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

JANUARY 2017 IMMIGRATION UPDATE

Posted on January 11, 2017 by Cyrus Mehta

Headlines:

1. **Most Previous Forms Accepted Until February 21, But Must Include New Fees** – USCIS said it will accept most prior versions of forms until February 21, 2017, but all filings postmarked December 23 or later must include the new fees or they will be rejected.
2. **USCIS Urges H-2B Employers To Stop Identifying Returning Workers in Petitions for FY 2017** – Because Congress has not reauthorized the H-2B returning worker program, USCIS now urges employers to stop identifying returning workers in petitions for FY 2017.
3. **DHS Designates AAO Precedent Decision on National Interest Waivers** – *Matter of Dhanasar* vacates *Matter of New York State Department of Transportation*.
4. **USCIS Issues Policy Guidance on Registration of Lawful Permanent Resident Status** – The updated policy: (1) provides guidance on eligibility and evidentiary requirements for presumption of lawful admission and creation of record, registration by children born in the United States to accredited foreign diplomats, and the registry program; (2) provides guidance on presumption of lawful admission following certain errors that occurred at the time of admission; and (3) explains relevant codes of admission and effective dates of LPR status for approved applications for registration.
5. **United States, Honduras Sign MOU To Protect Workers From Discrimination** – The U.S. Department of Justice and Honduras announced a formal partnership to protect workers from discrimination based on citizenship, immigration status, and national origin.
6. **SCIS Announces Extension of Parole for Immediate Relatives of U.S. Citizens in CNMI** – To allow immediate relatives of U.S. citizens and

certain stateless individuals to maintain legal status in the Commonwealth of the Northern Mariana Islands, USCIS has extended the parole program for these relatives until December 31, 2018.

7. **ABIL Global: Non-Lucrative Residence Visa and Permit in Spain** – The Spanish immigration legal framework regulates the non-lucrative residence permit allowing third-country nationals (foreign nationals not covered by the European Union legal framework) to live in Spain without performing labor activities.
8. **ABIL Global: A Memo to Santa** – Nicolas Rollason of Kingsley Napley LLP responds to a query from Santa noting that the United Kingdom (UK) is one of his largest markets and that he has a number of concerns about current political developments there.

Details:

1. **Most Previous Forms Accepted Until February 21, But Must Include New Fees**

When new fees for most U.S. Citizenship and Immigration Services (USCIS) forms went into effect on December 23, 2016, the agency published updated versions of the forms. USCIS strongly encourages applicants to submit the new versions, which have an edition date of 12/23/16. However, USCIS said it will accept most prior versions of forms until February 21, 2017, but all filings postmarked December 23 or later must include the new fees or they will be rejected. USCIS said it will accept only the new 12/23/16 edition of Form N-400, Application for Naturalization.The updated forms are at http://uscis.gov/forms. The announcement is at https://www.uscis.gov/news/alerts/previous-editions-forms-accepted-until-feb-21-2017-must-include-new-fees.

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2. **USCIS Urges H-2B Employers To Stop Identifying Returning Workers in Petitions for FY 2017**

The H-2B returning worker provisions of the Consolidated Appropriations Act of 2016 expired on September 30, 2016. In anticipation that Congress could reauthorize this exemption from the H-2B cap, U.S. Citizenship and Immigration Services (USCIS) had previously advised H-2B employers to ontinue identifying potential returning workers with employment start dates in fiscal year (FY)

2017. However, because Congress has not reauthorized the H-2B returning worker program, USCIS now urges employers to stop identifying returning workers in petitions for FY 2017.

Because the returning worker program has expired, petitions requesting H-2B workers for new employment with an employment start date on or after October 1, 2016, will generally be counted toward the annual H-2B cap of 66,000 for FY 2017, USCIS said.

Petitions for the following types of workers are still exempt from the H-2B cap:

- 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, or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of the Northern Mariana Islands or Guam from November 28, 2009, until December 31, 2019.

For FY 2017, USCIS will consider those identified by employers as potential returning workers as subject to the cap. Once the H-2B cap is reached, USCIS may accept petitions only for H-2B workers who are exempt from or not subject to the H-2B cap. The spouse and children of H-2B workers classified as H-4 nonimmigrants are not counted against this cap, USCIS noted.

Information about the H-2B program is at https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

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3. **DHS Designates AAO Precedent Decision on National Interest Waivers**

Jeh Johnson, Secretary of the Department of Homeland Security (DHS), recently designated as precedential a U.S. Citizenship and Immigration Services' (USCIS) Administrative Appeals Office (AAO) decision, *Matter of Dhanasar*. The decision vacates *Matter of New York State Dep't of Transp*. , 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998).

