



## DECEMBER 2015 IMMIGRATION UPDATE

*Posted on December 2, 2015 by Cyrus Mehta*

### Headlines:

1. **USCIS Adds 16 Countries to H-2A/H-2B Visa Programs** - The countries being added in January are Andorra, Belgium, Brunei, Colombia, Finland, France, Germany, Greece, Lichtenstein, Luxembourg, Malta, Monaco, San Marino, Singapore, Taiwan, and Timor-Leste. Moldova will no longer be designated as an eligible country to participate in the H-2B program because Moldova is not meeting regulatory standards. Nationals of Moldova may still participate in the H-2A program because Moldova continues to meet those standards.
2. **USCIS Updates Application for Employment Authorization** - Several older versions are also still being accepted.
3. **USCIS Releases Controversial Draft Policy Memo on Job Portability** - The memo provides additional guidance on determining whether one job is in "the same or a similar occupational classification" as another job.
4. **DHS Provides Post-Earthquake Relief to Nepali F-1 Students** - Eligible Nepali citizens who are F-1 students may request employment authorization, work an increased number of hours while school is in session, and reduce their course loads while continuing to maintain their F-1 student status.
5. **Wisconsin Joins E-Verify RIDE Program** - Wisconsin joins Florida, Idaho, Iowa, Mississippi, Nebraska, and North Dakota in the program.
6. **Credit Cards Now Accepted for Naturalization Fees** - USCIS explained that this change is one of the recommendations made by the White House Task Force on New Americans.
7. **USCIS Updates Paper Version of G-28 Notice of Appearance** - USCIS recently updated the paper version of Form G-28, Notice of Entry of Appearance as Attorney or Representative.

8. **Fifth Circuit Upholds Injunction Against Obama Administration's DACA/DAPA Programs** - The court found, among other things, that the states have shown that the threatened injury if the injunction were denied outweighed any harm that would result if the injunction were granted.
9. **State Dept. Projects Employment-Based Visa Number Availability in Coming Months** -The Department of State's Visa Bulletin for December 2015 includes information on visa number availability in the coming months.
10. **State Dept. Replaces Manual of Visa Guidance** - The 9 FAM-e, which replaces the legacy 9 FAM, will become the authoritative source for visa guidance.
11. **USCIS Issues Policy Memo on Initial Field Review of AAO Appeals** - USCIS issued a policy memorandum on initial field review of appeals to the Administrative Appeals Office. The memo provides guidance to USCIS employees on the proper processing of such appeals.
12. **ABIL Global: United Kingdom** - Several developments have been announced.
13. **Firm In the News**

## Details

### 1. USCIS Adds 16 Countries to H-2A/H-2B Visa Programs

Effective January 18, 2016, USCIS and the Department of Homeland Security (DHS), in consultation with the Department of State, are adding Andorra, Belgium, Brunei, Colombia, Finland, France, Germany, Greece, Lichtenstein, Luxembourg, Malta, Monaco, San Marino, Singapore, Taiwan, and Timor-Leste to the list of countries whose nationals are eligible to participate in the H-2A and H-2B visa programs for 2016.

DHS noted that it reserves the right to add countries to the eligible list at any time, and to remove any country whenever the agency determines that a country fails to meet the requirements for continued designation.

Secretary of Homeland Security Johnson and Secretary of State Kerry have agreed that Moldova will no longer be designated as an eligible country to participate in the H-2B program because Moldova is not meeting regulatory standards. Nationals of Moldova may still participate in the H-2A program because Moldova continues to meet those standards.

USCIS explained that the H-2A and H-2B visa programs allow U.S. employers to bring foreign nationals to the United States to fill temporary agricultural and nonagricultural jobs, respectively. Typically, USCIS only approves H-2A and H-2B petitions for nationals of countries the Secretary of Homeland Security has designated as eligible to participate in the programs. USCIS, however, may approve H-2A and H-2B petitions for nationals of countries not on the list if it is determined to be in the interest of the United States.

The notice does not affect the status of beneficiaries who currently are in the United States in H-2A or H-2B status unless they apply to change or extend their status. Each country's designation is valid for one year from January 18, 2016.

The Federal Register notice announcing the additions is at <http://www.gpo.gov/fdsys/pkg/FR-2015-11-18/html/2015-29373.htm>.

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## **2. USCIS Updates Application for Employment Authorization**

U.S. Citizenship and Immigration Services (USCIS) has published an update to Form I-765, Application for Employment Authorization. The new edition is dated 11/04/15. Previous editions dated 02/13/15, 05/27/08, or later are also being accepted.

