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US IMMIGRATION & NATIONALITY LAW

NOVEMBER 2016 IMMIGRATION UPDATE

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Headlines:

1. **DHS Extends TPS for Nepal** – DHS is extending the designation of Nepal for TPS through June 24, 2018. The 60-day re-registration period runs through December 27, 2016.
2. **ABIL, Commenters Weigh In on USCIS Proposed Rule on Parole for Entrepreneurs** – The comment period ended October 17, 2016, and yielded hundreds of comments.
3. **CW-1 Visa Limit Reached for FY 2017, USCIS Says** – USCIS has received a sufficient number of petitions to reach the numerical limit of 12,998 workers who may be issued CNMI-Only Transitional Worker visas or otherwise provided with CW-1 status for FY 2017.
4. **ABIL Global: Australia, South Africa** – Australia has announced changes to certain temporary activity visas effective November 19, 2016. Also, in South Africa, there are several options for the divorcing foreign spouse.
5. **Firm In the News…**

Details:

1. **DHS Extends TPS for Nepal**

The Department of Homeland Security announced on October 26, 2016, that it is extending the designation of Nepal for temporary protected status (TPS) effective December 25, 2016, through June 24, 2018. The 60-day re-registration period began October 26 and runs through December 27, 2016. DHS urged re-registrants to timely re-register during the 60-day period and not wait until their employment authorization documents (EADs) expire.

DHS said this extension will allow eligible Nepalese nationals (and those having no nationality who last habitually resided in Nepal) to retain TPS through June

24, 2018, as long as they otherwise continue to meet the eligibility requirements for TPS. The agency has determined that an extension is warranted because conditions in Nepal supporting its designation for TPS continue to be met.

DHS also set forth procedures necessary for nationals of Nepal (or those having no nationality who last habitually resided in Nepal) to re-register for TPS and to apply for renewal of their EADs with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Nepal and whose applications have been granted. Certain nationals of Nepal (or those having no nationality who last habitually resided in Nepal) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) at least one of the late initial filing criteria; and, (2) all TPS eligibility criteria (including continuous residence in the United States since June 24, 2015, and continuous physical presence in the United States since June 24, 2015).

USCIS will issue new EADs with a June 24, 2018, expiration date to eligible Nepal 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 recognizes that not all re-registrants will receive new EADs before their current EADs expire on December 24, 2016. Accordingly, through the notice, DHS has automatically extended the validity of EADs issued under the TPS designation of Nepal for 6 months, through June 24, 2017. 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.

The notice is at https://www.gpo.gov/fdsys/pkg/FR-2016-10-26/html/2016-25907.htm.

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2. **ABIL, Commenters Weigh In on USCIS Proposed Rule on Parole for Entrepreneurs**

A recently proposed U.S. Citizenship and Immigration Services (USCIS) rule would, among other things, allow the agency to use its discretionary authority to parole into the United States founders of startups with a minimum $345,000 investment from certain qualified U.S. investors with established records of

successful investments. The comment period ended October 17, 2016, and yielded hundreds of comments.

The Alliance of Business Immigration Lawyers (ABIL) took issue with various "miserly and inflexible provisions," noting that the USCIS proposal "falls short in several material ways"; for example, by:

- Requiring voluminous and burdensome documentation to prove, by a preponderance of the evidence, "the substantial and demonstrated potential" likelihood that a start-up venture backed by a foreign entrepreneur will grow in revenue and add jobs rapidly;
- Offering no way for a parolee to switch from or to another lawful immigration status in the United States;
- Permitting startups and parolees too short a runway of initial and extended time for lift-off and stable cruising at higher elevations;
- Mandating an unreasonably high investment amount, limiting the source of startup capital to a small group of venture capitalists, and barring consideration of "friends and family"-backed investments;
- Requiring re-submission of evidence and re-adjudication of the parole benefit virtually every time the entity's ownership or strategic direction, or the job duties assigned to the foreign entrepreneur, may change after the initial approval of parole; and
- Omitting any direct path for the parolee to become a lawful permanent resident.

ABIL made the following recommendations:

1. Start-up companies in "stealth mode" should be allowed to participate in this program.
2. The final rule should lower the parole and re-parole capital thresholds.
3. Qualifying investment amounts obtained within three years after creation of the start-up should count toward the USCIS-proposed threshold of $345,000.
4. The final rule should reduce the investment threshold of $345,000 for initial parole to $120,000.
5. The final rule should revise the definition of "well-positioned" to substantially assist a start-up.
6. The final rule should define "start-up entity" more clearly and accept reputable expert witness testimony.

