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

# FEBRUARY 2016 IMMIGRATION UPDATE

*Posted on February 1, 2016 by Cyrus Mehta*

**Headlines:**

1. **DHS Revises Regs on H-1B1, E-3, CW-1 Nonimmigrants and Certain EB-1 Immigrants –** DHS said the final rule does not impose any additional costs on employers, workers, or any governmental entity.
2. **Court Delays STEM OPT Ruling, Preserving Current STEM OPT Program** – DHS persuaded the court that it was working diligently to evaluate more than 50,000 comments and promulgate a final rule, but was unable to do so in time for a new rule to be effective by February 12, 2016. The court modified its order to leave the current STEM OPT rule in effect until the new May 10, 2016, deadline.
3. **OSC Responds to Query on Steps to Follow After Internal I-9 Audit** – An attorney asked what steps a client should take with respect to employee-submitted green cards that the attorney found doubtful, and whether the attorney was obligated to train the client on what to look for in a valid green card.
4. **4**. **DHS Extends and Redesignates TPS for South Sudan** – DHS has determined that an extension of the current designation and a redesignation of South Sudan for TPS are warranted because the ongoing armed conflict and extraordinary and temporary conditions that prompted the 2014 TPS redesignation have persisted, and in some cases deteriorated.
5. **New York Immigration Attorney Arrested for Immigration Fraud, Aggravated Identity Theft** – According to the complaint, the attorney allegedly engaged in a scheme to use personal information contained in legitimate immigration documents for fraudulent purposes.
6. **Supreme Court Agrees to Hear DAPA Case** – The Supreme Court has agreed to hear a case challenging President Obama's November 2014

executive actions to temporarily shield certain undocumented children and parents from removal. The Supreme Court is expected to decide the case in late June.

7. **ABIL Global: China** – Companies filing for work permits in Beijing must receive preapproval.
8. **Firm In The News…**

**Details:**

1. **DHS Revises Regs on H-1B1, E-3, CW-1 Nonimmigrants and Certain EB-1 Immigrants**

In a final rule effective February 16, 2016, the Department of Homeland Security (DHS) is amending its regulations affecting highly skilled workers in the nonimmigrant classifications for specialty occupations from Chile, Singapore (H-1B1), and Australia (E-3); the immigrant classification for employment-based first preference (EB-1) outstanding professors and researchers; and nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) classification.

Specifically, the final rule amends DHS regulations to:

- Include H-1B1 and principal E-3 classifications in the list of classes of foreign nationals authorized for employment incident to status with a specific employer. This means that H-1B1 and principal E-3 nonimmigrants can work for a sponsoring employer without having to apply separately for employment authorization;
- Authorize continued employment with the same employer for up to 240 days for an H-1B1 or principal E-3 nonimmigrant whose status has expired while his or her employer's timely filed extension of stay request remains pending;
- Provide this same continued employment authorization for a CW-1 nonimmigrant whose status has expired while his or her employer's timely filed Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker, request for an extension of stay remains pending;
- Include principal E-3 and H-1B1 nonimmigrant classifications in existing regulations on the filing procedures for extensions of stay and change of status requests; and
- Allow employers petitioning for EB-1 outstanding professors and

researchers to submit initial evidence comparable to the other forms of evidence already listed in 8 CFR § 204.5(i)(3)(i), much like certain employment-based immigrant categories that already allow for submission of comparable evidence.

- DHS said the final rule does not impose any additional costs on employers, workers, or any governmental entity. Further, DHS noted, changing the employment authorization regulations for H-1B1 and E-3 nonimmigrants "makes them consistent with other similarly situated nonimmigrant worker classifications." Additionally, this rule "minimizes the potential of employment disruptions for U.S. employers of H-1B1, E-3, and CW-1 nonimmigrant workers." Finally, DHS expects that this change "will help U.S. employers recruit EB-1 outstanding professors and researchers by expanding the range of evidence that U.S. employers may provide to support their petitions."

The DHS announcement is at http://www.uscis.gov/news/dhs-enhances-opportunities-h-1b1-e-3-cw-1-nonimmigrants-and-certain-eb-1-immigrants-final-rule-posted. The final rule is at https://www.federalregister.gov/articles/2016/01/15/2016-00478/enhancing-opportunities-for-h-1b1-cw-1-and-e-3-nonimmigrants-and-eb-1-immigrants.

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2. **Court Delays STEM OPT Ruling, Preserving Current STEM OPT Program**

The U.S. District Court for the District of Columbia has accepted the Department of Homeland Security's (DHS) request to modify the court's stay of its ruling that the agency invalidly issued its 2008 rule on STEM OPT (optional practical training for students in science, technology, engineering, and mathematics). The court modified the stay to give DHS an additional 90 days, until May 10, 2016, to re-issue the STEM OPT rule using valid notice-and-comment procedures.

