converts them into electronic records. Those filing an I-90 on paper can still create an online account to track the case electronically.

Information about electronic filing is at http://www.uscis.gov/uscis-elis. The I-90 application is at http://www.uscis.gov/i-90.

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5. USCIS Reminds Those Affected by South Carolina Floods of Immigration Relief Options

U.S. Citizenship and Immigration Services (USCIS) recently issued an alert noting that the agency "offers immigration relief measures that may help people affected by unforeseen circumstances, such as disasters like the recent severe flooding in South Carolina."

USCIS said that requestors should "explain how the flooding created a need for

the requested relief." The agency noted that the following measures may be available upon request:

- Change or extension of nonimmigrant status for an individual currently in the United States, even if the request is filed after the authorized period of admission has expired
- Re-parole of individuals previously granted parole by USCIS
- Expedited processing of advance parole requests
- Expedited adjudication of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship
- Expedited adjudication of employment authorization applications, where appropriate
- Consideration of fee waivers due to an inability to pay
- Assistance for those who received a Request for Evidence or a Notice of Intent to Deny but were unable to appear for an interview, submit evidence, or respond in a timely manner
- Replacing lost or damaged immigration or travel documents issued by USCIS, such as a Permanent Resident Card (green card)
- Rescheduling of scheduled biometrics appointment

The announcement is at http://www.uscis.gov/news/uscis-alerts-customers-affected-south-carolina-floods-available-immigration-relief. More information on humanitarian relief in special situations is at http://www.uscis.gov/humanitarian/special-situations.

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6. Congress Extends Four Immigration Programs Until December 11

Congress has extended the EB-5, E-Verify, Conrad state 30 (physician J-1 aiver), and religious workers programs until December 11, 2015, as part of congressional passage of a continuing resolution to fund the government.

Members of Congress hope to reauthorize and reform the EB-5 program in the interim, although the outcome is uncertain due to political disputes and legislative scheduling pressures. In January, Reps. Mark Amodei (R-Nev.) and Jared Polis (D-Colo.) introduced an EB-5 reauthorization bill in the House of Representatives. In June, Sens. Chuck Grassley (R-Iowa) and Patrick Leahy (D-Vt.) introduced a reauthorization and reform bill in the Senate. At least two other bills

to reform the EB-5 program have also been introduced. Conrad 30 supporters also hope to make changes, such as reducing backlogs in the wait for green cards.

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7. Registration Opens for Diversity Visa 2017 Program

The 2017 diversity visa (DV) program opened for electronic registrations opened on October 1, 2015, and closes at noon, eastern time, Tuesday, November 3, 2015.

For DV-2017, natives of the following countries are not eligible to apply, because more than 50,000 natives of these countries immigrated to the United States in the previous five years: Bangladesh, Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Haiti, India, Jamaica, Mexico, Nigeria, Pakistan, Peru, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

The Department of State said that based on the allocations of available visas in each region and country, individuals will be randomly selected by computer from among qualified entries. DV-2017 entrants must go to Entrant Status Check using the confirmation numbers from their DV-2017 online entry registrations to find out whether they have been selected. Those who are selected will be directed to a confirmation page that will provide further instructions, including information about fees connected with immigration to the United States. The Department noted that Entrant Status Check will be the only means by which selectees are notified of their selection for DV-2017. The Department of State will not mail notification letters or email selectees.

Applicants can access the electronic DV entry form (E-DV) at the official E-DV website: http://www.dvlottery.state.gov during the registration period. DV instructions, including a video, are on the Department of StateXs public website at:
http://www.travel.state.gov/content/visas/en/immigrate/diversity-visa/instructions

.html. Entrant Status Check will be available on the E-DV website at http://www.dvlottery.state.gov starting May 3, 2016, through at least September 30, 2017.

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8. USCIS Announces New Direct Filing Address for Certain I-140 Petitions, Workload Rebalancing

U.S. Citizenship and Immigration Services (USCIS) announced that starting on October 19, 2015, the direct filing address has changed for Form I-140 (Immigrant Petition for Alien Worker) petitions submitted together with Form I-907 (Request for Premium Processing) petitions with a worksite location in Maryland, New Jersey, New York, or Pennsylvania. Those who are filing an I-907 to upgrade a pending I-140 to premium processing should mail the I-907 to the service center that has the pending I-140.

USCIS also noted that it recently rebalanced its workload for certain I-140 petitions and employment-based I-485 (Application to Register Permanent Residence or Adjust Status) applications between the Texas and Nebraska service centers.

The announcement, including address information, is at http://www.uscis.gov/news/i-140-i-485-workload-transfers-and-change-direct-filing-address-certain-form-i-140-petitions-submitted-together-form-i-907-request-premium-processing.

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9. H-1B, L-1 Additional Fees Expire

U.S. Citizenship and Immigration Services (USCIS) announced that H-1B and L-1 petitions should no longer include the additional fee required by ¤ 402 of Public Law 111-230, as amended, for certain H-1B and L-1 petitions. The additional fee expired on September 30, 2015. The fee was $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions postmarked on or after August 14, 2010.

All other H-1B and L-1 fees are still required. USCIS reminded petitioners that the agency prefers separate checks for each filing fee.

The announcement is at http://www.uscis.gov/news/public-law-111-230-h-1b-l-1-additional-fees-expire.