The AAO said that, based on the agency's experience with *NYSDOT*, "we believe it is now time for a reassessment." This precedent decision in *Dhanasar* means USCIS may grant a national interest waiver if the petitioner demonstrates that: (1) the foreign national's proposed endeavor has both substantial merit and national importance; (2) he or she is well positioned to advance the proposed endeavor; and (3) on balance, it would be beneficial to the United States to waive the requirement of a job offer and thus of a labor certification.

Among other things, the AAO decision noted that the first *Dhanasar* prong of the three listed above—substantial merit and national importance—focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas, such as business, entrepreneurialism, science, technology, culture, health, or education. The AAO explained that evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required because an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States. In determining whether the proposed endeavor has national importance, the AAO said it considers its potential prospective impact. An undertaking may have national importance, for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. "But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance," the AAO noted. "In modifying this prong to assess 'national importance' rather than 'national in scope,' as used in *NYSDOT*, we seek to avoid overemphasis on the geographic breadth of the endeavor. An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance."

The second prong, the AAO said, shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, the AAO said it considers factors including,

but not limited to, "the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals."

The AAO said it recognizes that forecasting feasibility or future success may present challenges to petitioners and USCIS officers, and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. "We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor."

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification, the AAO said. "On the one hand, Congress clearly sought to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. On the other hand, by creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. Congress entrusted the Secretary to balance these interests within the context of individual national interest waiver adjudications," the AAO noted.

In performing this analysis, the AAO said that USCIS may evaluate factors such as "whether, in light of the nature of the foreign national's qualifications or proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process." The AAO emphasized that, in each case, the factors considered "must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification." The AAO noted that this new prong in *Dhanasar*, unlike the third prong in *NYSDOT*, "does not require a showing of harm to the national interest or a comparison against U.S. workers

in the petitioner's field. ... *NYSDOT*'s third prong was especially problematic for certain petitioners, such as entrepreneurs and self-employed individuals. This more flexible test, which can be met in a range of ways ..., is meant to apply to a greater variety of individuals."

USCIS noted that the Secretary of DHS may, with the Attorney General's approval, designate AAO or other DHS decisions to serve as precedents in all future proceedings involving the same issue or issues. Precedent decisions are binding on DHS employees except as modified or overruled by later precedent decisions, statutory changes, or regulatory changes.

The decision is in the Virtual Law Library of the Department of Justice's Executive Office for Immigration Review at https://www.justice.gov/eoir/page/file/920996/download.

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4. **USCIS Issues Policy Guidance on Registration of Lawful Permanent Resident Status**

U.S. Citizenship and Immigration Services (USCIS) issued policy guidance on December 21, 2016, addressing registration of lawful permanent resident (LPR) status.

USCIS said the updated policy: (1) provides guidance on eligibility and evidentiary requirements for presumption of lawful admission and creation of record, registration by children born in the United States to accredited foreign diplomats, and the registry program; (2) provides guidance on presumption of lawful admission following certain errors that occurred at the time of admission; and (3) explains relevant codes of admission and effective dates of LPR status for approved applications for registration.

The policy alert (PA-2016-10) is at https://www.uscis.gov/policymanual/Updates/20161221-Registration.pdf, and the updated guidance is included in the *USCIS Policy Manual*. The latest manual is at https://www.uscis.gov/policymanual/HTML/PolicyManual.html. A summary of new or updated policies available for comment is at https://www.uscis.gov/outreach/feedback-opportunities/policy-manual-comment.

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5. **United States, Honduras Sign MOU To Protect Workers From Discrimination**

The U.S. Department of Justice (DOJ) and the government of Honduras announced a formal partnership to protect workers from discrimination based on citizenship, immigration status, and national origin.

On December 7, 2016, Principal Deputy Assistant Attorney General Vanita Gupta, head of the DOJ's Civil Rights Division, and Honduran Charge D'Affaires Luís F. Cordero, signed a memorandum of understanding (MOU) between the embassy and its consulates and the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Among other things, OSC pledged to conduct training of consular staff identified by each Honduran consulate; attend and participate in forums organized by the Honduran consulates for Honduran nationals and employers involving topics under OSC's jurisdiction; disseminate compliance and educational materials through the U.S. embassy to Honduran consulates and stakeholders in other locations; and publicizing the MOU. The Honduran government pledged to establish a system, through its Secretariat at the Honduran embassy in Washington, DC, for referring discrimination, unfair documentary practices, and retaliation allegations to OSC, and consult periodically with OSC to ensure that Honduran consulates are referring such allegations.