7. The final rule should allow parole for entrepreneurs in startup companies formed more than three years before the parole application is filed.
8. The final rule should define "capital" broadly.
9. The final rule should allow investments from family members and close friends.
10. The final rule should include a more flexible definition of full-time employment.
11. The proposed rule's requirement to file a new parole application whenever a material change occurs is impractical and onerous.
12. The final rule should extend parole beyond five years and allow a pathway to permanent resident status.
13. The final rule should complement and not supplant prior USCIS policy on entrepreneurs.
14. Spouses of entrepreneurial parole beneficiaries should automatically receive work authorization incident to status; i.e., without the need to apply separately for an Employment Authorization Document.
15. The final rule should authorize premium processing and expressly permit review by motion to reopen and reconsider and administrative appeal, also with premium processing, with the assured continuity of the parolee's employment authorization until the receipt of the final USCIS decision.
16. The final rule should allow parolees to switch status to or from all employment-based nonimmigrant visa categories and to qualify for adjustment of status.
17. The final rule should apply the authority granted to approve applications for adjustment of status to that of a lawful permanent resident where the parolee's inability to adjust is "other than through no fault of his or her own or for technical reasons."

ABIL's 20-page comment is at https://www.regulations.gov/document?D=USCIS-2015-0006-0416. The proposed rule was published on August 31, 2016, and is at https://www.federalregister.gov/articles/2016/08/31/2016-20663/international-entrepreneur-rule.

Also see the Firm's blog on this matter, "*Reviving The National Interest Waiver For International Entrepreneurs*," (http://blog.cyrusmehta.com/2016/10/reviving-the-national-interest-waiver-for-i

nternational-entrepreneurs.html).

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3. **CW-1 Visa Limit Reached for FY 2017, USCIS Says**

U.S. Citizenship and Immigration Services (USCIS) reported on October 21, 2016, that the agency has received a sufficient number of petitions to reach the numerical limit of 12,998 workers who may be issued Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) visas or otherwise provided with CW-1 status for fiscal year 2017. October 14, 2016, was the final receipt date for CW-1 worker petitions requesting an employment start date before October 1, 2017.

USCIS said it will reject CW-1 petitions received on or after October 15, 2016, that request an employment start date before October 1, 2017. This includes CW-1 petitions for extensions of stay that are subject to the CW-1 cap. USCIS will return the filing fees 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 leave 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.

The following types of Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker, are generally subject to the CW-1 cap: 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 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. USCIS will reject a petition if it is filed more than 6 months in advance.

For more information on the CW-1 visa classification, see https://www.uscis.gov/working-united-states/temporary-workers/cw-1-cnmi-only-transitional-worker.

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4. **ABIL Global: Australia, South Africa**

Australia has announced changes to certain temporary activity visas effective November 19, 2016. Also, in South Africa, there are several options for the divorcing foreign spouse.

Australia

Australia's Department of Immigration and Border Protection has announced changes to certain temporary activity visas effective November 19, 2016. These changes do not affect the subclass 457 visa.

The following visas will be closed as of November 19:

(a) Subclass 401—Temporary Work (Long Stay Activity) Visa. This visa included four streams:

(i) Exchange stream—to work in a skilled position under a reciprocal staff exchange arrangement
(ii) Sports stream
(iii) Religious worker stream
(iv) Domestic worker stream

(b) Subclass 402—Training and Research Visa, which has permitted occupational trainees to undergo training in Australia;

(c) Subclass 416—Special Program Visa, allowing participation in cultural exchanges;

(d) Subclass 420—Temporary Work (Entertainment Visa); and

(e) Subclass 488—Super Yacht Crew Visa.

Beginning on November 19, 2016, four new visa subclasses will be introduced (or continued):

1. Subclass 400—Temporary Work (Short Stay Specialist Visa)

   The current subclass 400 visa enables the visa holder to live and work in Australia for a period of up to 3 months normally, but up to 6 months in special circumstances. It has proven to be an extremely useful visa. It allows the visa holder to undertake short-term highly specialized non-ongoing work or to participate in an activity or work relating to Australia's

interest.

2. Subclass 403- Temporary Work (International Relations Visa)

   This visa is for people wishing to enter Australia on a temporary basis:

   (i) In relation to a bilateral agreement;
   (ii) To represent a foreign government or to teach a foreign language in an Australian school;
   (iii) To undertake full-time domestic work for a diplomat;
   (iv) As a person with statutory privileges or immunities; or
   (v) To participate in seasonal worker programs.

3. Subclass 407—Training Visa

   This visa supplants the current subclass 402 Training and Research Visa.

4. Subclass 308—Temporary Activity Visa

   This visa is available for those wishing to enter Australia on a temporary basis to:-

   (i) Work in the entertainment industry;
   (ii) Participate in non-ongoing cultural or social activities;
   (iii) Observe or participate as an academic in a research project;
   (iv) Undertake full-time or religious work;
   (v) Participate in a special program to enhance international relations and cultural exchange;
   (vi) Participate in high-level sports and/or training;
   (vii) Work in a skilled position under a staff exchange arrangement;
   (viii) Participate in an Australian government-endorsed event;
   (ix) Work as a super yacht crew member; or
   (x) Undertake full-time domestic work on behalf of senior foreign executives.