DHS issued a proposed rule on October 19, 2015, and received more than 50,000 comments. The agency persuaded the court that it was working diligently to evaluate those comments and promulgate a final rule, but was unable to do so in time for a new rule to be effective by the February 12, 2016, deadline. The court modified its order to leave the current STEM OPT rule in

effect until the new May 10, 2016, deadline.

DHS argued that it needed only the 90-day extension and that it would be able to publish the final rule in time to meet that deadline. The court said it would grant no further extensions.

The plaintiff, Washington Alliance of Technology Workers, said it planned to appeal the extension. The D.C. court's opinion from January 23, 2016, is at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0529-51. Its opinion from August 12, 2015, is at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv0529-43.

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3. **OSC Responds to Query on Steps to Follow After Internal I-9 Audit**

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) recently responded to an attorney who asked how to advise her client following an internal audit of the client's I-9 employment authorization verification forms. The attorney asked specifically what steps the client should take with respect to permanent resident cards (Forms I-551) that the attorney found doubtful, and whether the attorney was obligated to train the client on what to look for in a valid green card or whether such training would be outside the scope of what the employer should be trained to do, since that could take the employer beyond the "reasonable person" standard.

OSC noted that it cannot give an advisory opinion on any particular set of facts, only general guidelines. OSC said that to prevent discrimination, an employer or representative conducting an internal I-9 audit should conduct it in a consistent manner, treating similarly situated employees in a similar manner. Employees should not be treated differently based on citizenship, immigration status, or national origin. For example, an employer should apply the same level of scrutiny to all employees' I-9 documentation and not single out for review the I-9 forms of employees from a particular country or immigration status.

In response to the attorney's specific question about doubtful green cards, OSC referred to joint guidance recently issued by OSC and U.S. Immigration and Customs Enforcement (ICE), which reminds employers that they are required to accept original I-9 documentation that "reasonably appears to be genuine and

to relate to the individual presenting the documentation." If an employer conducting an internal I-9 audit concludes, based on a photocopy, that the document does not appear genuine or reasonably related to the employee, the employer should address its concern with the employee and provide the employee an opportunity to choose a different document to present from the I-9's Lists of Acceptable Documents. However, OSC noted, the employee can also give the employer the originally presented document and, if the employer determines that it appears genuine and reasonably related to the employee, the employer must accept that document and not request additional documents. If the employer, on the other hand, determines that the original document does not appear genuine or reasonably related to the employee, "the employer should provide the employee with an opportunity to choose a different document to present from the Lists of Acceptable Documents."

Regarding whether the attorney's firm must train her client on "what to look for in a valid green card," OSC directed her to ICE guidance.

The OSC's response is at http://www.justice.gov/crt/file/812686/download. The joint OSC-ICE guidance referenced in the response, "Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits," is at http://www.justice.gov/crt/file/798276/download.

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4. **DHS Extends and Redesignates TPS for South Sudan**

The Department of Homeland Security (DHS) announced on January 25, 2016, that it is extending the designation of South Sudan for temporary protected status (TPS) for 18 months, from May 3, 2016, through November 2, 2017, and redesignating South Sudan for TPS for 18 months, effective May 3, 2016, through November 2, 2017.

DHS said it determined that an extension of the current designation and a redesignation of South Sudan for TPS are warranted because the ongoing armed conflict and extraordinary and temporary conditions that prompted the 2014 TPS redesignation have persisted, and in some cases deteriorated, and would pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country. Although the parties to the conflict signed a peace agreement in August 2015, violence persists in many parts of the country, and the implementation of the peace agreement is halting

to date, DHS noted.

The notice, from U.S. Citizenship and Immigration Services (USCIS), states that the extension allows currently eligible TPS beneficiaries to retain TPS through November 2, 2017, so long as they otherwise continue to meet the eligibility requirements for TPS. The redesignation of South Sudan allows additional individuals who have been continuously residing in the United States since January 25, 2016, to obtain TPS if otherwise eligible.

DHS also set forth procedures necessary for eligible nationals of South Sudan (or individuals having no nationality who last habitually resided in South Sudan) either to: (1) re-register under the extension if they already have TPS and to apply for renewal of their employment authorization documents (EADs) with USCIS; or (2) submit an initial registration application under the redesignation and apply for an EAD.

For individuals who have already been granted TPS, the 60-day re-registration period runs from January 25, 2016, through March 25, 2016. USCIS will issue new EADs with a November 2, 2017, expiration date to eligible South Sudan TPS beneficiaries who timely re-register and apply for EADs under this extension. Given the time frames involved with processing TPS re-registration applications, DHS said it recognizes that not all re-registrants will receive new EADs before their current EADs expire on May 2, 2016. Accordingly, DHS is automatically extending the validity of EADs issued under the TPS designation of South Sudan for 6 months, through November 2, 2016. The notice explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and their impact on the employment eligibility verification (Form I-9) and E-Verify processes.

