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

JULY 2016 IMMIGRATION UPDATE

Posted on July 6, 2016 by Cyrus Mehta

Headlines:

1. **Split Supreme Court Decision Blocks DAPA** – In *U.S. v. Texas*, the Supreme Court let stand lower court rulings that block the Obama administration's plan to allow approximately 4 million parents of U.S. citizen children to remain in the United States and obtain work authorization.
2. **USCIS Celebrates SAVE's 30th Anniversary, Launches Redesigned Website** – SAVE has 1,138 registered agencies with more than 75,000 users.
3. **Justice Dept. Settles Immigration-Related Discrimination Claims Against 121 Residency Programs and AACPM** – DOJ announced that it reached agreements with 121 podiatry residency programs and the American Association of Colleges of Podiatric Medicine to resolve claims that they discriminated against work-authorized non-U.S. citizens.
4. **ABIL Global: Canada** – Several developments have been announced.
5. **Firm In The News...**

Details:

1. **Split Supreme Court Decision Blocks DAPA**

In a one-sentence 4-4 split decision on June 24, 2016, *U.S. v. Texas*, the U.S. Supreme Court let stand lower court rulings that block the Obama administration's plan, known as Deferred Action for Parents of Americans (DAPA), to allow approximately 4 million parents of U.S. citizen children to remain in the United States and obtain work authorization.

President Barack Obama called the decision "heartbreaking" for those affected

by the ruling "who made their lives here, who've raised families here, who hope for the opportunity to work, pay taxes, serve in our military, and fully contribute to the country we all love in an open way." Hillary Clinton, presumptive Democratic presidential nominee, said the ruling threw "millions of families across our country into a state of uncertainty." She pledged to "introduce comprehensive immigration reform with a path to citizenship within my first 100 days."

The decision was not expected to lead to any immediate removals due to the Obama administration's enforcement priorities. Secretary of Homeland Security Jeh Johnson said on June 23, 2016, that he was "disappointed" by the Supreme Court's ruling. He noted:

It is important to emphasize that this ruling does not affect the existing DACA policy, which was not challenged. Eligible individuals may continue to come forward and request initial grants or renewals of DACA, pursuant to the guidelines established in 2012.

We are also moving forward on the other executive actions the President and I announced in November 2014 to reform our immigration system. This includes our changes to the Department's immigration enforcement priorities. Through these priorities, we are more sharply focused on the removal of convicted criminals; and threats to public safety and national security, and border security. We have ended the controversial Secure Communities program. We are expanding policies designed to help family members of U.S. citizens and permanent residents stay together when removal would result in extreme hardship. And we are taking several actions to make it easier for international students, entrepreneurs, and high-skilled immigrants to contribute to the U.S. economy.

On the other side, Donald Trump, presumptive Republican presidential nominee, said the decision "blocked one of the most unconstitutional actions ever undertaken by a president." Ken Paxton, Texas' Republican Attorney General, said it was "a major setback to President Obama's attempts to expand executive power, and a victory for those who believe in the separation of powers and the rule of law."

The Supreme Court's decision is at http://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf. President Obama's statements are at

https://www.whitehouse.gov/the-press-office/2016/06/23/remarks-president-supreme-court-decision-us-versus-texas and https://www.whitehouse.gov/blog/2016/06/23/president-obama-supreme-court-ruling-immigration-reform. Secretary Johnson's statement is at https://www.dhs.gov/news/2016/06/23/statement-secretary-johnson-todays-supreme-court-decision. Ms. Clinton's statement is at https://www.hillaryclinton.com/briefing/statements/2016/06/23/hillary-clinton-statement-on-texas-v-united-states/. Mr. Trump's statement is at https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-executive-amnesty-ruling.

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2. **USCIS Celebrates SAVE's 30th Anniversary, Launches Redesigned Website**

On June 23, 2016, U.S. Citizenship and Immigration Services (USCIS) celebrated the 30th anniversary of the Systematic Alien Verification for Entitlements (SAVE) program by redesigning its website, among other things. USCIS noted that SAVE has 1,138 registered agencies with more than 75,000 users.

USCIS said SAVE's redesigned website includes enhanced graphics, an improved navigation menu, and new search features. The redesign "makes it easier for benefit-granting agencies, prospective agencies and benefit-seeking applicants to learn about the immigration status verification process and services," USCIS noted. A new "History & Milestones" page outlines SAVE's enhancements over the years.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-celebrates-saves-30th-anniversary. A related announcement is at https://www.uscis.gov/save/whats-new. The new "History & Milestones" page is at https://www.uscis.gov/save/history-milestones. USCIS Director Leon Rodriguez released a new video on YouTube about the SAVE program, at https://www.uscis.gov/save/uscis-save-program-30th-anniversary.

