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US IMMIGRATION & NATIONALITY LAW

APRIL 2017 IMMIGRATION UPDATE

Posted on April 3, 2017 by Cyrus Mehta

Headlines:

1. **USCIS To Accept FY 2018 H-1B Petitions Starting April 3** – USCIS will begin accepting H-1B petitions subject to the fiscal year 2018 cap on April 3, 2017.
2. **State Dept. Cable Calls for U.S. Embassies To Increase Scrutiny of Certain Visa Applicants** – The cable orders U.S. embassies to identify "applicant populations warranting increased scrutiny" and toughen their screening. The cable also orders a "mandatory social media review" for applicants who have ever been present in Islamic State-controlled territory.
3. **Judge Extends Second Travel Ban Block, Trump Administration Appeals** – On March 29, 2017, the U.S. District Court for the District of Hawaii ordered that the temporary restraining order against several sections of President Trump's second executive order issuing a travel ban be converted to a preliminary injunction. The Trump administration filed an appeal the next day.
4. **USCIS Reaches H-2B Cap for FY 2017** – USCIS has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for fiscal year 2017.
5. **State Dept. Reminds About Expiration of Two Employment Visa Categories** – The Department of State's Visa Bulletin for the month of April 2017 includes reminders about the possible expiration in late April of two employment-based immigrant visa categories, and an update on Special Immigrant Visa availability.
6. **USCIS Will Accept CW-1 Petitions Beginning April 3** – On April 3, 2017, USCIS will begin accepting CW-1 petitions subject to the FY 2018 cap. Employers in the Northern Mariana Islands use the CW-1 program to

employ foreign workers who are otherwise ineligible to work under other nonimmigrant worker categories. The cap for CW-1 visas for FY 2018 has not been set, but it must be less than the FY 2017 cap, which is currently set at 12,998.

7. **BIL Global: Netherlands** – This article offers comments from a Dutch perspective on the new European Union Directive on intracorporate transferees.
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Details:

1. **USCIS To Accept FY 2018 H-1B Petitions Starting April 3**

U.S. Citizenship and Immigration Services (USCIS) announced that it will begin accepting H-1B petitions subject to the fiscal year 2018 cap on April 3, 2017. All cap-subject H-1B petitions received before April 3, 2017, for the FY 2018 cap will be rejected.

Congress set a cap of 65,000 H-1B visas per fiscal year. An advanced-degree exemption from the H-1B cap is available for 20,000 beneficiaries who have earned a U.S. master's degree or higher. The agency said it will monitor the number of petitions received and notify the public when the H-1B cap has been met.

USCIS also recently announced a temporary suspension of premium processing for all H-1B petitions starting April 3 for up to six months. While H-1B premium processing is suspended, petitioners will not be able to file Form I-907, Request for Premium Processing Service, for a Form I-129, Petition for a Nonimmigrant Worker that requests the H-1B nonimmigrant classification. While premium processing is suspended, any I-907 filed with an H-1B petition will be rejected, USCIS said. If the petitioner submits one combined check for both the I-907 and I-129 H-1B fees, both forms will be rejected.

USCIS reminded H-1B petitioners to follow all statutory and regulatory requirements as they prepare petitions to avoid delays in processing and possible requests for evidence. The I-129 filing fee has increased to $460, and petitioners no longer have 14 days to correct a dishonored payment. If any fee payments are not honored by the bank or financial institution, USCIS will reject the entire H-1B petition without the option for the petitioner to correct it.

The USCIS announcement about the April 3 start date for FY 2018 H-1B petitions is at https://www.uscis.gov/news/news-releases/uscis-will-accept-h-1b-petitions-fiscal-year-2018-beginning-april-3. The announcement about the suspension of premium processing for H-1B petitions is at https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions. Detailed information on how to complete and submit an FY 2018 H-1B petition is at https://www.uscis.gov/sites/default/files/files/form/m-735.pdf. For more information on the H-1B nonimmigrant visa program and current I-129 processing times, see https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2018-cap-season.