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10. USCIS Will Close Vienna Field Office in December

U.S. Citizenship and Immigration Services (USCIS) will permanently close its field office in Vienna, Austria, on December 31, 2015. The last day the office will be open to the public and accept applications is November 30, 2015. The USCIS field offices in Frankfurt, Rome, and Athens will assume Vienna's former jurisdiction, which includes Austria, Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Hungary, Kosovo, Former Yugoslav Republic of Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, and Slovenia. The U.S. Embassy in Vienna will assume responsibility for certain limited services previously provided by USCIS to individuals residing in Austria.

Additional details, including the new jurisdictional breakdown for countries in USCIS Vienna's former jurisdiction and detailed filing instructions for various services and forms, is at http://www.uscis.gov/news/austria-uscis-vienna-field-office.

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11. DHS Sets FY 2016 Limit for CNMI-Only Transitional Workers

The Department of Homeland Security (DHS) announced on October 22, 2015, that it will allow up to 12,999 nonimmigrants in fiscal year (FY) 2016 for the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) program.

Under the CW-1 program, employers in the CNMI can apply for temporary permission to employ foreign nationals who are ineligible for any existing employment-based nonimmigrant category under the Immigration and

Nationality Act. The CW program is in effect until December 31, 2019. DHS said it reduced the FY 2016 CW-1 limit by 1,000 "to meet the CNMI's existing labor market needs and provide opportunity for potential growth, while meeting a regulatory requirement to reduce the numerical limit each year."

The announcement does not affect the status of current CW-1 workers unless their employer files for an extension of their current authorized period of stay. Approved petitions with an employment start date between October 1, 2015, and September 30, 2016, will generally count toward the 12,999 limit, DHS said. The numerical limit applies only to CW-1 principals. It does not directly affect anyone currently holding CW-2 status, which is for spouses and minor children of CW-1 nonimmigrants. However, CW-2 nonimmigrants may be indirectly affected because their status depends upon that of the principal CW-1, USCIS noted.

The Federal Register notice is at http://www.gpo.gov/fdsys/pkg/FR-2015-10-22/pdf/2015-26963.pdf. A related announcement is at http://www.uscis.gov/news/news-releases/fiscal-year-2016-limit-set-cnmi-only-transitional-workers.

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12. ABIL Global: Peru

On September 26, 2015, a new Aliens Law in Peru was published in the official gazette, El Peruano*. Selected highlights are discussed below.*

Legislative decree No. 1236, most of which will be effective 90 days after related regulations are published, will change the scheme of work visas, and immigration categories and statuses, in Peru. Among other things, the immigration categories under the new law will include:

- **Visitor:** Allows foreign nationals short-term visits to Peru.
- **Temporary:** Allows foreign nationals to carry out paid activities, study, or undertake training activities, as appropriate to the immigration status assigned.
- **Resident:** Allows foreign nationals to set up residence in Peru. Foreign nationals with resident status may carry out any kind of paid or for-profit activity as a subordinate, independent, or self-employed person. The

resident immigration category is divided into:

- **Permanent Resident:** Allows foreign nationals to establish permanent residence in Peru. Foreign nationals may apply to obtain this status after 21 months as provisional residents. The specific requirements will be set in regulations.
- **Provisional Resident:** Allows foreign nationals to perform tasks or activities only during the period of their authorized stay. Maximum term of 2 years.

A foreigner may apply for provisional residence in certain cases: (1) after two years under certain immigration statuses, including humanitarian, investor, religious, worker, and other immigration statuses as determined by Supreme Decree countersigned by the Minister of Interior and Minister of Foreign Affairs; or (2) as an intra-company transfer, applicable to a foreign national who enters Peru as an employee of a multinational company or international corporation and relocates to Peru to work in a company that is part of the same economic group or holding, to serve in a managerial (high-ranking) position, as employee in a position of trust, or as a highly qualified specialist.

Under the "Temporary" category, a new immigration status has been created: Worker—Short-Term Stay (T19), applicable to a foreign national who enters Peruvian national territory to perform work for the public or private sectors, during a brief determined term expected to be up to 30 days, nonrenewable. Short-term stay workers cannot perform paid or for-profit activities on their own account or independently.

Some immigration statuses enable the exercise of certain activities that are also allowed under a different immigration status that is not incompatible, as established in the regulations.

The Ministers of Interior and Foreign Affairs may jointly create new immigration statuses by Supreme Decree for the purpose of developing certain temporary activities. They also can develop subcategories for each immigration status. To exercise duties under the new law, MIGRACIONES and the Ministry of Foreign Relations have sanctioning power under the scope of their authority.

Actions that breach the provisions of the new law constitute punishable offenses. When evaluating the breach, the competent authority must take into account the seriousness of the offense based on proportionality and

reasonableness criteria. Unlawful actions are classified as minor, serious, or very serious. National citizens; foreign nationals; transportation companies, operators, or concessionaires; domiciled individuals; and corporations that breach the obligations of the decree are subject to disciplinary proceedings.

For family unity purposes, not only the spouse but the common-law partner (according to the provisions of Article 2049 of the Peruvian Civil Code) is recognized as member of the family unit of a foreign national who can request family reunification.

As noted above, most of the law will be effective 90 working days after the publication of corresponding regulations in the official gazette, *El Peruano*, unless otherwise provided by law.

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13. **Firm In The News**

David Isaacson was a Speaker, *There's Been Some Malfeasance Up Near Brainerd—Ethical Issues to Consider*, AILA 2015 Fall CLE Conference: The Absolute Waivers Conference—In the Land of 10,000 Lakes, Minneapolis, MN, October 2, 2015

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