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3. **Justice Dept. Settles Immigration-Related Discrimination Claims Against 121 Residency Programs and AACPM**

The Department of Justice (DOJ) announced on June 20, 2016, that it reached agreements with 121 podiatry residency programs and the American Association of Colleges of Podiatric Medicine (AACPM) to resolve claims that they discriminated against work-authorized non-U.S. citizens in violation of the Immigration and Nationality Act.

DOJ's investigations found that between 2013 and 2015, the programs and AACPM created and published discriminatory postings for podiatry residents through AACPM's online podiatry residency application and matching service. Specifically, DOJ said hundreds of job postings limited podiatry residency positions to U.S. citizens. Several work-authorized non-U.S. citizens stated that they were discouraged or deterred from applying to residency programs because of the citizenship requirements, and the agency concluded that two lawful permanent residents were denied consideration for positions because of unlawful citizenship requirements.

Under the settlement agreements, the programs must remove citizenship requirements from podiatry residency postings except where required by law, train staff involved in the advertising and hiring of podiatric residents, and ensure that future residency postings are reviewed by staff trained in equal employment opportunity laws or by legal counsel. Some of the settlements also require the programs to pay civil penalties from the programs totaling $141,500.

The settlement with AACPM requires it to pay $65,000 in civil penalties, train its staff on the anti-discrimination provision of the INA, and ensure that all participating programs receive such training before they may use AACPM's online system to advertise residency positions. The settlement also requires AACPM to refund the fees that the charging party paid to use AACPM's residency application and matching system.

The agency began its investigations of the programs and AACPM in 2015 after receiving a charge against AACPM from a podiatry medical student with lawful permanent residence. The charge alleged that AACPM published a series of podiatry residency job announcements that unlawfully restricted positions to U.S. citizens through AACPM's online application service. The charge further claimed that AACPM used its online service to collect citizenship status information from residency applicants and share that information with residency programs.

DOJ noted that unless a legal exception applies, jobs may not be advertised as available only to U.S. citizens because doing so excludes other work-authorized individuals, such as U.S. nationals, lawful permanent residents (green card holders), asylees, and refugees.

The announcement is at https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claims-against-121-residency.

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4. **ABIL Global: Canada**

Several developments have been announced.

Many are being caught unprepared by new primary inspection tools. Beginning in November 2015, the Canada Border Services Agency (CBSA) updated its frontline systems so that CBSA officers working the Primary Inspection Line (PIL) at border crossings now have immediate access to the Canadian Police Information Centre (CPIC) database. Previously, these frontline officers only had access to an immigration-related database, and an individual seeking to enter Canada would need to be referred to secondary inspection for an Officer to run his or her information through CPIC.

The introduction of this change has affected the information available to PIL CBSA officers, and has the potential to affect any foreign national who has ever been arrested, charged, or convicted of a crime inside or outside of Canada. In the first month of operation, this procedural change flagged 1,800 cases where travelers were identified as having outstanding warrants against them.

All foreign nationals seeking to enter Canada who have been subject to an arrest, charge, or conviction in or outside of Canada need to proactively consider if they are inadmissible to Canada and be prepared to address any issues, including disclosing their past history. Of importance is the fact that the CPIC information is not always up-to-date, so even if the matter was resolved without a conviction (i.e., dismissed or finding of not guilty), the onus is on the foreign national to satisfy the CBSA officer that he or she is admissible. Depending on the nature of the charge or conviction, these foreign nationals might find that prior incidents render them inadmissible to Canada. Failure to disclose the information on entry can result in a finding of misrepresentation, and could lead to a five-year ban on entering Canada, or refusals of future

immigration applications. Even without the CPIC system, it is imperative that a foreign national disclose any past infractions, from driving while impaired to issues of criminality.

There are ways to overcome inadmissibility based on a past criminal activity. These include a discretionary application known as a Temporary Resident Permit or a finding of "deemed rehabilitation," which can be executed directly at the port of entry, or a more involved application for rehabilitation that typically needs to be filed at a Canadian embassy or consular office outside Canada before entry.

Administrative monetary penalties are introduced for employers failing to comply with rules for foreign workers. Canada has introduced a new system of financial penalties and other consequences for employers found to be non-compliant with the conditions of the Temporary Foreign Worker Program (TFWP) and the International Mobility Program (IMP). New regulations introducing fines known as Administrative Monetary Penalties (AMPs), and bans on hiring foreign workers for whom work permits are required, came into force on December 1, 2015.

The new system takes various factors into consideration, including the nature and severity of the violation, the employer's compliance history, and the size of the employer. A points system is used to determine the amount of any applicable fines and the length of any applicable bans. In the spirit of encouraging compliance with program conditions, employers are encouraged to voluntarily disclose non-compliance and may receive reduced consequences for doing so, depending on the circumstances.