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2. **State Dept. Cable Calls for U.S. Embassies To Increase Scrutiny of Certain Visa Applicants**

Reuters recently published a March 17, 2017, cable marked "sensitive" from Secretary of State Rex Tillerson on screening and vetting of visa applicants. The cable orders U.S. embassies to identify "applicant populations warranting increased scrutiny" and toughen their screening. The cable also orders a "mandatory social media review" for applicants who have ever been present in Islamic State-controlled territory. Also, notwithstanding the fact that Iraqis are exempt from the travel ban order (which is temporarily suspended by court order), the cable states that President Donald Trump "contemplate additional screening for Iraqi nationals in addition to the robust vetting already in place." According to Reuters, two former U.S. officials said the effort would constitute a broad, labor-intensive expansion of screening procedures.

Among other things, the cable states that "all visa decisions are national security decisions," and notes that the measures being taken now are "preliminary" and that "dditional screening measures will be introduced."

The text of the cable is at http://live.reuters.com/Event/Live_US_Politics/791255396. The Reuters article is at http://www.reuters.com/article/us-usa-immigration-visas-exclusive-idUSKBN16

U12X?wpisrc=nl_daily202&wpmm=1.

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3. **Judge Extends Second Travel Ban Block, Trump Administration Appeals**

On March 29, 2017, Judge Derrick K. Watson, of the U.S. District Court for the District of Hawaii, ordered that the temporary restraining order against sections 2 and 6 of President Trump's second executive order issuing a travel ban, "Protecting the Nation from Foreign Terrorist Entry into the United States," be converted to a preliminary injunction. The Trump administration filed an appeal the next day, to be decided by the U.S. Court of Appeals for the 9th Circuit.

Among other things, the Hawaii court noted that the Trump Administration urged the court not to look beyond the four corners of the Executive Order and to defer to the President in the national security context. The court noted that where the historical context and sequence of events leading up to the adoption of the challenged executive order are "as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context." The court declined to do so, stating, "The Court will not crawl into a corner, pull the shutters closed, and pretend it has not seen what it has. The Supreme Court and this Circuit both dictate otherwise, and that is the law this Court is bound to follow." The court said the requested nationwide relief from the executive order was appropriate in light of the likelihood of success of the plaintiffs' Establishment Clause claim, since "the entirety of the Executive Order runs afoul of the Establishment Clause" where the available information supports "a commonsense conclusion that a religious objective permeated" the order.

Following the court's ruling, Douglas Chin, Hawaii's Attorney General, said, "This is an important affirmation of the values of religious freedom enshrined in our Constitution’s First Amendment. With a preliminary injunction in place, people in Hawaii with family in the six affected Muslimmajority countries—as well as Hawaii students, travelers, and refugees across the world—face less uncertainty. While we understand that the President may appeal, we believe the court's well-reasoned decision will be affirmed."

Sean Spicer, Press Secretary for the Trump administration, said after the ruling

that the Department of Justice is reviewing the ruling and "is considering the best way to defend the President's lawful and necessary order. This ruling is just the latest step that will allow the administration to appeal. Just a week ago, the U.S. District Court in the Eastern District of Virginia upheld the President's order on the merits. The White House firmly believes that this order is lawful and necessary, and will ultimately be allowed to move forward."

Mr. Chin's statement, to which is appended the entire court order, is at https://ag.hawaii.gov/wp-content/uploads/2017/01/News-Release-2017-34.pdf. The second executive order that was the subject of the court action is at https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

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4. **USCIS Reaches H-2B Cap for FY 2017**

U.S. Citizenship and Immigration Services (USCIS) announced on March 16, 2017, that it has received a sufficient number of petitions to reach the congressionally mandated H-2B cap for fiscal year 2017. March 13, 2017, was the final receipt date for new H-2B worker petitions requesting an employment start date before October 1, 2017. The H-2B visa category is for temporary non-agricultural workers.

Except as noted below, USCIS said it will reject new H-2B petitions received after March 13 that request an employment start date before October 1, 2017. USCIS will continue to accept H-2B petitions that are exempt from the congressionally mandated cap. This includes the following types of petitions:

- 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/or 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 and/or Guam.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2017.

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5. **State Dept. Reminds About Expiration of Two Employment Visa Categories**

The Department of State's Visa Bulletin for the month of April 2017 included the following reminders about the possible expiration in late April of two employment-based immigrant visa categories, and an update on Special Immigrant Visa (SIV) availability.

