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US IMMIGRATION & NATIONALITY LAW

MID-JUNE 2017 IMMIGRATION UPDATE

Posted on June 16, 2017 by Cyrus Mehta

Headlines:

1. **Ninth Circuit Rules Against President Trump's Revised Travel Ban** – The U.S. Court of Appeals for the Ninth Circuit held on June 12, 2017, that President Donald Trump exceeded his authority in issuing the revised executive order banning travel to the United States from certain countries.
2. **New State Dept. Form Asks Certain Visa Applicants 'Supplemental Questions' Regarding Social Media Usage** – A new Department of State form for visa applicants asks supplemental questions of "mmigrant and nonimmigrant visa applicants who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities."
3. **Labor Dept. Announces Aggressive Anti-Visa Fraud Measures; White House Considers H-1B Overhaul** – Secretary of Labor Alexander Acosta recently announced actions "to increase protections of American workers while more aggressively confronting entities committing visa program fraud and abuse."
4. **Nonprofit Group Fights Cease-and-Desist Order from DOJ** – The Northwest Immigrant Rights Project (NWIRP) recently received a "cease-and-desist" letter from the Department of Justice, ordering NWIRP to stop representing clients and close down its asylum advisory program. NWIRP subsequently filed a lawsuit and was granted a temporary restraining order in May.
5. **International Entrepreneur Final Rule Sent Back to OMB for Further Review** – A final rule on international entrepreneurs, issued by the Obama administration on January 17, 2017, and scheduled to take effect July 17, 2017, was recently returned to the Office of Management and

Budget for further review. The Trump administration has not yet explained its plans for the rule publicly, but it could amend, postpone, or withdraw the rule.

6. **Certain STEM OPT and English Language Students Affected by Loss of Accreditation** – Certain students applying for 24-month STEM OPT extension programs and English language study programs are being affected by the U.S. Department of Education's decision no longer to recognize the Accrediting Council for Independent Colleges and Schools (ACICS) as an accrediting agency.
7. **July Visa Bulletin Notes Oversubscription of Employment-Based Green Card Categories for China EB-3 and India EB-4 Categories** – The date for these preferences will once again become Current for October, the first month of fiscal year 2018.
8. **Pro Bono: DACA Recipient Can Stay, Work in United States for Now** – Kuck Immigration Partners announced that the U.S. District Court for the Northern District of Georgia in Atlanta recently preliminarily enjoined USCIS's decision to terminate DACA status and employment authorization for a Mexican person living and working in the United States.
9. **Firm In the News...**

Details

1. **Ninth Circuit Rules Against President Trump's Revised Travel Ban**

The U.S. Court of Appeals for the Ninth Circuit held on June 12, 2017, that President Donald Trump exceeded his statutory authority in issuing the revised executive order banning travel to the United States from certain countries. In suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for fiscal year 2017, the President "did not meet the essential precondition" to exercising that authority, the court said: "The President must make a sufficient finding that the entry of these classes of people would be 'detrimental to the interests of the United States.' " Further, the court said, the order "runs afoul of other provisions of the that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees." On these statutory bases, the court affirmed in large part the district court's order preliminarily enjoining several sections of the executive order. The court also

vacated the portions of the injunction that prevent the government from conducting internal reviews. The court remanded the case to the district court with instructions to reissue an order consistent with the June 12 opinion.

The Trump administration also seeks Supreme Court review of a May 25, 2017, decision by the U.S. Court of Appeals for the Fourth Circuit on the revised travel ban. In that case, the Fourth Circuit ruled against the revised executive order on constitutional grounds, citing the First Amendment's Establishment Clause against religious discrimination.

The Ninth Circuit's decision is at http://cdn.ca9.uscourts.gov/datastore/uploads/general/cases_of_interest/17-15589%20per%20curiam%20opinion.pdf. The Fourth Circuit's decision is at http://coop.ca4.uscourts.gov/171351.P.pdf.