The latest I-765 edition is at <http://www.uscis.gov/i-765>. The related Federal Register notice is at <https://www.federalregister.gov/articles/2015/11/24/2015-29909/agency-information-collection-activities-employment-eligibility-verification-form-i-9-revision-of-a>. Other recent forms updates are listed at <http://www.uscis.gov/forms-updates>, including the Immigrant Petition for Alien Worker (<http://www.uscis.gov/i-140>) and the Application to Register Permanent Residence or Adjust Status (<http://www.uscis.gov/i-485>).

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## **3. USCIS Releases Controversial Draft Policy Memo on Job Portability**

U.S. Citizenship and Immigration Services (USCIS) recently released a draft policy memorandum, "Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability." The memo was posted on November 20, 2015, and the comment

period ends January 4, 2016.

The memo instructs Immigration Services Officers (ISOs) on how they may use the Department of Labor's (DOLXs) Standard Occupational Classification (SOC) codes and other evidence to determine whether a new job is in the same or a similar occupational classification as the original job offer in an Immigrant Petition for Alien Worker (Form I-140 petition) submitted to USCIS. USCIS said the purpose of the memo is "to promote consistency and efficiency in section 204(j) portability adjudications in accordance with the policy objectives described herein. Such adjudications require individualized assessments that consider the totality of the circumstances and are based on a preponderance of the evidence presented."

The memo notes that despite the statutory flexibility provided in INA § 204(j), "stakeholders have raised concerns that the job portability provision is underutilized due to significant uncertainty concerning USCIS determinations in this area." The memo "is intended to address that uncertainty by providing additional guidance for determining whether two jobs are in the same or similar occupational classification(s)."

In making these determinations, the memo explains, USCIS may refer to DOL's labor market expertise as reflected in its SOC system, which is used to organize occupational data and classify workers into distinct occupational categories. Occupations are generally categorized based on the type of work performed and, in some cases, on the skills, education, and training required to perform the job. The memo notes that the SOC organizes all occupations into 23 "major groups," which are then broken down in descending order into: 97 "minor groups," 461 "broad occupations," and 840 "detailed occupations." All workers are classified into one of these 840 detailed occupations. Detailed occupations with similar job duties and, in some cases, skills, education, and/or training are generally grouped together in the same broad occupation. The SOC system is organized using numeric codes that generally consist of six digits. Each digit or group of digits represents the level of similarity of positions. No occupation is assigned to more than one category at the lowest level of the classification (sixth digit).

Some attorneys complain that USCIS misses the mark with this memo and ignores the legislative history, which was, as the title of the provisions suggest, for "job flexibility," so that workers are not treated as indentured servants and

may improve their prospects by switching jobs and employers. These commenters note that the agency interprets “similar” to mean having a “marked resemblance,” rather than a mere “resemblance,” although it cites two dictionaries, only one of which says the resemblance must be “marked.” They also expressed concerns that USCIS mechanistically applies the SOC codes, which were never intended to be used for this purpose, and instead were a bureaucratic fix for DOL to stop publishing the 40,000+ job listing in the Dictionary of Occupational Titles.

The memo is at

[http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft\\_Same\\_or\\_Similar\\_Policy\\_Memorandum\\_-\\_11.20.15.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Same_or_Similar_Policy_Memorandum_-_11.20.15.pdf).

See also Cyrus Mehta’s blog entitled *The Proposed USCIS Guidance On Job Portability: Good, Bad or*

*Ugly*, <http://blog.cyrusmehta.com/2015/11/the-proposed-uscis-guidance-on-job.html>

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#### **4. DHS Provides Post-Earthquake Relief to Nepali F-1 Students**

Effective November 9, 2015, the Department of Homeland Security (DHS) suspended certain regulatory requirements for F-1 nonimmigrant students whose country of citizenship is the Federal Democratic Republic of Nepal and who are experiencing severe economic hardship as a direct result of the earthquake there on April 25, 2015.

DHS said this action is intended to provide relief to Nepali citizens who are F-1 students so they may request employment authorization, work an increased number of hours while school is in session, and reduce their course loads while continuing to maintain their F-1 student status. DHS will deem an F-1 student who receives employment authorization by means of this notice to be engaged in a “full course of study” for the duration of the employment authorization, if the student satisfies the minimum course load requirement described in the notice.

The Federal Register notice is at

<http://www.gpo.gov/fdsys/pkg/FR-2015-11-09/html/2015-28360.htm>.