Employment Fourth Preference Certain Religious Workers (SR) category. The non-minister special immigrant program expires on April 28, 2017. No SR visas may be issued overseas, or final action taken on adjustment of status cases, after midnight April 27, 2017. Visas issued before that date will only be issued with a validity date of April 27, 2017, and all individuals seeking admission as non-minister special immigrants must be admitted into the United States by midnight April 27, 2017.

The final action date for this category has been listed as Current for April for all countries except El Salvador, Guatemala, Honduras, and Mexico, which are subject to a July 15, 2015, final action date for April. If there is no legislative action extending this category for FY 2017, the Department said, the final action date would immediately become Unavailable for April for all countries effective April 28, 2017.

Employment Fifth Preference (I5 and R5) categories. This immigrant investor pilot program had been extended by a continuing resolution until April 28, 2017. The I5 and R5 visas for EB-5 immigrant investors may be issued until the "close of business" on April 28, 2017, and may be issued for the full validity period. No I5 or R5 visas may be issued overseas, or final action taken on adjustment of status cases, after April 28, 2017.

The final action dates for the I5 and R5 categories have been listed as Current for April for all countries except China-mainland born, which is subject to a May 22, 2014, final action date. If there is no legislative action extending them for FY 2017, the final action dates would immediately become "Unavailable" for April for all countries effective April 29, 2017.

SIV availability. The Department expects to exhaust the SIV numbers allocated by Congress under the Afghan Allies Protection Act of 2009, as amended, by June 1, 2017. As a result, the Final Action Date for the SQ category for certain

Afghan nationals employed by or on behalf of the U.S. government in Afghanistan will become Unavailable effective June 2017. No further interviews for Afghan principal applicants in the SQ category will be scheduled after March 1, 2017, and further issuances will not be possible after May 30, 2017.

The SQ category for certain Iraqi nationals employed by or on behalf of the U.S. government in Iraq is not affected and remains Current, although the application deadline was September 30, 2014.

The FY 2017 annual limit of 50 SIVs in the SI category was reached in December 2016 and the final action date remains Unavailable. As noted in the January 2017 Visa Bulletin, further issuances in the SI category will not be possible until October 2017, under the FY 2018 annual limit, the Department explained.

The Visa Bulletin for April 2017 is at https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2017/visa-bulletin-for-april-2017.html.

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6. **USCIS Will Accept CW-1 Petitions Beginning April 3**

On April 3, 2017, U.S. Citizenship and Immigration Services (USCIS) will begin accepting CW-1 petitions subject to the fiscal year 2018 cap. Employers in the Commonwealth of the Northern Mariana Islands (CNMI) use the CW-1 program to employ foreign workers who are otherwise ineligible to work under other nonimmigrant worker categories. The cap for CW-1 visas for FY 2018 has not been set, but it must be less than the FY 2017 cap, which is currently set at 12,998.

For the FY 2018 cap, an extension petition may request a start date of October 1, 2017, even if that worker's current status will not expire by that date. USCIS said it encourages employers to file a petition for a CW-1 nonimmigrant worker up to 6 months in advance of the proposed start date of employment and as early as possible within that time frame. The agency will reject a petition if it is filed more than 6 months in advance.

USCIS reminds employers to submit all required documentation, including evidence that the job vacancy announcement was posted on the Department of Labor website.

USCIS also reminds employers that the new base filing fee for a CW-1 petition is

$460. A petitioning CNMI employer must also pay the required education fee ($150 per year) for each requested CW-1 worker. A biometric service fee of $85 per beneficiary is also required if the beneficiary is present in the CNMI when filing for an initial grant of CW-1 status.

Employers must submit the latest version of Form I-129CW, which has an edition date of 12/23/16.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-will-accept-cw-1-petitions-fiscal-year-2018-beginning-april-3-2017. Additional instructions and the form are at https://www.uscis.gov/i-129cw.

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7. **ABIL Global: Netherlands**

This article offers comments from a Dutch perspective on the new European Union Directive on intracorporate transferees.

The European Union (EU) has introduced an EU-wide permit scheme for intracompany transfers. Directive 2014/66, in force since November 29, 2016, offers excellent options for mobility of intracorporate transferees throughout EU territory—at least in theory. Another interesting feature: it's obligatory.

