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

JUNE 2017 IMMIGRATION UPDATE

Posted on June 1, 2017 by Cyrus Mehta

Headlines:

1. **Fourth Circuit Upholds Rejection of Trump Travel Ban** – The U.S. Court of Appeals for the Fourth Circuit has upheld a nationwide preliminary injunction rejecting a substantial portion of the Trump administration's revised executive order barring entry into the United States of people from certain countries.
2. **DHS Extends TPS Designation for Haiti** –DHS has extended the temporary protected status designation for Haiti for 6 months, from July 23, 2017, through January 22, 2018.
3. **USCIS Reaches CW-1 Cap for FY 2018** – USCIS announced that as of May 25, 2017, it has received a sufficient number of petitions to reach the numerical limit of workers who may be issued CNMI-Only Transitional Worker (CW-1) visas or otherwise provided with CW-1 status for FY 2018. Although the FY 2018 cap has not been set, it is required by statute to be less than the 12,998 workers set for FY 2017.
4. **Recent Fraud Investigations Led to Convictions, USCIS Announced** – USCIS assisted in several recent investigations leading to convictions in immigration fraud cases.
5. **ABIL Global: Australia** – This article summarizes significant changes to the 457 visa system that will replace the current 457 visa by March 2018. Important changes have already been implemented. The changes occurred without warning.
6. **Firm In The News…**

Details:

1. **Fourth Circuit Upholds Rejection of Trump Travel Ban**

The U.S. Court of Appeals for the Fourth Circuit has upheld a nationwide preliminary injunction rejecting a substantial portion of the Trump administration's revised executive order barring entry into the United States of people from certain countries.

Chief Judge Roger Gregory noted that the question for the court, distilled to its essence, was whether the Constitution protected plaintiffs' right to challenge the executive order, which "in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination." He noted that "urely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another." He said that Congress granted the President broad power to deny entry to the United States, but that this power is not absolute. "It cannot go unchecked when, as here the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation."

Among other things, the court took into account not just the text of the executive order but also the context of statements made by President Trump both before and after his election and assumption of office. For example, the court noted that on December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his website that proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Among other things, the statement noted "great hatred toward Americans by large segments of the Muslim population." The court noted that this statement remained on President Trump's campaign website at least until February 12, 2017, and was highlighted on Twitter. On March 9, 2016, then-candidate Trump said, "I think Islam hates us," and renewed his call for a ban on Muslim immigration in a March 22, 2016, interview. And when asked about a tweet that said that calls to ban Muslims from entering the United States were offensive and unconstitutional, then-candidate Trump responded, "So you call it territories. OK? We're gonna do territories." In an interview a week later, he said, "I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." With respect to people revering the part of the Constitution that guarantees religious freedom, he said,

"I view it differently."

The court said, among other things, that it was "unmoved by the Government's rote invocation of harm to 'national security interests' as the silver bullet that defeats all other asserted injuries." Citing a 1967 case, *United States v. Robel*, the court noted that implicit in the term "national defense" is "the notion of defending those values and ideals which set this Nation apart....It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the Nation worthwhile." National security "may be the most compelling of government interests," the court observed, "but this does not mean it will always tip the balance of the equities in favor of the government." The court noted that unconditional deference to a government agent's invocation of "emergency" has a "lamentable place in our history" and that the government's asserted national security interest appeared to be a "post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country." The court said it remained unconvinced that the relevant section of the executive order "has more to do with national security than it does with effectuating the President's promised Muslim ban."

Circuit Judge Wynn, concurring, noted that "nvidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination." In this case, he said, the invidious discrimination is "layered under the guise of a President's claim of unfettered congressionally delegated authority to control immigration and his proclamation that national security requires his exercise of that authority to deny entry to a class of aliens defined solely by their national origin." Laid bare, he said, "this Executive Order is no more than what the President promised before and after his election: naked invidious discrimination against Muslims," which he said contravenes the authority Congress delegated to the President under the Immigration and Nationality Act, and is unconstitutional under the Establishment Clause.