Therefore, it is particularly important that employers ensure their employees' working conditions (such as name of employer, work location, occupation, and wage) remain the same as those outlined in the Labour Market Impact Assessment (LMIA) approval letter or, in the case of an LMIA-exempt position, that the name of the employer, work location, and occupation match those outlined in the offer of employment provided to Immigration, Refugees and Citizenship Canada (IRCC), formerly Citizenship and Immigration Canada. Note, however, that IRCC may see a significant change in wages as an indication that the occupation has changed, and additional information establishing that this is not the case could be required.

The potential consequences for employers are significant: up to $1,000,000 in

fines and a permanent ban on hiring foreign workers for whom work permits are required. Consequences may be reduced if employers voluntarily disclose non-compliance and provide justification, especially if employers are able to demonstrate that they were proactive in reporting or addressing the discrepancy or violation. Employers are encouraged to take the following steps:

1. Identify all foreign workers in the organization with Canadian work permits.
2. For each foreign worker with an LMIA-based work permit, compare his or her current occupation (job title and duties), wages (including benefits and other compensation), and work location with what was indicated on the LMIA approval letter. Identify any discrepancies and consult with immigration counsel on whether to report these discrepancies to Service Canada as not substantially the same terms as those initially approved.
3. Review each other Canadian employer-specific work permit to determine if the employer, occupation (job title and duties), and work location are consistent with what is listed on the work permit and with what was submitted to IRCC at the time the work permit application was made. Identify any discrepancies and consult with immigration counsel on whether an application to vary and change the work permit should be made.
4. Set up a flag in employment records for all employees holding employer-specific Canadian work permits as a reminder to the human resources team that any changes in wage, occupation, or work location should be reviewed with immigration counsel.
5. Educate human resources personnel and employees with Canadian work permits on the potential implications of changing wages, location of work, or job duties.
6. Consider implementing a workplace harassment policy, harassment awareness training, and a mechanism for employees to report concerns.
7. Take steps to review and ensure compliance with provincial and federal legislation regulating employment and the recruitment of employees.
8. Develop an immigration strategy to transition foreign workers to Canadian permanent residence.
9. Take steps to ensure that payroll and recruiting records for workers holding Canadian work permits are maintained for 6 years.

As of October 26, 2015, employers offering employment to LMIA-exempt

foreign nationals must submit compliance information through the new IRCC Employer Portal. The IMM 5802 form (Offer of Employment to a Foreign National Exempt from a Labour Market Impact Assessment (LMIA)) that was in place since February 21, 2015, is no longer accepted. For a foreign worker employed by a non-Canadian company, it is unclear whether the Canadian company receiving the benefit of the work or the foreign worker's non-Canadian employer is responsible for filing the compliance form and ultimately liable if there is a finding of non-compliance. Recently, IRCC stated that the Canadian company receiving the benefit of the work performed by the foreign worker is responsible for filing the compliance form. Accordingly, the Canadian company will be held liable if there is a finding of non-compliance.

Many Canadian companies are reluctant to assume responsibility for filing the compliance form for their foreign vendors or foreign vendors' employees. Those that are prepared to file may seek an indemnification from the foreign vendor to mitigate against the foreign vendor's not keeping payroll records or failing to pay the foreign worker the wage offered at the time the work permit was issued. In other instances, the foreign vendor may be unwilling to provide the Canadian company with details of wages paid to their employees, which are necessary for the Canadian company to file the compliance form. Vendors typically want to avoid the Canadian company's knowing the foreign vendor's profit margins. Consequently, this new compliance scheme may have a chilling effect on trade relationships between Canadian and foreign vendors providing services. The foreign national cannot proceed with a work permit application at a port of entry or through a visa office without this compliance requirement first having been completed online.

Given the potential severity of these new penalties, it is imperative that employers provide accurate and complete information on all LMIA and LMIA-exempt applications.

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5. **Firm In The News**

Cyrus Mehta was a Speaker on two panels: 1) *Caveat Emptor: The Ethics of Choosing and Working with Service Vendors* and 2) *AILA Ethics Compendium Live,* 2016 AILA Annual Conference On Immigration Law, Las Vegas, Nevada, June 22-25, 2016.

Cyrus Mehta received the American Immigration Lawyers Association President's Commendation for exemplary service to the President and to AILA, June 25, 2016.

Cora-Ann V. Pestaina was a Speaker on the panel*, Establishing the Employer-Employee Relationship in NIV Third-Party Placements*, 2016 AILA Annual Conference on Immigration Law, Las Vegas, Nevada, June 22-25, 2016.

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