Related regulations have not yet been published. We do not know how any of the above activities are defined and whether such definition will expand or limit availability.

Parent Visa. Australia has a contributory parent visa system whereby each parent must pay a sum of AUD$43,600 before the grant of this visa. The Minister of Immigration and Border Protection has stated that parents have made substantial claims on the Australian national medical benefit scheme far

in excess of the sums paid by them to obtain the visa. There is a strong possibility that the sum payable by a parent to obtain this visa will be substantially increased in the not too distant future.

South Africa

There are several options for a divorcing spouse in South Africa. Under South Africa's Immigration Act, 13 of 2002, a foreign national can qualify for a visa to reside in South Africa as a spouse under two common scenarios: where he or she is (1) in a spousal relationship with a South African citizen (or permanent resident); or (2) accompanying another foreign national to South Africa who is coming on a long-term, temporary residence visa, such as to work.

Much like counseling newlyweds about the possibility of divorce, amid the excitement of moving to a new country little is said in law about what happens if things fall apart in the spousal relationship.

But as a starting point, for an expat to qualify for a visa based on being a spouse, the couple either must be in a formally registered union—for example, a civil union or marriage—or, if unmarried, must have been in an unregistered life partnership for at least two years.

Foreign spouses of South Africans can also get permission to work without their needing, or their employers needing, to meet the usual requirements for a work visa. Spouses traveling into the country to accompany their non-South African spouses who will be working in South Africa do not qualify for permission to work (unless they qualify for a work visa in their own right).

If the spousal relationship fails, the Act and regulations require the foreign national to notify the Department of Home Affairs as soon as the relationship ends. At that point, the Department may withdraw the foreign spouse's visa and he or she will be required to leave the country.

But what does one do in certain special situations; for example, if the spouse wishes to remain in South Africa after a divorce because the children need to remain in the country or because South Africa has become the spouse's home and he or she has nowhere else to go?

These types of situations have created a number of policy challenges for the Department. As a matter of logic, almost invariably the spousal relationship will end before the marriage is formally ended by a divorce. However, it is not

unknown for couples to separate acrimoniously and with the intent of divorcing (at which point, strictly speaking, the notice referred to above should be given to the Department) only to reconcile before such divorce. As a result, the Department has adopted the practice that notice of termination of the relationship does not need to be furnished to the Department until the divorce occurs.

However well-intentioned the Department's policy is, it can create a problem where the foreign spouse is in the middle of divorcing and needs to extend his or her spousal visa. A corollary of the termination policy is that the spousal visa must be deemed to be valid until the divorce happens. But the prescribed requirements to extend a spousal visa include that the "principal" visa holder (or South African) must formally confirm support for the extension application. Getting that confirmation in the midst of an acrimonious divorce is often either unlikely to happen or may only be obtained at the price of the principal's securing some benefit in the negotiations.

In practice, the way to address this is for the foreign spouse to approach the Department separately to explain the circumstances and seek permission to file the extension application without the need for the spouse's support. The applicant must show "good cause" for this request. This term is not defined, which allows the Department considerable leeway in determining what constitutes good cause in any given case.

If the Department is duly persuaded, it will issue a written authorization recording which requirements have been waived. The applicant then applies for the extension of the visa and submits the authorization letter to document what is not required. If the request is declined, an administrative appeal may be made.

A potential downside to this process is that it is entirely on an *ex parte* basis. This means that if the other party/spouse has valid grounds to oppose the extension application, he or she will not have an opportunity to be heard until becoming aware of the visa extension. However, at that time, he or she can approach the Department on the matter, as it does have the discretion to withdraw a visa.

Assuming a divorce is granted and the spouse needs to remain in South Africa, he or she must notify the Department of this development. The Department *may* then withdraw the visa, but in practice the applicant can ask for the fact of

the divorce to be noted and to be allowed a reasonable opportunity to apply for and obtain a more appropriate visa.

If the expat ex-spouse needs a work visa because he or she now needs to work, whether for self-support, to support the family, or just for the sake of his or her own dignity, the applicant must use the same procedure as described above to seek a waiver of the "offending" requirements of the work visa with which the applicant cannot reasonably comply due to his or her circumstances.

Again, if either the special request or the visa itself is declined, the applicant has the right to appeal that decision.

In conclusion, while the process for addressing the post-spousal relationship for the expat spouse in South Africa is somewhat inelegant, it does work.

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5. **Firm In The News**

Cyrus Mehta was a Discussion Leader, *Protecting Your EB-5 Practice: Ethical Issues and Minimizing Risk*, 2016 EB-5 Investors Summit: Representing EB-5 Investors & Regional Centers in a Time of Upheaval, AILA, Washington, DC, October 25, 2016.

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