Several judges dissented. The government stated that it intends to appeal to the Supreme Court.

The 205-page decision, including the dissents, is at http://coop.ca4.uscourts.gov/171351.P.pdf.

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2. **DHS Extends TPS Designation for Haiti**

The Department of Homeland Security (DHS) has extended the temporary protected status (TPS) designation for Haiti for 6 months, from July 23, 2017, through January 22, 2018. Although Haiti has made significant progress in recovering from the January 2010 earthquake that prompted its designation, conditions in Haiti supporting its designation continue to be met, DHS said.

A worker who is a current beneficiary of Haiti's designation for TPS and wants to use his or her Form I-766, Employment Authorization Document (EAD), as evidence of employment eligibility after it expires on July 22, 2017, must timely file application to renew that EAD by July 24, 2017. Timely filing automatically extends the validity of the expired EAD for 180 days, until January 18, 2018. (The Federal Register notice does not automatically extend the validity of the EAD for these beneficiaries and is not an acceptable document for Form I-9 Employment Eligibility Verification purposes.)

USCIS will then provide a Form I-797C, Notice of Action. If the EAD and Form I-797C both contain either category code “A-12” or “C-19,” this combination is considered a List A document for I-9 purposes. Employers will need to reverify employment authorization for these employees by January 18, 2018.

DHS encourages Haitian TPS beneficiaries during this 6-month extension "to prepare for their return to Haiti in the event Haiti's designation is not extended again, including requesting updated travel documents from the government of Haiti." At least 60 days before January 22, 2018, DHS Secretary John Kelly will re-evaluate the designation for Haiti and will determine whether another extension, a re-designation, or a termination is warranted.

Additional information, including where to file, is at https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti.

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3. **USCIS Reaches CW-1 Cap for FY 2018**

U.S. Citizenship and Immigration Services (USCIS) announced that as of May 25, 2017, it had received a sufficient number of petitions to reach the numerical limit (cap) of workers who may be issued CNMI-Only Transitional Worker (CW-1) visas or otherwise provided with CW-1 status for fiscal year (FY) 2018. Although

the FY 2018 cap has not been set, it is required by statute to be less than the 12,998 workers set for FY 2017.

USCIS said it will issue subsequent guidance when the FY 2018 cap is set and when the agency is able to announce the final receipt date. Because the final receipt date will depend on the FY 2018 cap, it is also possible that USCIS will not accept some petitions it received on or before May 25, 2017.

The agency noted that it will reject CW-1 petitions received on or after May 26, 2017, that request an employment start date before October 1, 2018. 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 USCIS rejects an extension petition, the beneficiaries listed on that petition are not permitted to work beyond the validity period of the previously approved petition, USCIS noted. Therefore, affected beneficiaries, including any CW-2 derivative family members of a CW-1 nonimmigrant, must depart the Commonwealth of the Northern Mariana Islands (CNMI) within 10 days after the CW-1 validity period expires, unless they have some other authorization to remain under U.S. immigration law.

New employment petitions and extension-of-stay petitions are generally subject to the CW-1 cap.

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 derivative family members.

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 noted, however, that it will reject a petition if it is filed more than 6 months in advance.

For more information, see https://www.uscis.gov/working-united-states/temporary-workers/cw-1-cnmi-only-transitional-worker. The petition is at https://www.uscis.gov/i-129cw.

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4. **Recent Fraud Investigations Led to Convictions, USCIS Announced**

U.S. Citizenship and Immigration Services (USCIS) assisted in several recent

investigations leading to convictions in immigration fraud cases.

In one case, USCIS assisted in an investigation that led to a federal jury finding Jason Shiao guilty in a marriage fraud scheme. Mr. Shiao, of Santa Fe Springs, California, posed as an attorney in an elaborate scheme in which at least 87 foreign nationals, mostly Chinese citizens, paid up to $50,000 to enter into sham marriages.