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## **5. Wisconsin Joins E-Verify RIDE Program**

U.S. Citizenship and Immigration Services (USCIS) recently announced that Wisconsin has become the latest state to join the “Records and Information from DMVs for E-Verify” (RIDE) program. In conjunction with the American Association of Motor Vehicle Administrators, RIDE links the E-Verify system with participating state driver’s licensing agencies. RIDE allows E-Verify to validate the authenticity of driver’s licenses and state identification cards presented by employees as Form I-9 identity documents.

Wisconsin joins Florida, Idaho, Iowa, Mississippi, Nebraska, and North Dakota in the program.

For more information, see

[http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/Wisconsin\\_RIDE\\_Fact\\_Sheet.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Wisconsin_RIDE_Fact_Sheet.pdf).

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## **6. Credit Cards Now Accepted for Naturalization Fees**

U.S. Citizenship and Immigration Services (USCIS) is now accepting credit cards to pay the processing fee for Form N-400, Application for Naturalization. Most applicants pay \$680, which includes the \$595 naturalization application fee and a biometrics fee of \$85.

To pay with a credit card, an applicant must file Form G-1450, Authorization for Credit Card Transaction. USCIS explained that this change “is one of the recommendations made by the White House Task Force on New Americans.” Acceptable cards include Visa, MasterCard, American Express, and Discover, along with gift cards with Visa, MasterCard, American Express, or Discover logos. The entire fee must be paid using a single card. USCIS will reject the application if the card is declined.

Details on how to pay with a credit card are at

<http://www.uscis.gov/forms/fingerprints/pay-your-n-400-application-fee-your-credit-card>.

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## **7. USCIS Updates Paper Version of G-28 Notice of Appearance**

U.S. Citizenship and Immigration Services (USCIS) recently updated the paper

version of Form G-28, Notice of Entry of Appearance as Attorney or Representative. The update does not address filings made in the Electronic Immigration System.

The notice is at

[http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-11-17 PM 602-0127 Updated Form G-28 Notice of Entry of Appearance .pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-11-17_PM_602-0127_Updated_Form_G-28_Notice_of_Entry_of_Appearence_.pdf).

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## **8. Fifth Circuit Upholds Injunction Against Obama Administration's DACA/DAPA Programs**

On November 9, 2015, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit upheld 2-1 a preliminary injunction against the Obama administration's executive actions on Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA). The court found, among other things, that the states have shown that the threatened injury if the injunction were denied outweighed any harm that would result if the injunction were granted. "The states have alleged a concrete threatened injury in the form of millions of dollars of losses," the panel majority noted.

The majority also rejected the argument that congressional silence on immigration has conferred on the Department of Homeland Security (DHS) the power to act. The court found, among other things, that DAPA was "foreclosed by Congress's careful plan," and that immigration law "prescribes how parents may derive an immigration classification on the basis of their child's status and which classes of aliens can achieve deferred action and eligibility for work authorization."

Judge Carolyn King dissented, citing, among other things, a "litany of errors committed by the district court." She noted, "There can be little doubt that Congress's choices as to the level of funding for immigration enforcement have left DHS with difficult prioritization decisions. But those decisions, which are embodied in the DAPA Memorandum, have been delegated to the Secretary by Congress. Because federal courts should not inject themselves into such matters of prosecutorial discretion, I would dismiss this case as non-justiciable." Judge King concluded, "I have a firm and definite conviction that a mistake has been made."

The Obama administration plans to appeal the ruling to the Supreme Court.



The decision, including Judge King's dissent, is at <http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf>.

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## **9. State Dept. Projects Employment-Based Visa Number Availability in Coming Months**

The Department of State's Visa Bulletin for December 2015 includes information on visa number availability in the coming months.

For the employment fourth preference (certain religious workers) category, the bulletin notes that the non-minister special immigrant (SR) program expires on December 11, 2015. No SR visas may be issued overseas, or final action taken on adjustment of status cases, after midnight on December 10, 2015. Visas issued before that date will only be issued with a validity date of December 10, 2015, and all individuals seeking admission as non-minister special immigrants must be admitted into the U.S. by midnight on December 10, 2015.

For the employment fifth preference (I5 and R5) categories, visas may be issued until the close of business on December 11, 2015, and may be issued for the full validity period. No I5 or R5 visas may be issued overseas, or final action taken on adjustment of status cases, after December 11, 2015.

The bulletin notes that Congress is considering an extension of the SR, I5, and R5 visa categories, "but there is no certainty when such legislative action may occur." If there is no legislative action extending one or both of these categories, those cut-off dates would become "Unavailable" on December 12, 2015.