The MOU is available in English at https://www.justice.gov/crt/page/file/917476/download and in Spanish at https://www.justice.gov/crt/page/file/917481/download.

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6. **USCIS Announces Extension of Parole for Immediate Relatives of U.S. Citizens in CNMI**

To allow immediate relatives of U.S. citizens and certain stateless individuals to maintain legal status in the Commonwealth of the Northern Mariana Islands (CNMI), U.S. Citizenship and Immigration Services (USCIS) has extended the parole program for these relatives until December 31, 2018.

USCIS said this parole extension will allow an immediate relative to lawfully remain with a U.S. citizen in the CNMI, but parole does not authorize

employment. Immediate relatives must, as before, obtain an employment authorization document (EAD_ by submitting Form I-765, Application for Employment Authorization, or obtain work authorization as a CW-1 CNMI-Only Transitional Worker or in another employment-based nonimmigrant status.

The announcement does not extend to anyone other than the immediate relatives of U.S. citizens and certain stateless individuals. USCIS noted that it may grant parole on a case-by-case basis based on individual circumstances and has exercised parole authority on a case-by-case basis in the CNMI since 2009 for special situations.

To apply for extension of parole, individuals must: (1) reside in the CNMI; (2) be an immediate relative; and (3) have been granted parole previously. There is no fee.

The announcement, with application details, is at https://www.uscis.gov/news/news-releases/uscis-announces-extension-parole-immediate-relatives-us-citizens.

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7. **ABIL Global: Non-Lucrative Residence Visa and Permit in Spain**

The Spanish immigration legal framework regulates the non-lucrative residence permit allowing third-country nationals (foreign nationals not covered by the European Union legal framework) to live in Spain without performing labor activities.

Foreign nationals wishing to obtain this type of permit must meet four main requirements:

- To be financially reliable, evidencing a regular monthly income of at least 2,130 euros for the principal and 532.51 euros for each dependent, if applicable.
- Not to have a criminal background in the country/countries of residence during the last 5 years.
- To hold private or public medical insurance coverage for Spain (including for hypothetical repatriation).
- Not to have any of the illnesses/diseases listed in the international Sanitary Regulation of 2005 as serious conditions for public health.

In addition to these requirements, the applicant should not be in unlawful

status in Spanish territory during the process and should not have signed a non-return agreement to Spain.

If the foreign national has fulfilled the above conditions, he or she may apply for the non-lucrative visa and residence permit at the Spanish consulate having jurisdiction over the applicant's place of legal residence. The applications are currently being resolved in approximately 15 days (the statutory processing time is 3 months) and the applicant has one month to collect the visa from the notification of approval.

Once the foreign national is in Spain with a valid visa, he or she must apply for and collect a residence card, initially valid for one year. This type of permit can be extended for two consecutive periods of two years each provided the conditions that led to the initial approval are maintained. After five years of legal residence, the non-lucrative residence permit holder may apply for a long-term residence permit, provided the legal requirements are fulfilled.

Also, after one year of living in Spain with a non-lucrative permit, the visa-holder can apply for a residence permit allowing work, and the Labor Market Test will not be applicable.

Stays outside of Spain for more than 180 days in a year, either continuous or discontinuous, are grounds of cancellation of this permit.

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8. **ABIL Global: A Memo to Santa**

To: sclaus@laplandtoys.eu From: nrollason@kingsleynapley.co.uk Date: 24 December 2016

Dear Father Christmas:

Thank you for your letter of 12 December in which you asked for advice regarding your ability to travel to and deliver presents to British children on the night of 24-25 December 2019. I understand that the United Kingdom (UK) is one of your largest markets and that you have a number of concerns about current political developments there. You have asked in particular about whether your rights of free movement as a Finnish and European Union (EU) national, and your ability to provide cross-border services in the UK, will be affected by the UK leaving the European Union.

The Current Position

As you will know, as an EU national, you currently have full rights to enter the UK in order to provide services and, if required, to reside and work in the UK. The right to provide services enables you to come to the UK, visit children's parties, department stores, and shopping centers, and fly back home after a temporary stay. You may also reside in the UK as an employed, a self-employed, or a self-sufficient person. The EU Treaty also allows you, should you wish to do so, to establish your toy-making factory in the UK and to transfer your elves/helpers to work in the UK.

Because your toys are goods that are made and therefore originate in the EU, these toys can be exported from Lapland and imported into the UK without any import duty or tariffs. In addition, as I am sure that your toy factory in Lapland complies with strict EU-wide standards on safety, all these toys will automatically meet the identical EU standards applied to children's toys in the UK.

