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

MID-DECEMBER 2017 IMMIGRATION UPDATE

Posted on December 18, 2017 by Cyrus Mehta

Headlines:

1. **USCIS Is Accepting Applications Under International Entrepreneur Rule (IER) But Plans Proposed Rule to Eliminate IER** – USCIS is taking steps to implement the International Entrepreneur Rule (IER) in accordance with a recent court decision. USCIS noted that while the agency implements the IER, DHS will also "proceed with issuing a notice of proposed rulemaking (NPRM) seeking to remove the Jan. 17, 2017, IER. DHS is in the final stages of drafting the NPRM."
2. **Supreme Court Allows Trump Travel Ban to Proceed; State Dept. Issues Guidance** – On December 4, 2017, the U.S. Supreme Court granted the Trump administration's motions for emergency stays of preliminary injunctions issued by U.S. District Courts in Hawaii and Maryland. The Supreme Court's orders allow the government to fully implement the Trump administration's entry restrictions on certain countries.
3. **USCIS Issues FAQ on Rejected DACA Requests, Resubmissions** – U.S. Citizenship and Immigration Services recently released a FAQ on rejected Deferred Action for Childhood Arrivals requests, and resubmissions.
4. **Attorney General Issues Memo to EOIR on Reducing Backlogs** – The memo and accompanying documents set forth principles and plans to reduce the backlog of cases pending before the EOIR. Some of the proposals are controversial.
5. **OFLC Releases Tips on H-2A Labor Certification Process for Employers** – The Department of Labor's Office of Foreign Labor Certification released a presentation including tips on the H-2A labor certification process for employers.
6. **U.S. Mission in Canada Implements New Appointment Scheduling System for E Visas** – On December 5, 2017, the U.S. Mission in Canada

sent an alert announcing a new appointment scheduling system for E visa applications.

7. **Firm In the News...**

Details:

1. **USCIS Is Accepting Applications Under International Entrepreneur Rule (IER) But Plans Proposed Rule to Eliminate IER**

U.S. Citizenship and Immigration Services (USCIS) announced on December 14, 2017, that it is taking steps to implement the International Entrepreneur Rule (IER) in accordance with a recent court decision. USCIS noted that while the agency implements the IER, the Department of Homeland Security (DHS) will also "proceed with issuing a notice of proposed rulemaking (NPRM) seeking to remove the Jan. 17, 2017, IER. DHS is in the final stages of drafting the NPRM."

USCIS explained that although the IER was published during the previous administration with an effective date of July 17, 2017, it did not take effect because DHS issued a final rule on July 11, 2017, delaying the IER's effective date until March 14, 2018. USCIS said this "delay rule" was meant to give USCIS time to review the IER and, if necessary, to issue a rule proposing to remove the IER program regulations. However, a December 1, 2017, ruling from the U.S. District Court for the District of Columbia in *National Venture Capital Association v. Duke* vacated USCIS's final rule to delay the effective date.

The IER was intended to provide international entrepreneurs a new avenue to apply for parole, enter the United States, and invest in establishing and growing start-up businesses, USCIS noted. The rule established new criteria to guide the adjudication of parole applications from certain foreign entrepreneurs, providing them with temporary admission. The rule did not afford a path to citizenship.

The instructions and form are at https://www.uscis.gov/i-941. The IER is at https://www.federalregister.gov/documents/2017/01/17/2017-00481/international-entrepreneur-rule. The vacated final rule is at https://www.federalregister.gov/documents/2017/07/11/2017-14619/international-entrepreneur-rule-delay-of-effective-date.

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2. **Supreme Court Allows Trump Travel Ban to Proceed; State Dept.**

Issues Guidance

On December 4, 2017, the U.S. Supreme Court granted the Trump administration's motions for emergency stays of preliminary injunctions issued by U.S. District Courts in Hawaii and Maryland. The preliminary injunctions had prohibited the government from fully enforcing or implementing the entry restrictions of Presidential Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats" to nationals of six countries: Chad, Iran, Libya, Syria, Yemen, and Somalia. The Supreme Court's orders allowed the government to implement those restrictions fully beginning December 8, 2017, until related litigation is resolved. The District Court injunctions did not affect implementation of entry restrictions against nationals from North Korea and Venezuela. Those individuals remain subject to the restrictions and limitations listed in the Presidential Proclamation. The Proclamation does not restrict the travel of dual nationals as long as they are traveling on the passport of a non-designated country.

The Department of State (DOS) issued a statement on December 4 providing guidance on several details related to the travel ban. Among other things, the statement said:

> We will not cancel previously scheduled visa application appointments. In accordance with the Presidential Proclamation, for nationals of the eight designated countries, a consular officer will make a determination whether an applicant otherwise eligible for a visa is exempt from the Proclamation or, if not, may be eligible for a waiver under the Proclamation and therefore issued a visa.
>
> No visas will be revoked pursuant to the Proclamation. Individuals subject to the Proclamation who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued.
>
> We will keep those traveling to the United States and our partners in the travel industry informed as we implement the order in a professional, organized, and timely way.

The DOS provided the following details on the travel restrictions by country:

> Nationals of the eight countries are subject to various travel restrictions

contained in the Proclamation, as outlined in the following table, subject to exceptions and waivers set forth in the Proclamation.

