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

JUNE 2016 IMMIGRATION UPDATE

Posted on June 6, 2016 by Cyrus Mehta

Headlines:

1. **USCIS, DOS Launch e-Approval for H-2A Petitions** –USCIS and DOS announced the launch of e-Approval for Form I-129, Petition for a Nonimmigrant Worker, for the H-2A (temporary agricultural worker) classification.
2. **USCIS Will Now Use Pre-Paid Mailers To Send H-2A Receipt Notices** – Coinciding with the launch of e-Approval, USCIS has begun using pre-paid mailers provided by petitioners to send out receipt notices for H-2A (temporary agricultural worker) petitions.
3. **Employers May Submit Inquiries If Extension of Status/Change of Employer Petitions Have Been Pending for 210 Days or More** – USCIS recently began allowing petitioners who filed Form I-129, Petition for a Nonimmigrant Worker, requesting an **extension of status or change of employer** to submit an inquiry after their petition has been pending for 210 days or more.
4. **DHS Extends TPS for Nicaragua and Honduras** – *DHS has extended TPS for eligible nationals of Nicaragua and Honduras (and those without nationality who last habitually resided in one of those two countries) for an additional 18 months, through January 5, 2018.* The 60-day re-registration period runs through July 15, 2016.
5. **USCIS Reaches H-2B Cap for FY 2016** – May 12, 2016, was the final receipt date for new H-2B worker petitions requesting an employment start date before October 1, 2016.
6. **USCIS Reaches CW-1 Cap for FY 2016** – May 5, 2016, was the final receipt date for CW-1 (CNMI-Only Transitional Worker) petitions requesting an employment start date before October 1, 2016.
7. **USCIS Launches Optional Forms Checklist Pilot for Employment**

Authorization Application – The checklist identifies what documents need to be included in the initial filing and the important items needed to complete the form, such as a signature.

8. **OSC Launches Submission of Charge Forms Online** – Anyone who alleges that he or she is a victim of discrimination or an authorized person on behalf of the victim can now submit a charge form online within 180 days of the alleged date of discrimination.
9. **ABIL Global: Belgium** – This article summarizes details on work permit requirements and exemptions for foreign employees in Belgium.
10. **Firm In The News…**

Details:

1. **USCIS, DOS Launch e-Approval for H-2A Petitions**

U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of State (DOS) recently announced the launch of e-Approval for Form I-129, Petition for a Nonimmigrant Worker, for the H-2A (temporary agricultural worker) classification. This new electronic process, begun on May 16, 2016, allows USCIS to send approval information for H-2A petitions to DOS by the end of the next business day. DOS will accept this electronic information in place of a Form I-797 approval notice and allow its consular posts to proceed with processing an H-2A nonimmigrant visa application, including conducting any required interview.

USCIS will continue the current practice of updating My Case Status online upon approving a case and mailing approval notices to petitioners. Employers will not be charged any additional fees for the USCIS/DOS e-Approval process.

USCIS said the goals of the USCIS/DOS e-Approval process are to:

- Reduce delays for U.S. employers that wish to employ H-2A agricultural workers;
- Reduce the amount of paperwork between USCIS and DOS;
- Replace the current paper-based USCIS/DOS notification process with an electronic process that will make the visa process more efficient for applicants; and
- Provide greater efficiency and consistency in transmitting information to DOS consular posts.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-and-department-state-launch-e-approval-h-2a-petitions. My Case Status is at https://egov.uscis.gov/casestatus/landing.do.

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2. **USCIS Will Now Use Pre-Paid Mailers To Send H-2A Receipt Notices**

Coinciding with the launch of e-Approval, U.S. Citizenship and Immigration Services (USCIS) has begun using pre-paid mailers provided by petitioners to send out receipt notices for H-2A (temporary agricultural worker) petitions. USCIS said this is a change from standard processing at USCIS service centers, which normally use pre-paid mailers only for final decision notices.

Under this change, H-2A petitioners may now submit two pre-paid mailers if they want to expedite delivery of both the receipt notice and the final decision notice. Any submitted pre-paid mailers for H-2A petitions must still meet the same requirements for their use with other forms and classifications.

Until further notice, USCIS will:

- Use any pre-paid mailer provided by an H-2A petitioner primarily to send the receipt notice.
- Send the final decision notice (such as a Notice of Approval or Notice of Denial) in a pre-paid mailer only if the H-2A petitioner provided a second pre-paid mailer.
- Continue to send all other notices regarding an H-2A petition, including any Requests for Evidence, by regular U.S. mail.