EU Directive 2014/66 of May 15, 2014, on the entry and residence of third-country nationals in the framework of an intra-corporate transfer (ICT Directive) was implemented in the Netherlands on November 29, 2016, the last day of the transition window. The ICT Directive is a landmark regulation in the sense that it introduces—compared to existing EU directives on labor migration—an exceptional level of harmonization across the EU. What does this directive mean, and how does it function?

Main Features of the ICT Directive Scheme

The ICT Directive applies to third-country nationals (i.e., non-EU/EEA nationals) who are temporarily transferred for occupational or training purposes to a Member State and who, at the time of the residence permit application, reside outside the territory of the Member States. It provides for a residence permit valid for a maximum of three years (for managers and technical specialists) or one year (for trainees). The main benefit of the permit is that it allows the transferee to travel from the EU Member State that has granted the permit to

an establishment of the same group of undertakings in another Member State, without the need for a new test on fulfillment of the conditions. Thus, the ICT permit opens important new mobility options within the EU. Note that the United Kingdom, Ireland, and Denmark have opted out of the ICT Directive.

ICT Mobility

The ICT permit allows the transferee to move to other Member States for periods of time not exceeding 90 days (short-term mobility) and for periods longer than that (long-term mobility). For short-term mobility, the Member States have two options: they may simply allow the transferee to move and work in their territory on the basis of the valid ICT permit issued in the first Member State, or they might opt for a (rather complex) notification procedure. For long-term mobility, the Member States have three options. They may: (1) allow such longer stays on the basis of the ICT permit issued in the first Member State; (2) provide for a notification system; or (3) opt for an extra application procedure. Much will depend on which of these options the Member States will choose when implementing the Directive. Many still have not done so yet. In theory, the EU could effectively become a single area in which intracorporate transferees can move and work as if there were no Member States. The Netherlands has taken a conservative approach and chosen a notification system for short-term mobility and a permit system for long-term mobility. However, the applicant can work from the moment of application and with fewer conditions than for a first-entry application.

Concerns Raised by Corporations

As is often the case, the new rules were met with enthusiasm but also raised some concerns. Indeed, the residence permit obtained on the basis of the ICT Directive has certain limitations vis-à-vis existing permit schemes, both national schemes and EU schemes (such as the EU Blue Card scheme), or, at any rate, from a Dutch perspective. For example, the Dutch knowledge migrant permit (*kennismigrantenvergunning, KMR)* is granted for up to five years (depending on the employment contract) and can be renewed without limitation. The ICT residence permit can be granted for a maximum of three years (for managers and technical specialists) or one year (for trainees), as noted above, but cannot be renewed. It is true that a new ICT permit might be obtained subsequent to the first one. However, depending on the Member State's implementation, the transferee first must leave EU territory for a period ranging from one day to six

months. The latter is the case in the Netherlands, so an ICT residence permit based on the Directive effectively cannot be renewed, and a new posting for the same employee in the Netherlands is possible only after an interruption of at least six months.

This would not be problematic, of course, if the application of the Directive were not obligatory. It should be noted that the Dutch KMR scheme can be used for local hires, as well as for intra-corporate transferees who remain on a foreign contract and payroll. The KMR scheme is generally preferred to other schemes, not only for the length of the permit but also for its procedural swiftness (two weeks' processing time) and the rights associated with it (e.g., full spousal labor market access).

But the ICT Directive has now changed all of this, as it does not leave the Member States an option. If a transferee falls within the scope of the Directive (mainly foreign contracts and payroll), national permit schemes may not be applied and the Member State must apply the ICT Directive scheme.

In addition to the ICT permit being limited in duration and renewability, the entry conditions are in some cases more onerous than those of national schemes, so that where the national permit might successfully be applied for, the ICT permit application must be refused. For example, the ICT Directive requires that the transferee have three months' prior employment in the group of undertakings (the Directive leaves Member States the option to choose for prior employment of up to six months), whereas the KMR scheme allowed for hiring and immediate transfer to the Netherlands. Thus a newly hired employee will now, as a result of the Directive, effectively have to wait three months before being able to move to the Netherlands. Another potential obstacle is the qualification requirement (a bachelor's degree or higher, whereas the Dutch KMR scheme requires no formal education level).