The bulletin also notes the following potential monthly movement for employment-based categories in the coming months:

Employment First: Current

Employment Second:

- Worldwide: Current
- China: Forward movement during FY 2015 has resulted in a dramatic increase in demand. Little, if any, movement is likely during the coming months.
- India: Up to eight months.



### Employment Third:

- Worldwide: The rapid forward movement during FY 2015 was expected to generate a significant amount of demand for numbers. If such demand fails to materialize in the near future, it will be necessary to begin advancing this cut-off date.
- China: Rapid forward movement is expected. Such movement will result in increased demand, which will require "corrective" action as early as April.
- India: Will advance up to three weeks.
- Mexico: Will remain at the worldwide date.
- Philippines: Will advance four to six weeks.

### Employment Fourth: Current

Employment Fifth: The category will remain "Current" for most countries.

- China-mainland born: Slow forward movement.

The bulletin notes that the above projections for the employment categories indicate what is likely to happen on a monthly basis through March based on current applicant demand patterns. "Readers should never assume that recent trends in cut-off date movements are guaranteed for the future, or that 'corrective' action will not be required at some point in an effort to maintain number use within the applicable annual limits," the bulletin states. "The determination of the actual monthly cut-off dates is subject to fluctuations in applicant demand and a number of other variables."

Also, U.S. Citizenship and Immigration Services (USCIS) announced recently that for family-sponsored filings, applicants may use the "Dates for Filing Visa Applications" chart in the December bulletin. For employment-based filings, however, USCIS said the "Application Final Action Dates" for December must be used.

The Visa Bulletin for December 2015 is at

<http://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-december-2015.html>.

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## **10. State Dept. Replaces Manual of Visa Guidance**

On November 18, 2015, the Department of State (DOS) will replace the legacy

Volume 9 of the Foreign Affairs Manual (9 FAM) with the 9 FAM-e. The 9 FAM-e will become the authoritative source for visa guidance.

DOS said the new 9 FAM-e represents the revision and reorganization of more than 4,000 pages of the legacy 9 FAM content that paralleled Volume 22 of the Code of Federal Regulations. The new 9 FAM-e overhauls language and organization, but not substance, DOS said. The former interpretive and procedural notes were merged, along with appendices. The new 9 FAM-e "adopts a hierarchical structure that is both more logical and better suited to modern search technologies," DOS said, noting that the revised 9 FAM-e also uses a new citation system that is similar to the citation system used in other volumes of the FAM and the Foreign Affairs Handbook. DOS also has developed crosswalk tables correlating old citations with new, so that users can match new sections with former locations in the legacy FAM.

The announcement is in section F of the December 2015 Visa Bulletin at <http://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-december-2015.html>.

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## **11. USCIS Issues Policy Memo on Initial Field Review of AAO Appeals**

U.S. Citizenship and Immigration Services (USCIS) issued a policy memorandum on November 4, 2015, on initial field review of appeals to the Administrative Appeals Office (AAO). The memo provides guidance to USCIS employees on the proper processing of such appeals.

Field offices include USCIS field and overseas offices, service centers, and the National Benefits Center. The memo notes that appeals to the AAO are filed on Form I-290B, Notice of Appeal or Motion. USCIS first conducts an intake procedure to ensure the appeal is complete and the agency has collected any required filing fees. After intake, the USCIS field office that made the unfavorable decision conducts an "initial field review" of the appeal. If the field office does not take favorable action, it forwards the appeal to the AAO for appellate review without issuing a new decision.

The memo notes that the purpose of initial field review is "to promote the efficient review of administrative appeals of field office decisions." The affected party may submit a brief and/or additional evidence with the appeal. The appeal process is "undermined" if initial field review is not timely or if the

appeal is inappropriately terminated, the memo states. Therefore, the memo provides additional guidance on the timeliness and scope of initial field review.

Among other things, the memo states that the regulations do not require the field office to complete initial field review within 45 days of receipt, but USCIS is adopting 45 days as the agency's processing goal.

The memo is at

[http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-1104\\_Initial\\_Field\\_Review\\_PM\\_APPROVED.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-1104_Initial_Field_Review_PM_APPROVED.pdf).