Back to Top

2. **New State Dept. Form Asks Certain Visa Applicants 'Supplemental Questions' Regarding Social Media Usage**

A new Department of State form, DS-5535, for visa applicants asks supplemental questions of "mmigrant and nonimmigrant visa applicants who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities," according to a related Federal Register notice. A wide variety of organizations are expressing concerns about the new form and its use.

The form's questions include where the applicant has traveled outside his or her country of residence in the last 15 years, with "details for each trip, including locations visited, date visited, source of funds, and length of stay." The form also asks for information about any passports other than those listed in the visa application; full names and dates of birth of any siblings; children; current or previous spouse or civil/domestic partner; addresses where the applicant has lived during the last 15 years; phone numbers, including "primary, secondary, work, home, and mobile numbers," used over the last 5 years; email addresses used over the past 5 years, including "primary, secondary, work, personal, and educational"; usernames for any websites or social media applications used to create or share content, including photos, videos, and status updates, over the last 5 years (the form does not ask for passwords); and employers, job descriptions, and job titles over the last 15

years.

The Federal Register notice announcing the new form explains that most of this information is already collected on visa applications but for a shorter time period; for example, 5 years rather than 15 years. The notice states that requests for names and dates of birth of siblings and, for some applicants, children are new. The request for social media identifiers and associated platforms is also new for the Department of State, although the Department of Homeland Security (DHS) already collects such information on a "voluntary basis" from certain individuals. The notice explains that applicants may be asked to provide details of their international or domestic (within their country of nationality) travel, if it appears to the consular officer that the applicant has been in an area while the area was under the operational control of a terrorist organization. Applicants "may be asked to recount or explain the details of their travel, and when possible, provide supporting documentation."

Reaction. A number of organizations sent a letter to the Office of Management and Budget (OMB) and the Department of State expressing their concerns about the new form. Among other things, the letter acknowledges the need to secure the United States, but cautions that there is also a need to remain open to those pursuing academic study and scientific research. The letter states that the notice is likely to have a "chilling effect" not only on those required to submit additional information but indirectly on all international travelers coming to the United States. According to the letter, the notice also provides insufficient information on the criteria for identifying those required to complete the supplemental form, the effect of unintentional incomplete disclosure, and remedies for correcting information initially provided. "These additional questions could lead to unacceptably long delays in processing, which are particularly harmful to applicants with strict activity timeframes or enrollment deadlines," the letter notes, adding that no information is provided about the longer-term use, retention, or privacy protections for the information provided. The letter asks that the State Department publish an additional notice with this and other information.

The letter notes that scientific exchanges, whether through long- or short-term visits or at professional society meetings, are vitally important to the United States. Many project collaboration meetings take place at conferences held in the United States, and not having the top international talent in attendance "would be a significant problem," the letter states. "Scientists must periodically

meet in person, and if bureaucratic hurdles for entry into the United States are too high, they will hold their meetings elsewhere, hurting U.S. economic, technological, and scientific competitiveness." For example, the letter notes, the "American Geophysical Union and the American Physical Society both have strong international counterparts that hold regular conferences and meetings, and the collaborators could well turn to those venues instead."

Moreover, the letter notes, many U.S. professional societies have significant numbers of international members, and it is important for those individuals to be able to attend the U.S. societies' meetings. The letter cites a 2012 report by PricewaterhouseCoopers noting that nearly 1.8 million meetings (not all scientific) were held in the United States during 2009 involving "an estimated 205 million participants and generat more than $263 billion in direct spending and $907 billion in total industry output." The attendance of international scientists at U.S. meetings and conferences "is important in terms of the intellectual content they contribute, for the benefit to the United States from the formation and sustainment of partnerships with U.S. counterparts, and in terms of benefits to the U.S. economy," the letter notes.

The letter was signed by 55 U.S. professional associations and other entities, including the American Association of Collegiate Registrars and Admissions Officers, the American Society of Civil Engineers, the Association for Research in Vision and Ophthalmology, the Institute of Mathematical Statistics, NAFSA: Association of International Educators, and the Society of Engineering Science.