When corporate employers began to realize these aspects of the ICT Directive, a certain anxiety started to build. It didn't help that the immigration authority in the Netherlands (IND) did not take a sufficiently clear position on the issues of non-renewability of the ICT permit and its obligatory character. The lack of clarity revolved around the definition of the scope of the ICT Directive—when is an applicant within the scope of the ICT Directive so that national schemes fall away?

Scope and Definitions of the ICT Directive

Article 2 of the ICT Directive limits its scope to third-country nationals who reside outside the territory of the EU Member States at the time of application, or who are residing in a Member State under the ICT Directive already. This means that for every person who does not meet one of those two criteria, the ICT Directive does not apply. For these employees, the regular KMR scheme can still be used.

The scope is further limited (via article 2 and 3 of the ICT Directive) by the fact that it must concern intra-company transfers. If it is not "intra-company," the ICT Directive does not apply. Also, if it is not a transfer because the employee gets a contract and payroll in the Netherlands (local hire), the ICT Directive does not apply.

Permit Requirements

If the ICT Directive applies, the employee must meet the requirements of article 5 of the ICT Directive to obtain the permit. As mentioned, it is important to distinguish between the scope of the ICT Directive and the requirements for a permit. The first step is the scope: Does the ICT Directive apply to this employee? If not, then other schemes like the KMR scheme might be used. If yes, then step two is to check whether the transferee meets the requirements for the ICT permit. If not, then no permit can be issued. To solve the issue, the person must be brought outside of the scope of the ICT Directive so the KMR scheme can be used (e.g., by moving the contract and payroll to the Netherlands).

Frequently Asked Questions

While initially the IND did not take a sufficiently clear position, most issues have now been clarified. The outcome is that the ICT permit can be transferred into a national permit, even if the employee remains on a foreign contract and payroll. The process that led to this conclusion is interesting.

Since November 2016, the IND has published two new documents: the ICT Directive Frequently Asked Questions (FAQs) in Dutch dated December 8, 2016, and a translation of these FAQs into English. Although these texts have no formal legal status, it seems that the IND has chosen the form of FAQs to communicate its guidelines for the implementation of the ICT Directive scheme. The IND has never used this method before.

When the English version of the FAQs was published on February 16, 2017, the

IND gave no indication that it was anything other than a literal translation. Surprisingly, however, this version differed significantly from the Dutch version of December 2016, namely on the most contested point: the renewability of the ICT permit. The Dutch version suggested that after the maximum duration of an ICT permit, the permit holder must return to his or her foreign employer: "The idea behind the ICT Directive is that after the stay in the Netherlands the employee returns to the foreign employer or goes to another EU-based undertaking of the organisation." In the English version, however, the following sentence was added to this paragraph: "However, the employee can apply for a national residence permit after the maximum period of residence."

As if to leave no room for interpretation, a whole new question-and-answer was inserted that explained that after three (or one) year(s), a transferee falls out of scope of the Directive and is therefore entitled to apply and obtain a KMR permit, even if he keeps his labor contract and payroll with the employer outside the EU.

This argument might certainly be refuted, as article 2 of the Directive reads: "This Directive shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive."

The question is whether the European Commission is likely to take any action on this, as their main priority is currently to chase those Member States that have not transposed the Directive at all, which is a much bigger threat to the well-functioning of this new EU-wide permit scheme.

Conclusion

The ICT Directive is a very interesting new permit scheme that applies throughout (most of) the EU. Multinational corporations will certainly benefit from its mobility options, although it will still take time before the practices in all Member States will be sufficiently clear and interchangeable for the EU to "feel" as one area. In terms of a new permit scheme that reinforces the options of an intracompany transfer to the EU, the Directive must be compared to local permit schemes—a test that in the Netherlands turns out negatively. The Dutch government has found a way around the obligatory character, but the solution does not seem compliant with the wording of the ICT Directive. The future will show whether such national disobedience eventually jeopardizes the success of

the ICT scheme and, if so, how the European Commission will get the Member States back on the same page.

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8. **Firm In the News**

Cyrus Mehta was a Moderator of a program entitled *What is the Current Status of Immigration Post Election?* which was organized by Office of the Chief Attorney to the Attorney Grievance Committee, First Judicial Department, New York, NY, on March 23, 2017.

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