As part of the scheme, according to USCIS, Mr. Shiao falsely claimed to be an attorney, paid U.S. citizens up to $15,000 to participate in the scheme, introduced would-be immigrants seeking benefits to U.S. citizens to facilitate the sham marriages, instructed his clients to pose for wedding photographs, and told clients to lie to USCIS officials. The defendants went to considerable lengths to make the fake marriages appear real, USCIS said. Mr. Shiao and his daughter prepared documentation that was filed with USCIS to bolster the validity of the fraudulent marriages, including staged photographs of "wedding ceremonies" and bogus tax returns, life insurance policies, joint bank account information, and apartment lease applications.

Mr. Shiao was sentenced to two years in prison. Mr. Shiao's daughter was sentenced to six months in prison. A third defendant was transferred to the Eastern District of Pennsylvania, where he is also being prosecuted for drug trafficking charges based on crimes allegedly committed while on pre-trial release in the immigration fraud case.

In another case, USCIS assisted in an investigation that led to sentencing of Rosa Cingari to 12 years and seven months in federal prison and Domenico Cingari to eight years and one month in federal prison for conspiracy, making false statements in immigration applications and petitions, and mail fraud. The court also ordered the Cingaris to forfeit real property that was used to facilitate the offenses. As part of their sentence, the court also entered a money judgment in the amount of $740,880, the proceeds of the charged criminal conduct.

According to evidence presented at trial, the Cingaris owned and operated R.E.P.C. Accounting and Translations out of their home on West Park Street in Lakeland, Florida. They assisted undocumented people in obtaining Florida driver's licenses by filing fraudulent immigration documents. Specifically, they filed Forms I-589, Application for Asylum and Withholding of Removal; I-130, Petition for Alien Relative; and I-765, Work Authorization. Most of the

applications and petitions submitted to USCIS by the Cingaris contained materially false information, USCIS said. The Cingaris filed the fraudulent immigration documents to obtain USCIS I-797C Notices of Action. The Cingaris put their mailing address on all of the fraudulent forms so that USCIS would mail the Notices of Action to their business. They then sold the Notices of Action to their clients. The Cingaris charged their clients between $500 and $1,300 each for the fraudulent immigration applications.

More information on these cases is at https://www.uscis.gov/news/news-releases/uscis-assists-investigation-leading-conviction-imposter-attorney-marriage-fraud-scheme-0 and https://www.uscis.gov/news/news-releases/uscis-efforts-investigating-large-scale-immigration-fraud-leads-sentencing.

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5. **ABIL Global: Australia**

This article summarizes significant changes to the 457 visa system that will replace the current 457 visa by March 2018. Important changes have already been implemented. The changes occurred without warning.

On April 18, 2017, Australia's Prime Minister, Malcolm Turnbull, announced major changes to the Temporary Residence Subclass 457 program. The changes will also affect the Employer Nomination Scheme (ENS) permanent residence visa program for skilled workers.

The 457 Visa will be phased out and replaced with a Temporary Skills Shortage (TSS) visa, which will comprise two streams: Short-Term (2 years) and Medium-Term (4 years).

With immediate effect, the Consolidated Sponsored Occupation List (CSOL) will be renamed as the Short-Term Skill Occupations List (STSOL), which will be reviewed every 6 months.

Over 200 occupations have been removed from that list. As the change is immediate, all 457 applications currently being processed related to occupations that have been removed from the list will not be approved and applicants will be afforded the opportunity to withdraw the applications and receive a refund of the filing fee.

Conversely, any applications filed on or after April 19, 2017, must nominate

occupations on the STSOL or on what is known as the Medium and Long-Term Strategic Skills List (MLTSSL).

Visas granted on or after April 18, 2017, relating to nominations of occupations on the STSOL will only be granted for a two-year period. After two years, a further and final period of two years may be sought. As of March 2018, visa holders can only be sponsored for a permanent visa if they are nominated for a position appearing on the MLTSSL.

457 Visa applicants granted visas on or after April 18, 2017, and holding MLTSSL positions may receive a four-year visa. Holders of the four-year visa will be able to be nominated for a permanent visa after a three-year period of employment with the sponsor.