The OMB approved the new form on an emergency basis for six months. The form is at https://tr.usembassy.gov/supplemental-questions-visa-applicants-ds-5535/. The Federal Register notice explaining who will use the form and why is at https://www.federalregister.gov/documents/2017/05/04/2017-08975/notice-of-information-collection-under-omb-emergency-review-supplemental-questions-for-visa. The letter from U.S. professional associations and other entities expressing concerns about the form is at http://www.nafsa.org/_/file/_/amresource/DS5535Comment051817.pdf.

Back to Top

3. **Labor Dept. Announces Aggressive Anti-Visa Fraud Measures; White House Considers H-1B Overhaul**

Secretary of Labor Alexander Acosta recently announced actions "to increase protections of American workers while more aggressively confronting entities committing visa program fraud and abuse," according to a Department of Labor (DOL) press release. Secretary Acosta said these measures will include "heightened use of criminal referrals. The U.S. Department of Labor will focus on preventing visa program abuse and take every available legal action against those who abuse these programs."

The announcement states that "it is now the policy of the department to enforce vigorously all laws within its jurisdiction governing the administration and enforcement of non-immigrant visa programs," including:

- Directing the DOL's Wage and Hour Division (WHD) to use all its tools in conducting civil investigations to enforce labor protections provided by the visa programs.
- Directing the DOL's Employment and Training Administration (ETA) to develop proposed changes to the Labor Condition Application, and directing the WHD to review its investigatory forms, to better identify systematic violations and potential fraud, and to provide greater transparency for agency personnel, U.S. workers, and the general public.
- Directing the WHD, ETA, and Office of the DOL Solicitor to coordinate the administration and enforcement activities of the visa programs and make referrals of criminal fraud to the Office of the Inspector General (OIG).
- Establishing a working group made up of senior leadership from ETA, WHD, and the Solicitor's office to supervise these efforts and coordinate enforcement. The working group will invite OIG to send representatives to participate in its efforts.

DOL will continue to work with the departments of Justice and Homeland Security to further investigate and detect visa program fraud and abuse, the announcement states.

In addition, DOL said it has begun "to prioritize and publicize the investigation and prosecution of entities in violation of visa programs." For example, the agency announced that it obtained a preliminary injunction under the H-2A visa program from the U.S. District Court for Arizona against G Farms for "illegal and life-threatening housing provided to agricultural workers." DOL said it "continues to investigate the violations at G Farms and has also been in contact with the OIG on this matter."

This announcement comes on the heels of President Trump's April 18, 2017, executive order ordering several agencies to suggest H-1B reforms. The Department of Homeland Security said it plans to issue new rules and guidance on the H-1B program. According to reports, the White House is also working with the Department of Justice to consider measures such as reducing the numerical limit on, and duration of, H-1B visas, among other actions.

The announcement is at https://www.dol.gov/newsroom/releases/opa/opa20170606.

Back to Top

4. **Nonprofit Group Fights Cease-and-Desist Order from DOJ**

The Northwest Immigrant Rights Project (NWIRP) recently received a "cease-and-desist" letter from the Department of Justice, ordering NWIRP to stop representing clients and close down its asylum advisory program at an immigration detention center in Washington state. NWIRP subsequently filed a lawsuit and was granted a temporary restraining order in May. NWIRP provides free and low-cost legal services to thousands of immigrants each year and, as part of the larger "airport lawyers" efforts nationwide, sent staff and volunteer lawyers to SeaTac airport in Seattle, Washington, to provide emergency legal assistance to travelers caught up in President Trump's travel ban.