Under the redesignation, individuals who currently do not have TPS (or an initial TPS application pending) may submit an initial application during the 180-day initial registration period that runs from January 25, 2016, through July 25, 2016. In addition to demonstrating continuous residence in the United States since January 25, 2016, and meeting other eligibility criteria, initial applicants for TPS under the redesignation must demonstrate that they have been continuously physically present in the United States since May 3, 2016, the effective date of the redesignation of South Sudan.

Initial TPS applications that were filed under South Sudan's 2011 designation or the 2013 or 2014 redesignations and remained pending on January 25, 2016,

will be treated as initial applications under this redesignation. Individuals who have a pending initial South Sudan TPS application do not need to file a new Application for TPS (Form I-821). DHS provided additional instructions in the notice for individuals whose TPS applications remain pending and who would like to obtain an EAD valid through November 2, 2017.

The notice is at https://www.gpo.gov/fdsys/pkg/FR-2016-01-25/html/2016-01388.htm.

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5. **New York Immigration Attorney Arrested for Immigration Fraud, Aggravated Identity Theft**

U.S. Citizenship and Immigration Services (USCIS) announced on January 15, 2016, that it played a "critical role" in an investigation leading to the arrest of New York attorney Gnoleba Seri for immigration fraud and aggravated identity theft. Homeland Security Investigations arrested Mr. Seri the same day in New York.

According to the complaint against Mr. Seri, between October 2012 and April 2015, he allegedly engaged in a scheme to use personal information contained in legitimate immigration documents for fraudulent purposes. In his role as a licensed immigration attorney, the complaint alleges, Mr. Seri submitted falsified and forged I-864 forms (affidavits of support for those seeking immigrant visas) in support of his clients' applications for immigration visas and legal permanent resident status. Specifically, USCIS said, Mr. Seri received legitimate I-864 forms, tax information, pay stubs, and W-2 forms from individuals sponsoring his clients, then fraudulently submitted those documents with applications for other clients. USCIS said he submitted I-864 forms that listed individuals as financial sponsors who had never met the people they purportedly had agreed to sponsor. Those I-864 forms included the sponsors' real names, identifying information, financial information, and forged signatures. The fraudulent and forged forms all listed Mr. Seri as the preparer and many were notarized by him.

Mr. Seri was charged with one count of visa fraud, which carries a maximum sentence of 10 years in prison; one count of aggravated identity theft, which carries a mandatory consecutive minimum sentence of two years in prison; and one count of mail fraud, which carries a maximum sentence of 20 years in

prison.

The USCIS announcement is at http://www.uscis.gov/news/uscis-plays-critical-role-investigation-leading-arrest-new-york-immigration-attorney-immigration-fraud-and-aggravated-identity-theft.

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6. **Supreme Court Agrees to Hear DAPA Case**

The U.S. Supreme Court has agreed to rule on a challenge to President Obama's "Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)" program, in *U.S. v. Texas*, No. 15-674. Most recently, in November 2015, the U.S. Court of Appeals for the Fifth Circuit upheld an injunction based on insufficient notice and opportunity for public comment, preventing the program from proceeding until the legal matter could be addressed. The appeals court also said that President Obama had exceeded his statutory authority.

In an unusual move, the Court has asked the parties to the case whether President Obama violated his constitutional obligations to enforce U.S. laws—a question that goes to the heart of the scope of presidential power. Also at issue is whether the complaining states have standing to sue the federal government. The states argue that they would suffer direct and concrete injury in millions of additional dollars expended if DAPA goes forward; for example, Texas would have to provide driver's licenses to program beneficiaries.

According to reports, the case is expected to be argued in April and decided in June.

A brief submitted on behalf of the Obama administration is at http://www.scotusblog.com/wp-content/uploads/2016/01/15-674_rb_us_v._texas.pdf. The states' brief is at http://www.scotusblog.com/wp-content/uploads/2016/01/15-674_bio_State_of_Texas_et_al.2.pdf. The Fifth Circuit's opinion is at http://www.ca5.uscourts.gov/opinions/pub/15/15-40238-CV0.pdf. The opinion granting a preliminary injunction, by the U.S. District Court for the Southern District of Texas, Brownsville Division, is at https://www.documentcloud.org/documents/1668197-hanen-opinion.html.

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7. **ABIL Global: China**

*Companies filing for work permits in Beijing must receive preapproval.*

As of January 4, 2016, companies sponsoring work permit applications and Expert Certificates in Beijing must receive preapproval through online certification with the Beijing Labor Bureau. This includes applications for short-term work authorization, employment licenses, work permits (including permits for Hong Kong, Taiwan, and Macao nationals), and expert certificates. Sponsoring companies must apply for and activate a digital certificate with the Labor Bureau online. The Labor Bureau will review the application and schedule an interview for the sponsor to submit the required documents in person.

This is expected to increase the application time for a work permit in Beijing. It is recommended that sponsoring companies register with the Labor Bureau as soon as possible to avoid delays in the work permit process.

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8. **Firm In The News…**

**Cyrus Mehta** published “Immigration Considerations Under the Affordable Care Act” in Bender’s Immigration Bulletin on January 1, 2016.

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