Finally, I can also confirm that because your reindeer have all had their rabies vaccinations, have been microchipped, and have been issued with EU pet passports, they can currently freely come to the UK without having to be quarantined before travel.

The Position Post-Brexit

As I am sure you will be aware from reading the international press, there is a lot of uncertainty about when and on what terms the UK will leave the EU. The UK government has indicated that it will set in motion the two-year exit period by triggering Article 50 of the EU Treaty in March 2017, which would mean that the UK would be likely to leave the EU sometime after March 2019. While this timetable may be subject to change due to a current legal challenge in the House of Lords, the consensus appears to be that the UK will leave the EU in the second half of 2019. This means that, as you have indicated in your letter, any departure from the EU would first affect you in the Christmas season that year.

Your ongoing ability to come to the UK to provide services and to work here and to provide your toys and presents to British children will depend on the terms on which the UK leaves the EU and, in particular, whether UK companies and individuals will continue to have free unfettered access to the EU's single

market. As you may know, access to the single market is given to all members of the EU, the European Economic Area (EEA) and, to a more limited extent, to Switzerland through its specific agreements with the EU. The key to such access is that each participating state agrees to allow free movement of EU, EEA, or Swiss nationals by allowing them to live and work in each respective country.

The UK's access to the single market is therefore almost entirely dependent on whether it will allow continued free movement of EU nationals. Although there are no official statistics on the specific reason why the UK population voted to leave the UK, the UK Prime Minister and her cabinet have stated that the vote against remaining in the EU was due to a majority of UK citizens (52% of those who voted) no longer wanting to allow free movement of EU citizens. While I would not want to give a running commentary on the many differing views expressed by the current members of the UK government, the previous anti-immigration statements made by the Prime Minister (and former Home Secretary) Theresa May would seem to indicate that free movement for EU nationals will not continue and that therefore the UK will not have access to the single market.

So what does this mean for you and your ability to continue coming to the UK every Christmas? While any new regime will take many years to finalize, the current advice I can give you is:

Service provision: It is likely that if you come to the UK to provide services without any form of work permission or a visa allowing you to do this, you would be entering the UK illegally and would be subject to administrative removal action. As you would also be in breach of your visit entry conditions, you could be liable to an entry and visa ban, which would prevent you from entering the UK for 12 months.

Working in the UK: You would most likely need a work permit (known as sponsorship) to come to the UK to work here. It is not clear whether the role you would be filling (e.g., appearing at public events, distributing presents) would be treated as skilled enough under the UK's current Points Based System. You are well-known internationally, but you would not currently meet the requirements of the UK's Tier 1 Exceptional Talent visa because this only applies to those working in the sciences, the arts, or the technology sectors.

Import tariffs: As it is unlikely that the UK will have negotiated a trade deal with the EU (these deals can take up to 10 years to finalize), it is likely that the UK will

apply World Trade Organisation tariffs by default. This means you would pay 10% tariff duties on the value of goods imported to the UK. Considering that you are not selling these products and that you would still be charged, you may need to consider whether the UK will remain a viable market for your toys and presents.

Establishing your toy-making facility in the UK: If you wanted to come to set up your business here, you would need an Entrepreneur visa, which requires an investment of at least £200,000. It is likely that you would fail the genuine entrepreneur test, which requires you to provide a business plan for a viable business—since you would be giving away the presents you make, it is likely that the business would not be seen as financially viable. Around 60% of these applications are refused. Even if you were able to, you would not be able to sponsor your elves to come and work in the UK because the UK sponsored work permit regime does not allow sponsorship of lower-skilled workers.

You have also asked whether, if the UK were to leave the EU, the position would revert to the pre-1973 position where your presence and your activities were tolerated by the UK immigration authorities during each Christmas season. In light of the existing UK political climate, the rise of anti-immigration sentiment, and the current government's approach to illegal immigration (shown through a number of recent draconian Acts of Parliament, such as the Immigration Act 2014 and 2016), it is very unlikely that any breaches of UK immigration law would be tolerated. You should therefore work on the assumption that any breaches will be dealt with severely.

I am very sorry that I cannot bring you better news. As always, and subject to my comments on not providing a running commentary, I will keep you updated on any developments whenever they happen.

In the meantime, I wish you a very happy Christmas and New Year.

Kind regards,

Nick Rollason (bio: http://www.abil.com/lawyers/lawyers-rollason.cfm)

Head of Immigration, Kingsley Napley LLP

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