The U.S. District Court for the Western District of Washington at Seattle noted that the NWIRP is the sole pro bono organization listed by the Executive Office for Immigration Review (EOIR) for the state of Washington. In 2008, EOIR published new professional conduct rules for attorneys appearing in immigration proceedings. EOIR's rules were intended to protect individuals in immigration proceedings by disciplining attorneys who engage in "criminal, unethical, or unprofessional conduct or frivolous behavior." One of the activities the rules targeted was "notario fraud," where a would-be immigrant pays for ongoing legal services that are not provided. The court noted that NWIRP sometimes provides emergency legal services without the resources to commit to full future representation of each potential client. NWIRP said that it met with the local immigration court administrator to discuss the rule's impact and "agreed that it would notify the court when it assisted with any pro se motion or brief by including a subscript or other clear indication in the document that NWIRP had prepared or assisted in preparing the motion or

application."

Nearly nine years after promulgating the rule, EOIR sent a "cease and desist" letter to NWIRP ordering the nonprofit to stop "representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents." NWIRP filed suit against EOIR, among others, seeking injunctive relief and a temporary restraining order so the organization can maintain the status quo until the parties can be heard on the motion for preliminary injunction.

In granting the temporary restraining order, the court said NWIRP had shown that "it is likely to succeed on the claims that entitle it to relief; NWIRP has already suffered and is likely to continue suffering irreparable harm in the absence of temporary injunctive relief; the balance of the equities tips in NWIRP's favor; and granting this is in the public interest."

The court order is at https://www.nwirp.org/wp-content/uploads/2017/05/Dkt-33-order-granting-tro.pdf.

Back to Top

5. **International Entrepreneur Final Rule Sent Back to OMB for Further Review**

A final rule on international entrepreneurs, issued by the Obama administration on January 17, 2017, and scheduled to take effect July 17, 2017, was recently returned to the Office of Management and Budget for further review. The Trump administration has not yet explained its plans for the rule publicly, but it could amend, postpone, or withdraw the rule.

The final rule would add new regulatory provisions guiding the use of parole on a case-by- case basis with respect to entrepreneurs of start-up entities who can demonstrate through evidence of "substantial and demonstrated potential for rapid business growth and job creation" that they would provide a "significant public benefit" to the United States. Such potential would be indicated by, among other things, "the receipt of significant capital investment from U.S. investors with established records of successful investments, or obtaining significant awards or grants from certain Federal, State or local government entities." If granted, parole would provide a temporary initial stay of up to 30 months (which may be extended by up to an additional 30 months) "to facilitate

the applicant's ability to oversee and grow his or her start-up entity in the United States."

The final rule is at https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00481.pdf.

Back to Top

6. **Certain STEM OPT and English Language Students Affected by Loss of Accreditation**

Certain students applying for 24-month STEM OPT (optional practical training in science, technology, engineering, or math) extension programs and English language study programs are being affected by the U.S. Department of Education's decision in December no longer to recognize the Accrediting Council for Independent Colleges and Schools (ACICS) as an accrediting agency.

U.S. Citizenship and Immigration Services recently announced that this determination immediately affects two immigration-related programs:

- English language study programs, as the programs are required to be accredited under the Accreditation of English Language Training Programs Act
- F-1 students applying for a 24-month STEM OPT extension, as the regulations require them to use a degree from an accredited Student and Exchange Visitor Program (SEVP)-certified school as the basis of their STEM OPT extensions. The school must be accredited at the time of the application; this is the date of the Designated School Official's (DSO) recommendation on the Form I-20.

SEVP will provide guidance to affected students in notification letters if their school's certification is withdrawn. However, students enrolled at an ACICS-accredited school should contact their designated school officials (DSOs) immediately "to better understand if and how the loss of recognized accreditation will impact the F/M student's status and/or immigration benefits application(s)."

If an ACICS-accredited school voluntarily withdraws from SEVP certification or cannot provide evidence in lieu of accreditation for programs listed on their Form I-17, international students at these schools will have 18 months to:

- Transfer to a new SEVP-certified program;
- Continue their program of study until the current session end date listed on their Form I-20 (not to exceed 18 months); or
- Leave the United States.