Also as of March 2018, visa applicants will need to have at least two years of work experience prior to applying for a 457 visa before any nominated position. Apparently those nominated for STSOL positions will be required to demonstrate an intention to remain temporarily only in Australia.

Effective immediately are caveats that add layers of requirements on work experience or are occupation-specific. For example, in certain instances, employers may only nominate certain occupations if the employer is able to demonstrate a turnover of a $1 million per annum and a workforce of at least five.

Below is a timeline of these changes.

April 19, 2017

- 216 occupations removed from CSOL with 24 occupations restricted to regional Australia.
- CSOL re-named as STSOL and MLTSSL introduced.
- Visa applicants nominated for MLTSSL occupations to receive a four-year visa while those nominated for STSOL will be limited to two years. A second two-year visa may be applied for at the end of the first term.
- At present persons nominated for permanent visas under the direct stream of the Subclass 186 (ENS) may be nominated for a position from either list. This will cease in March 2018.

July 1, 2017

- Occupation Lists to be reviewed.

- The current English-language salary exemption threshold of $96,400.00 will be removed. This means that all 457 Visa applicants will be required to have the equivalent of IELTS Level 5. It is assumed that the current country-of-origin exemption will apply.
- Training benchmarks will be clarified.
- Police Clearance Certificates will become mandatory.
- Regarding ENS, IELTS level 6 in each component is required.
- Also regarding ENS, a maximum age requirement of 45 (time of application) will apply to Direct Entry Stream applicants. The current 50-year age limit will continue for Temporary Transition applicants.

December 31, 2017

- The Department of Immigration and Boarder Protection will begin collecting Tax File Numbers for all 457 holders and other employer-sponsored migrants. These data will be matched with Australian Tax Office records to check that 457 visa holders are not underpaid.
- The Department will publish details of sponsors sanctioned for failing sponsorship obligations.

March 2018

- The 457 Visa will be abolished and replaced by the TSS Visa, which will have two streams: the Short-Term Stream of up to two years and a Medium-Term Stream of up to four years.
- The Short-Term Stream (STS) will include the following criteria:

(i) Renewal: Onshore renewal once only.

(ii) Occupations:

(1) For non-regional Australia - STSOL will apply.

(2) Additional occupations available for regional employers.

(iii) English language requirement: Minimum IELTS of 5 with a minimum of 4.5 in each component.

(iv) Genuine entry: A genuine temporary entrant requirement.

- The Medium-Term Stream (MTS) will include the following criteria:

(i) Renewal: May be renewed onshore; pathway to permanent residence

available after three years.

(ii) Occupation:

(1) MLTSSL applies with additional occupations for regional employers.

(iii) English language requirement: IELTS Level 5 with 5 in each test component.

- Eligibility criteria for both streams:

1. Work experience of at least two years.
2. Labor market testing mandatory subject to international trade obligations.
3. Salaries to be paid must meet market rate and the Temporary Skill Migration Income Threshold (currently $53,900.00).
4. Character clearance certificates are required.
5. Introduction of a non-discretionary workforce test, details of which are unknown.
6. Training requirement to be strengthened.

- ENS March changes:

1. MTSSL only applies with additional occupations available for regional Australia;
2. Salaries must meet Temporary Skilled Migration Income Threshold and market rate;
3. PR period extended from two to three years;
4. Must have three years of relevant work experience;
5. Must be under 45 years of age at time of application;
6. Training requirements are strengthened.

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6. Firm In The News

The latest edition of Chambers & Partners USA 2017 has ranked Cyrus D. Mehta & Partners PLLC for immigration as a Band 2 law firm under Immigration in New York. Cyrus D. Mehta has been ranked as a Star Individual. David A. Isaacson and Cora-Ann V. Pestaina have also been ranked as Up and Coming. https://www.chambersandpartners.com/12806/31/editorial/5/1#117776_editorial. Chambers Nationwide has also ranked Cyrus D. Mehta as a Band 1 lawyer for immigration.

https://www.chambersandpartners.com/12788/31/editorial/5/1

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