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US IMMIGRATION & NATIONALITY LAW

MID-JULY 2017 IMMIGRATION UPDATE

Posted on July 17, 2017 by Cyrus Mehta

Headlines:

1. **State Dept. Issues Guidance on Trump 'Travel Ban'; Hawaii Motion Denied; More Court Action** – The Department of State recently released guidance on President Trump's "travel ban." The Department's guidance was issued following the U.S. Supreme Court's ruling partially granting the government's request to stay lower court injunctions against the travel ban. A federal judge in Hawaii has challenged aspects of the travel ban, and the Trump administration asked the Supreme Court for clarification and an emergency stay.
2. **DHS Delays, Plans To Propose Rescinding International Entrepreneur Rule** – As expected, DHS has delayed the effective date of the International Entrepreneur Rule to provide the agency with an opportunity to obtain comments from the public regarding a proposal to rescind the rule.
3. **I-94 Arrival/Departure Info Now Available Online for Air and Sea Travelers** – Foreign visitors arriving to the United States via air or sea no longer must complete the paper Arrival/Departure Record.
4. **USCIS Issues Policy Guidance on H-1B Master's Degree Cap Exemption Case** – A recent decision clarifies that to qualify for an H-1B numerical cap exemption based on a master's or higher degree, the conferring institution must have qualified as a "United States institution of higher education" at the time the beneficiary's degree was earned.
5. **Ten States Demand End of DACA** – Signers included officials from Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, Texas, and West Virginia.
6. **Firm In the News...**

Details:

1. **State Dept. Issues Guidance on Trump 'Travel Ban'; Hawaii Motion Denied; More Court Action**

The Department of State recently released guidance on President Trump's executive order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," frequently referred to as the "travel ban." The Department's guidance was issued following the U.S. Supreme Court's June 26, 2017, ruling partially granting the government's request to stay lower court injunctions against the travel ban.

The guidance states that implementation of the executive order, in compliance with the Supreme Court's decision, began June 29, 2017. The Department said it does not plan to cancel previously scheduled visa application appointments. For nationals of the six designated countries—Libya, Iran, Somalia, Sudan, Syria, and Yemen—a consular officer will make a determination in the course of the interview whether an applicant otherwise eligible for a visa is exempt from the executive order or, if not, is eligible for a waiver and may be issued a visa. Consular officers may issue visas to nationals of the six designated countries on a case-by-case basis, the guidance states, if they determine that issuance is in the national interest, the applicant poses no national security threat to the United States, and denial of the visa would cause undue hardship.

The guidance reiterates that the executive order provides specifically that no visas issued before its effective date will be revoked pursuant to the order, and that the order does not apply to nationals of affected countries who had valid visas on June 29, 2017. The guidance also notes:

> The E.O. further instructs that any individual whose visa was marked revoked or cancelled solely as a result of the original E.O. issued on January 27, 2017 (E.O. 13769) will be entitled to a travel document permitting travel to the United States, so that the individual may seek entry. Any individual in this situation who seeks to travel to the United States should contact the closest U.S. embassy or consulate to request a travel document.

The guidance notes that the Supreme Court's order specified that the travel ban may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. The guidance states that applicants seeking B, C-1, C-3, D, or I visas "will need to

make a credible claim to a consular officer at their visa interview that they have a bona fide close familial relationship with a person in the United States or of a bona fide, formal, documented relationship with an entity in the United States that was formed in the ordinary course, rather than for the purpose of evading the E.O., for the visa applicant to be exempt from the E.O. based on the Supreme Court order." Alternatively, the Department noted, some applicants may qualify for an exemption, and others may qualify for a waiver. Qualified applicants in nonimmigrant visa categories not listed above "are considered exempt from the E.O., because a credible claim of a bona fide relationship with a person or entity in the United States is inherent in the requirements for the visa classification," the guidance states.

Qualified applicants in the immediate-relative and family-based immigrant visa categories are also exempt from the executive order's travel ban under the Supreme Court's order, the guidance states, because having a credible claim of a bona fide close familial relationship is inherent in the requirements for the visa. Likewise, qualified employment-based immigrant visa applicants generally are exempt "because they have a credible claim of a bona fide, formal, documented relationship with an entity in the United States formed in the ordinary course." Unlike other employment-based immigrant visa applicants, certain self-petitioning employment-based first preference applicants with no job offer in the United States and special immigrant visas under INA section 101(a)(27) may be subject to the travel ban unless they have a credible claim of a bona fide close familial relationship with a person in the United States or of a bona fide, formal, documented relationship with an entity in the United States that was formed in the ordinary course, rather than for the purpose of evading the executive order, the guidance states. Applicants not exempted based on the Supreme Court's order still may qualify for an exemption or a waiver, the guidance says. Likewise, diversity visa applicants from the affected countries "will need a credible claim of a bona fide close familial relationship with a person in the United States or of a bona fide, formal, documented relationship with an entity in the United States that was formed in the ordinary course, to be exempted under the provisions of the E.O., or qualify for a waiver, before they can be issued a visa during the suspension," because a relationship with a person or entity in the United States is not required for such visas.