After this 18-month grace period, SEVP will terminate the SEVIS records of any active F/M student at an ACICS-accredited school who has not transferred to a SEVP-certified school or departed the United States. USCIS said this guidance applies equally to all F/M students regardless of the program of study, and the 18-month period is valid for English as a Second Language (ESL) students as well.

ACICS-accredited schools will be unable to issue program extensions, and students will only be allowed to finish their current session if the ACICS-accredited school voluntarily withdraws its certification or if it is withdrawn by SEVP. If a student's ACICS-accredited school is able to provide evidence of an ED-recognized accrediting agency or evidence in lieu of accreditation within the allotted time frame, the student may remain at the school to complete his or her

Students whose Forms I-20 have a DSO recommendation date before December 12, 2016, are not affected.

The USCIS announcement is at https://www.uscis.gov/news/alerts/certain-students-applying-english-language-study-and-24-month-stem-opt-extension-programs-affected-acics-loss-accreditation. More information about the loss of accreditation is at https://www.ice.gov/sevis/acics-loss-accreditation-recognition.

Back to Top

7. **July Visa Bulletin Notes Oversubscription of Employment-Based Green Card Categories for China EB-3 and India EB-4 Categories**

The Department of State's Visa Bulletin for the month of July 2017 includes the following information:

> CHINA Employment-based Third (E3) preference category: Readers were advised in item F of the June Visa Bulletin number 6, that it would be necessary to impose a date no later than August. The continued high level of demand for E3 numbers for USCIS adjustment of status applicants has

required the establishment of a date for July. This has been done in an attempt to hold number use within the China E3 annual limit. The China E3 date will return to October 1, 2014 for October, the first month of fiscal year 2018.

INDIA Employment-based Fourth (E4) AND Certain Religious Workers (SR) preference categories: As readers were advised in the June Visa Bulletin number 6, there has been extremely high demand in the E4 and SR categories. Pursuant to the Immigration and Nationality Act, it has been necessary to impose E4 and SR Final Action Dates for India, which has reached its per-country limit. This action will allow the Department to hold worldwide number use within the maximum allowed under the FY-2017 annual limits.

The date for these preferences will once again become CURRENT for October, the first month of fiscal year 2018.

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

Back to Top

8. **Pro Bono: DACA Recipient Can Stay, Work in United States for Now**

Kuck Immigration Partners announced that the U.S. District Court for the Northern District of Georgia in Atlanta recently preliminarily enjoined U.S. Citizenship and Immigration Services' (USCIS) decision to terminate Deferred Action for Childhood Arrivals (DACA) status and renewal, and employment authorization, for a Mexican person living and working in the United States, Jessica M. Colotl Coyotl. The court ordered USCIS to reconsider her DACA termination and readjudicate her renewal application "in a manner consistent with the Department of Homeland Security's Standard Operating Procedures and this Order." The court reinstated her work authorization pending readjudication of the renewal application and reconsideration of termination of DACA. The court said this order would remain effective until a further order from the same court, "which will issue only after Defendants have submitted sufficient proof that they have followed all relevant standard operating procedures regarding the adjudication of Plaintiff's renewal application and any termination of Plaintiff's DACA status."

Ms. Colotl is 28 and has lived continuously in the United States since she was 11. She works at Kuck Immigration Partners as a paralegal and aspires to attend law school and become an immigration lawyer. The Kuck firm represented Ms. Colotl pro bono. The decision is at https://www.dropbox.com/s/016oyab4nyrq26l/TRO%20Order_Colotl.pdf?dl=0. A related video is at https://www.youtube.com/watch?v=84UIJon6HuI&app=desktop.

Back to Top

9. **Firm In the News...**

David Isaacson published The "politically correct version": What Donald Trump's Recent Tweet and Previous Use of the Term "Politically Correct" Tell Us About His Revised Executive Order on June 5, 2017.

Cyrus D. Mehta published Trump's Tweet On "Extreme Vetting" May Have Opened the Door to a Court Challenge on June 12, 2017.

Back to Top