USCIS said it revised how it processes pre-paid mailers for H-2A petitions "in recognition of stakeholder interest in expediting the delivery of receipt notices for this very time-sensitive classification." This change is limited to H-2A petitions.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-will-now-use-pre-paid-mailers-send-h-2a-receipt-notices.

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3. **Employers May Submit Inquiries If Extension of Status/Change of**

Employer Petitions Have Been Pending for 210 Days or More

U.S. Citizenship and Immigration Services (USCIS) recently began allowing petitioners who filed Form I-129, Petition for a Nonimmigrant Worker, requesting an **extension of status or change of employer** to submit an inquiry after their petition has been pending for 210 days or more. This inquiry may be based on the petition being outside of normal processing times.

Employers whose I-129 petitions have been pending for at least 210 days may submit inquiries by calling the National Customer Service Center at 1-800-375-5283 (TDD for hearing-impaired: 1-800-767-1833). Those asking about case status should provide the original receipt number and specify that the case has been pending for 210 days or more.

The announcement is at https://www.uscis.gov/news/employers-may-submit-inquiries-if-extension-statuschange-employer-petition-has-been-pending-210-days-or-more.

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4. **DHS Extends TPS for Nicaragua and Honduras**

The Department of Homeland Security has extended temporary protected status (TPS) for eligible nationals of Nicaragua and Honduras (and those without nationality who last habitually resided in one of those two countries) for an additional 18 months, effective July 6, 2016, through January 5, 2018.

Current Nicaraguan and Honduran TPS beneficiaries who want to extend their TPS must re-register during the 60-day re-registration period that began May 16, 2016, and runs through July 15, 2016. U.S. Citizenship and Immigration Services (USCIS) encourages beneficiaries to re-register as soon as possible.

The 18-month extension allows TPS re-registrants to apply for a new Employment Authorization Document (EAD). Those who re-register during the 60-day period and request a new EAD will receive one with an expiration date of January 5, 2018. USCIS said it recognizes that some re-registrants may not receive their new EADs until after their current work permits expire. Therefore, USCIS is automatically extending current TPS Nicaragua EADs with a July 5, 2016, expiration date for six months. These existing EADs are now valid through January 5, 2017.

To re-register, current TPS beneficiaries must submit:

- Form I-821, Application for Temporary Protected Status (re-registrants do not need to pay the Form I-821 application fee);
- Form I-765, Application for Employment Authorization, regardless of whether they want an EAD;
- The Form I-765 application fee (or a fee-waiver request) only if they want an EAD. If the re-registrant does not want an EAD, no application fee is required; and
- The biometric services fee (or a fee-waiver request) if they are age 14 or older.

USCIS noted that it is transitioning to process Nicaraguan TPS applications electronically (the announcements do not mention electronic processing with respect to Honduran TPS applications). However, applicants must continue to complete the paper forms and submit them by mail. Once USCIS receives the documents, the agency will scan them in for processing. Nicaraguan applicants with properly filed submissions will receive a USCIS Account Acceptance Notice in the mail with instructions on how to create a USCIS online account. USCIS will still process TPS Nicaragua applications even if applicants choose not to access their online account. The agency will also send copies of case notifications via the U.S. Postal Service.

The TPS announcements are at https://www.uscis.gov/news/news-releases/temporary-protected-status-extended-nicaragua (Nicaragua) and https://www.uscis.gov/news/news-releases/temporary-protected-status-extended-honduras (Honduras). The related Federal Register notices are at https://www.gpo.gov/fdsys/pkg/FR-2016-05-16/html/2016-11305.htm (Nicaragua) and https://www.gpo.gov/fdsys/pkg/FR-2016-05-16/html/2016-11306.htm (Honduras).

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5. **USCIS Reaches H-2B Cap for FY 2016**

U.S. Citizenship and Immigration Services (USCIS) recently announced that it has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for fiscal year (FY) 2016. May 12, 2016, was the final receipt date for new H-2B worker petitions requesting an employment start date

before October 1, 2016.

USCIS said that except as noted below, the agency will reject new H-2B petitions received after May 12, 2016, that request an employment start date before October 1, 2016.