The guidance notes that if a principal visa applicant qualifies for an exemption or a waiver under the executive order, a qualified derivative is also exempt. The

order does not restrict the travel of dual nationals if they are traveling on the passport of an unrestricted country and, if needed, hold a valid U.S. visa, the notice states. This applies even if they hold dual nationality from one of the six restricted countries. Also, U.S. lawful permanent residents are not affected by the executive order.

Meanwhile, the U.S. Court of Appeals for the Ninth Circuit denied Hawaii's appeal of a U.S. District Court decision denying an emergency motion filed by Hawaii's Attorney General Douglas Chin asking the court to block portions of the travel ban and for clarification of "bona fide relationship" with respect to qualifying relationships under the travel ban.

However, on July 13, 2017, a federal judge in Hawaii ruled that the travel ban cannot apply to grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States. The Trump administration filed a motion with the Supreme Court on July 14, 2017, asking for clarification and a stay of the Hawaii order. "The Supreme Court has had to correct this lower court once, and we will now reluctantly return directly to the Supreme Court to again vindicate the rule of law and the Executive Branch's duty to protect the nation," Attorney General Jeff Sessions said.

The Department's guidance, which includes frequently asked questions, is at https://travel.state.gov/content/travel/en/news/important-announcement.html. Executive order 13780 is at https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states. Hawaii's emergency motion is at http://www.politico.com/f/?id=0000015c-f62c-d1e3-a97d-ff7cb9c30000.

Back to Top

2. **DHS Delays, Plans To Propose Rescinding International Entrepreneur Rule**

As expected, the Department of Homeland Security (DHS) has delayed the effective date of the International Entrepreneur Rule that was scheduled to take effect July 17, 2017. The Federal Register notice, published on July 11, 2017, states that this delay " will provide DHS with an opportunity to obtain comments from the public regarding a proposal to rescind the rule pursuant to Executive Order (E.O.) 13767, 'Border Security and Immigration Enforcement

Improvements.' " DHS said it will issue a Notice of Proposed Rulemaking soliciting public comments on the proposal to rescind the IE Final Rule.

The new effective date for the final rule, with one exception, is March 14, 2018. In the final rule, DHS added the Department of State Consular Report of Birth Abroad (Form FS-240) to the regulatory text and to the "List C" listing of acceptable documents for Form I-9 verification purposes. As part of the final rule, DHS also revised the accompanying form instructions to reflect this change. As this provision is unrelated to entrepreneur parole under the final rule, this one provision will go into effect on July 17, 2017, as originally provided, the notice states.

The final rule amended DHS regulations to include criteria that would guide the implementation of the Secretary of Homeland Security's discretionary case-by-case parole authority as applied to international entrepreneurs. Specifically, the notice states, it applied to international entrepreneurs who can demonstrate that their parole into the United States under § 212(d)(5) of the Immigration and Nationality Act (INA) would provide a significant public benefit to the United States. In accordance with the final rule's criteria, 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. In addition to defining criteria for the favorable exercise of the Secretary's discretionary parole authority, the final rule established a period of initial parole 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.

Comments may be submitted by August 10, 2017, by following the instructions in the notice at https://www.federalregister.gov/documents/2017/07/11/2017-14619/international-entrepreneur-rule-delay-of-effective-date. A letter from a group of investors and startup founders in support of the International Entrepreneur Rule is at http://nvca.org/wp-content/uploads/2017/06/Letter-to-President-Trump-on-IER-from-emerging-ecosystems.pdf. The original final rule is at https://www.gpo.gov/fdsys/pkg/FR-2017-01-17/pdf/2017-00481.pdf.

Back to Top

3. **I-94 Arrival/Departure Info Now Available Online for Air and Sea**

Travelers

U.S. Customs and Border Protection (CBP) recently announced that foreign visitors arriving to the United States via air or sea no longer must complete the paper Form I-94 Arrival/Departure Record or Form I-94W Nonimmigrant Visa Waiver Arrival/Departure Record. Such travelers who need to prove their legal-visitor status to employers, schools and universities, or government agencies, can now access their CBP arrival/departure record information online. CBP said it is gathering travelers' arrival/departure information automatically from their electronic travel records. Because advance information is transmitted only for air and sea travelers, CBP will still issue a paper I-94 at land border ports of entry.

If travelers need the information from their I-94 admission record to verify immigration status or employment authorization, the record number, and other admission information, CBP encourages them to obtain the I-94 number at https://i94.cbp.dhs.gov/I94/#/home.

Upon arrival, a CBP officer stamps the travel document of each arriving nonimmigrant traveler with the admission date, the class of admission, and the date until which the traveler is admitted. If a traveler would like a paper I-94, one can be requested during the inspection process. All requests will be accommodated in a secondary setting, CBP said.

Upon leaving the U.S., a traveler previously issued a paper I-94 should surrender it to the commercial carrier or to CBP upon departure. Otherwise, CBP will record the departure electronically via manifest information provided by the carrier or by CBP.