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## 12. ABIL Global: United Kingdom

*Several developments have been announced.*

### **Home Office Publishes Latest Changes to Immigration Rules—How Will These Affect Tier 2 Sponsors?**

**On October 29, 2015, the Home Office published its latest Statement of Changes to the Immigration Rules. The most relevant for points-based system Sponsors are those relating to Tier 2. These changes, which took effect November 19, 2015, are summarized below.** Also included below is an update on other immigration-related changes, including the United States' extending its passport fast-track scheme to United Kingdom (UK) citizens and further roll-out of criminal record checks.

#### **Tier 2 Changes**

- A number of additional jobs have been added to the Shortage Occupation List (SOL):
  - All nursing posts. This is a temporary measure, pending the outcome of a further consultation by the Migration Advisory Committee (MAC). The MAC will then report on the need for nurses to remain on the SOL. This is welcome news for the profession because it means that starting in April 2016, nurses will be exempt from the Resident Labour Market Test, will receive higher priority in the allocation of places for the Tier 2 limit, and will not need to meet the £35,000 qualifying salary threshold for Tier 2 (General) applicants to secure permanent residence in the UK.

- Four roles in the digital technology sector (product manager, data scientist, senior developer, and cyber security specialist). These roles are only available to Sponsors who can satisfy the new "qualifying company" criteria. A qualifying company is a licensed sponsor that employs between 20 and 250 employees, is not more than 25% owned by a company with one or more establishments in the UK having more than 250 employees, and has not been established in the UK for the purpose of supplying services exclusively to a single company or group in the UK. Each qualifying company will be able to sponsor up to 10 Tier 2 (General) migrants holding these positions. The roles also require migrants to have five or more years of relevant experience and demonstrable experience of having led a team.
- Entry clearance issuance dates will be better aligned with migrants' start dates of employment in the UK. In effect, they can be post-dated in line with the applicant's stated date of travel to the UK, provided this is no later than 14 days after the start date of employment given by the migrant's Sponsor. This change will give more flexibility to migrants and hopefully will reduce the incidence of migrants having to reapply for entry clearance if they have been unable to travel to the UK within the short window provided by the 30-day travel visa.
- Maintenance rules for family members are being amended so that where the Tier 2 migrant is exempt from having to show maintenance with extension applications, his or her dependents will also be exempt, even if applying at a later date.
- Tier 2 (and Tier 5) migrants are limited to four weeks of unpaid absence from work per calendar year. This is being changed from the current period of 30 days.
- Tier 2 provisions relating to maternity, paternity, and adoption leave will now also cover shared parental leave. This will be relevant where there is a salary reduction below the appropriate rate for the job, as stated in the government's Standard Occupation Codes, for the duration of the leave only.
- Indefinite leave to remain (ILR) additional requirements for Tier 2 (General) migrants include the requirement for Sponsors to certify in writing that the migrant is still required for the employment in question

for the foreseeable future and that the salary payable will continue for the foreseeable future. This will affect those migrants who have been issued a redundancy notice, for example, or where the migrant has given notice of termination of employment. Sponsors need to be aware of these new requirements when an application for ILR is submitted and a decision has been made regarding the end date of a migrant's employment.

### **United States Extends Passport Fast-Track Scheme to UK Citizens**

This development will be extremely useful for British nationals who travel frequently to the United States for business. Similar to the UK Registered Traveller Scheme, frequent travelers to the United States can apply to join "Global Entry" starting on December 3, 2015. Travelers first must apply to the Home Office and pay a £42 processing fee. If the applicant passes UK vetting, he or she will receive an access code to use when applying for the Global Entry program, which costs £65 and is valid for five years. This new program is intended to speed up passage through U.S. immigration control. According to the United States, the new process cuts down passport control waiting times by about 70%. For more on this program and the expansion to UK travelers, see <http://www.cbp.gov/travel/trusted-traveler-programs/global-entry>.

### **Further Roll-Out of Criminal Record Checks**

The Home Office is reviewing the further roll-out of the requirement for migrants to obtain police clearance certificates. Because this may be rolled out to Tier 2 migrants early in 2016, Sponsors should factor it in when planning for migrants to transfer to the UK early next year.

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### **13. Firm In The News**

**Cyrus Mehta** was a Speaker, *Advanced Corporate Immigration Law Conference: Issues for Attorneys, In-House Counsel & Human Resources Personnel*, New Jersey Institute for Continuing Legal Education – A Division of the New Jersey State Bar Association, Newark, NJ, November 11, 2015.

**Cyrus Mehta** was a Panelist, *Difficult Citizenship, Naturalization and Expatriation Cases*, AILA Latin American & Caribbean Chapter Annual Conference, Rio de Janeiro, Brazil, November 5-6, 2015.

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