The agency will continue to accept H-2B petitions that are exempt from the congressionally mandated cap. This includes the following types of petitions:

- For FY 2016 only, workers certified and confirmed as "returning workers" who were previously counted against the annual H-2B cap during FYs 2013, 2014, or 2015;
- Current H-2B workers in the U.S. petitioning to extend their stay and, if applicable, change the terms of their employment or change their employers;
- Fish roe processors, fish roe technicians, and supervisors of fish roe processing; and
- Workers performing labor or services from November 28, 2009, until December 31, 2019, in the Commonwealth of the Northern Mariana Islands or Guam.

USCIS said it will consider H-2B petitions requesting an employment start date on or after October 1, 2016, toward the FY 2017 H-2B cap. These petitions will be subject to all eligibility requirements for FY 2017 H-2B cap filings.

To avoid processing delays, petitioners who are including H-2B returning workers on their petitions must complete and include the H-2B Returning Worker Certification (https://www.uscis.gov/sites/default/files/files/form/i-129sup.pdf) and are encouraged to write "H-2B Returning Workers" prominently on the envelope and any cover page. More information is at https://www.uscis.gov/news/alerts/h-2b-returning-workers-exempted-h-2b-cap-fiscal-year-2016. Additional H-2B cap information is at https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2016. For more information about the H-2B work program, see uscis.gov/h-2b.

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6. **USCIS Reaches CW-1 Cap for FY 2016**

U.S. Citizenship and Immigration Services (USCIS) announced on May 19, 2016, that it has received a sufficient number of petitions to reach the numerical limit, or cap, of 12,999 workers who may be issued CW-1 visas or otherwise provided with CW-1 status for fiscal year (FY) 2016. May 5, 2016 was the final receipt date for CW-1 worker petitions requesting an employment start date before October 1, 2016.

The CNMI-Only Transitional Worker (CW) visa classification allows employers in the Commonwealth of the Northern Mariana Islands (CNMI) to apply for temporary permission to employ foreign nonimmigrant workers who are otherwise ineligible to work under other nonimmigrant worker categories. The CW classification provides a method for transition from the former CNMI foreign worker permit system to the U.S. immigration system.

USCIS said it will reject CW-1 petitions that were received after May 5, 2016, and that request an employment start date before October 1, 2016. This includes CW-1 petitions for extensions of stay that are subject to the CW-1 cap. The filing fees will be returned with any rejected CW-1 petition.

If an extension petition is rejected, the beneficiaries listed on that petition are not permitted to work beyond the validity period of the previously approved petition. Therefore, affected beneficiaries, including any CW-2 derivative family members of a CW-1 nonimmigrant, must depart the CNMI within 10 days after the CW-1 validity period has expired, unless they have some other authorization to remain under U.S. immigration law.

Form I-129CW petitions that are generally subject to the CW-1 cap include new employment petitions and extension of stay petitions. All CW-1 workers are subject to the cap unless the worker has already been counted toward the cap in the same fiscal year. The CW-1 cap does not apply to CW-2 dependents.

USCIS said it encourages CW-1 employers to file a petition for a CW-1 nonimmigrant worker up to 6 months in advance of the requested employment start date, and to file as early as possible within that time frame. However, USCIS will reject a petition if it is filed more than 6 months in advance.

USCIS is currently accepting CW-1 petitions requesting employment start dates **on or after October 1, 2016** (which apply to the FY 2017 CW-1 cap).

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-reaches-cw-1-cap-fiscal-year-2016. For more information about the CW-1 work program, see https://www.uscis.gov/cw-1.

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7. **USCIS Launches Optional Forms Checklist Pilot for Employment Authorization Application**

U.S. Citizenship and Immigration Services (USCIS) has launched a pilot study to offer an optional checklist for the submission of Form I-765, Application for Employment Authorization. The checklist identifies what documents need to be included in the initial filing and the important items needed to complete the form, such as a signature.

The pilot study is specific to applicants who have filed for adjustment of status. USCIS said it will use the results of the study to determine whether the agency will expand the availability of optional checklists for other USCIS forms where a checklist is not currently available. USCIS notes that the checklist does not replace or change the form instructions and statutory or regulatory requirements.

USCIS is conducting a similar pilot study with Form I-129F, Petition for Alien Fiancé(e). The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-launches-optional-forms-checklists-forms-i-129f-and-i-765.

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8. **OSC Launches Submission of Charge Forms Online**

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) recently announced that members of the public can now complete and submit charge forms online through OSC's website, in addition to the methods currently available (mail, fax, or email).