The notice is at https://www.cbp.gov/travel/international-visitors/i-94-instructions. A related fact sheet is at https://www.cbp.gov/sites/default/files/assets/documents/2016-Mar/i-94-automation-fact-sheet.pdf.

Back to Top

4. **USCIS Issues Policy Guidance on H-1B Master's Degree Cap Exemption Case**

U.S. Citizenship and Immigration Services (USCIS) recently published a policy

memorandum designating *Matter of A-T-* as an "Adopted Decision," which establishes policy that applies to and binds all USCIS employees. "USCIS personnel are directed to follow the reasoning in this decision in similar cases," the memo states. The decision clarifies that to qualify for an H-1B numerical cap exemption based on a master's or higher degree, the conferring institution must have qualified as a "United States institution of higher education" at the time the beneficiary's degree was earned.

In *Matter of A-T- Inc.*, Adopted Decision 2017-04 (AAO May 23, 2017), the California Service Center director denied the H-1B petition, concluding that the beneficiary did not qualify for the claimed master's cap exemption because the degree-conferring institution was not accredited when it awarded the beneficiary's master's degree. The petitioner asserted that a master's degree does not need to be from a U.S. institution of higher education when the degree is awarded to qualify for the master's cap exemption, but rather that a beneficiary may qualify for the exemption if he or she earned a degree from an entity that qualified as a U.S. institution of higher education at the time of adjudication. The Administrative Appeals Office (AAO) disagreed, noting that the degree must have been earned from an institution that has either been accredited or granted preaccreditation status. Among other things, the AAO noted that if a beneficiary could qualify for the master's cap exemption based on accreditation or preaccreditation that happens long after the degree was earned, this would not necessarily reflect the quality of the beneficiary's education. Conversely, the beneficiary subsequently could become ineligible for the exemption if the institution ended up not being accredited. Thus, the AAO noted, the petitioner's proffered interpretation introduces uncertainty for graduates seeking immigration benefits over time. In contrast, the AAO said, under its interpretation, an individual who earns a degree from an accredited or preaccredited institution may continue to qualify for the master's cap exemption even if the institution later closes or loses its accreditation status. Therefore, the AAO said it interprets the statute as requiring that the institution's qualifications be established at the time the degree is earned, and the date the beneficiary earned his master's degree is critical.

The USCIS policy memorandum is at https://www.uscis.gov/sites/default/files/files/nativedocuments/APPROVED_PM-602-0145_Matter_of_A-T-_Inc_Adopted_Decision.pdf.

Back to Top

5. **Ten States Demand End of DACA**

Republican officials from 10 states, led by Texas Attorney General Ken Paxton, sent a letter to the Department of Justice threatening further legal action if the Deferred Action for Childhood Arrivals (DACA) program is not ended. That program, instituted by President Obama in 2012, allows undocumented immigrants, called "DREAMers," who grew up in the United States to stay in the country and obtain work authorization. Signers included officials from Alabama, Arkansas, Idaho, Kansas, Louisiana, Nebraska, South Carolina, Tennessee, Texas, and West Virginia.

The letter states that the original 2012 DACA memorandum is "unlawful" because DACA "unilaterally confers eligibility for work authorization...and lawful presence without any statutory authorization from Congress." The letter, sent to Jeff Sessions, U.S. Attorney General, asks that DACA be phased out, that the 2012 memorandum be rescinded, and that DACA or Expanded DACA permits not be renewed or issued in the future. The letter asks the Trump administration to agree by September 5, 2017, to rescind the 2012 DACA memorandum and not to renew or issue any new such permits in the future, to avoid further legal action.

The states with the most DACA applicants are California, which reportedly has received an estimated 387,000 DACA applications or renewals and approved 359,000 as of August 2016, and Texas, which has received more than 220,000 such applications and approved nearly 200,000 in the same time frame.

Reaction from DACA advocates was swift and intense. Thomas A. Saenz, president and general counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), said his organization "condemns in the strongest terms each of the state officials who joined in threatening the federal administration to repeal DACA." Accusing the state signatories of "xenophobia" and "mean-spirited stupidity," he said MALDEF "urges the president not to cave in to the toothless threat in Texas letter. Presidential authority does constitutionally extend to protecting DACA recipients, whom the president has repeatedly declared worthy of protection. We urge the president to fight to vindicate that authority." He said MALDEF "takes encouragement from the fact that less than half of the plaintiff states in *Texas v. United States* joined today's craven letter. For its part, MALDEF, on behalf of the Jane Doe intervenors whom we represent, will be moving to dismiss the case as moot and not appropriate

for the threatened expansion."

The letter is at http://www.aila.org/infonet/ten-states-sent-letter-to-doj-requesting-end-daca. MALDEF's statement is at http://www.maldef.org/news/releases/2017_6_29_MALDEF_Statement_on_Texas_Letter_Demanding_Repeal_of_DACA/.

6. **Firm In The News**

Cyrus D. Mehta published Analysis of the 60-Day Grace Period for Nonimmigrant Workers on July 10, 2017.

David Isaacson published Travel Ban FAQs – Updated 01/14/2017 on July 15, 2017.

Back to Top