Anyone who alleges that he or she is a victim of discrimination or an authorized person on behalf of the victim can submit a charge form within 180 days of the alleged date of discrimination. Grounds under U.S. immigration law may include discrimination on the basis of citizenship status, national origin, document abuse, or retaliation.

The online form is at https://www.justice.gov/crt/complaint/osc/?language=en (English) and https://www.justice.gov/crt/complaint/osc/?language=es (Spanish). OSC said it will add more languages "in the near future."

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9. **ABIL Global: Belgium**

Below is a summary of details on some work permit exemptions, related to technical work, for foreign employees in Belgium.

In principle, any employment in Belgium of a foreign employee requires a work permit, unless an exemption applies.

Several activities are considered business visitors' activities, which do not trigger a work permit requirement, such as technical activities like initial assembly or first installation of a product. Such a service is defined as: (i) an essential part of a sales/supply agreement; (ii) necessary for the use of the product; and (iii) provided by qualified and/or specialized employees of the supplier. Work in the construction/building industry is excluded.

Official comments from the authorities refer to the following example:

An American company sells a highly technological printing press to a Belgian printing company. The company sends two technicians. They have to install the printing press, adjust it, and provide the Belgian client's personnel with a training course. All of this takes 5 days. This American company and its employees are exempt.

The work permit exemption only applies to employees who are posted/assigned to Belgium, and the work cannot take longer than 8 days. There is no salary requirement.

Another business visitor activity is urgent maintenance of and repair work on a product. The scope of this work by specialized technical workers is the performing of urgent maintenance of and repair work on goods supplied by the foreign employer to a Belgian customer. The regulations explicitly confirm that IT work falls under the scope of this work permit exemption.

Official comments from the authorities refer to the following example:

The air-conditioning in a Belgian company is defective. The company contacts the supplier in..., who sends out a technician. After half a day the technical problem is

solved. The ... employer/supplier is exempt from the declaration.

This exemption only applies to employees who are posted/assigned to Belgium, and the employee cannot work more than 5 days per month in Belgium. The remuneration of the employee must be at least equal to the Belgian minimum wage.

The employer who invokes a work permit exemption must be able to prove that the conditions for the exemption are met (such as in the event of audit by social inspection services). There are specific rules regarding the minimum initial documentation required:

- For initial assembly and/or first installation of a product: a sworn statement by the employer and a copy of the supply contract;
- For urgent maintenance of and repair work on a product: a sworn statement by the employer and a statement by the client regarding the urgency of the work.

In the event of an audit, the social inspection services can "overrule" the employer's sworn statement: they can opine on the basis of the facts that the work permit exemption does not apply. This could result in civil or criminal proceedings.

As a general requirement, to be able to invoke a work permit exemption, the employees must be legally residing in Belgium. Unless the employees reside in a hotel, they must make a declaration of arrival with the municipal authorities of the town where they will reside within three working days of arrival.

Legal residence in Belgium for visa waiver citizens implies that the employees have not yet resided in the Schengen area more than 90 days in any 180-day period. Furthermore, these employees must hold a travel document that (i) is valid "at least 3 months after the intended date of departure from the territory of the Member States" (this requirement may be waived in "a justified case of emergency"), and (ii) has "been issued within the previous 10 years."

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10. **Firm In The News**

Cyrus Mehta was a Guest Speaker, *Update on Immigration Developments and Ethics*, Annual Dinner Meeting of AILA Upstate New York Chapter, Syracuse, NY, May 25, 2016.

Mr. Mehta was a Speaker, *Top 5 PERM Issues*, Web Seminar, American Immigration Lawyers Association, May 24, 2016.

Cyrus D. Mehta & Partners PLLC announces that it has been ranked in the Chambers and Partners USA Guide. Among New York firms in the Immigration field, the firm ranked in Band 2. The firm's founder and managing partner, Cyrus D. Mehta, was for the second year in a row ranked among "Star Individuals" in the 2016 Guide, and partners Cora-Ann Pestaina and David Isaacson were also ranked in the 2016 Guide, as "Up and Coming". The 2016 Guide describes the firm as the "trong choice of counsel for startup companies, as well as individuals and large multinational corporations."

Further details are available at http://www.chambersandpartners.com/12806/31/editorial/5/1#117776_editorial, http://www.chambersandpartners.com/USA/person/280125/cyrus-d-mehta, http://www.chambersandpartners.com/USA/person/726274/cora-ann-v-pestaina, and http://www.chambersandpartners.com/USA/person/726271/david-a-isaacson.

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