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Chad	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2 or B-1/B-2 visas of any kind for officials of the following government agencies Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People's Power Ministry of Foreign Affairs, and their immediate family members.	

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

The DOS statement provides the following list of exceptions:

The following exceptions apply to nationals from all eight countries and will not be subject to any travel restrictions listed in the Proclamation:

a) Any national who was in the United States on the applicable effective date described in Section 7 of the Proclamation for that national, regardless of immigration status;

b) Any national who had a valid visa on the applicable effective date in Section 7 of the Proclamation for that national;

c) Any national who qualifies for a visa or other valid travel document under section 6(d) of the Proclamation;

d) Any lawful permanent resident (LPR) of the United States;

e) Any national who is admitted to or paroled into the United States on or after the applicable effective date in Section 7 of the Proclamation for that national;

f) Any applicant who has a document other than a visa, valid on the applicable effective date in Section 7 of the Proclamation for that applicant or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as advance parole;

g) Any dual national of a country designated under the Proclamation when traveling on a passport issued by a non-designated country;

h) Any applicant traveling on a diplomatic (A-1 or A-2) or diplomatic-type visa (of any classification), NATO-1 -6 visas, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; except certain Venezuelan government officials and their family members traveling on a diplomatic-type B-1, B-2, or B1/B2 visas

i) Any applicant who has been granted asylum; admitted to the United

States as a refugee; or has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

Exceptions and waivers listed in the Proclamation are applicable for qualified applicants. In all visa adjudications, consular officers may seek additional information, as warranted, to determine whether an exception or a waiver is available.

Meanwhile, the 9th and 4th Circuits held arguments on the travel ban on December 6 and 8, 2017, respectively. Both courts are likely to issue rulings relatively quickly. The cases are then likely to go to the Supreme Court.

The Supreme Court's brief orders are at https://www.supremecourt.gov/orders/courtorders/120417zr_4gd5.pdf and https://www.supremecourt.gov/orders/courtorders/120417zr1_j4ek.pdf. The DOS statement, which provides additional details about qualifications and procedures, along with frequently asked questions (FAQs), is at http://bit.ly/2jnCf95. The related Presidential Proclamation is at https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry. The DOS statement provided a link to a related Department of Homeland Security FAQ released in September 2017 at https://www.dhs.gov/news/2017/09/24/fact-sheet-president-s-proclamation-enhancing-vetting-capabilities-and-processes.

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3. **USCIS Issues FAQ on Rejected DACA Requests, Resubmissions**

U.S. Citizenship and Immigration Services (USCIS) recently released frequently asked questions (FAQ) on rejected Deferred Action for Childhood Arrivals (DACA) requests, and resubmissions.

The FAQ notes that the due date for new, initial DACA requests was September 5, 2017. The due date for DACA renewal requests was September 5, 2017, for recipients whose DACA status expired before that date and was October 5, 2017, for recipients whose DACA expired or will expire between September 5, 2017, and March 5, 2018.

For those whose DACA requests were delivered by the deadline but were not officially "received" by USCIS until the following day and were rejected and

returned to applicants for that reason, the FAQ states that USCIS "will identify you and send you a letter inviting you to resubmit your DACA request. You will have 33 days from the date of the letter to resubmit your request. You may wish to keep a copy of all materials included in your resubmission. USCIS expects to be able to identify and send letters to all persons in this situation."

Those in the situation noted above who have not yet been contacted by USCIS may contact Lockbox Support before resubmitting their DACA packages for reconsideration. Lockbox Support can be emailed at lockboxsupport@uscis.dhs.gov.

The USCIS FAQ, which includes additional details about who may resubmit and why, is at https://www.uscis.gov/daca2017/mail-faqs.

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4. **Attorney General Issues Memo to EOIR on Reducing Backlogs**

On December 5, 2017, Attorney General Jeff Sessions issued a memorandum to the Department of Justice's Executive Office for Immigration Review (EOIR), "Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest." The memo and accompanying documents set forth principles and plans to reduce the backlog of cases pending before the EOIR, some of which have proved controversial.

Mr. Sessions noted that 50 new immigration judges have begun work since January 20, 2017, and that 60 more are expected to be added in the next 6 months. He said that the current backlog of approximately 650,000 cases pending before immigration courts is a challenge but "not insurmountable." In addition to hiring more immigration judges and support personnel, he said:

> e must all work to identify and adopt—consistent with the law—additional procedures and techniques that will increase productivity, enhance efficiencies, and ensure the timely and proper administration of justice. Whether you are an immigration judge who has a unique way to better handle dockets, or an administrative assistant who has a better process for handling the distribution of files in the office, we can all contribute something to improve the system. I, too, anticipate clarifying certain legal matters in the near future that will remove recurring impediments to judicial economy and the timely administration of justice.

Toward this end, Mr. Sessions listed a set of principles to be followed:

- The immigration courts, the Board of Immigration Appeals, and the Office of the Chief Administrative Hearing Officer within EOIR are responsible for adjudicating cases and administering the immigration laws. We serve the national interest by applying those laws as enacted, irrespective of our personal policy preferences.
- The timely and efficient conclusion of cases serves the national interest. Unwarranted delays and delayed decision making do not. The ultimate disposition for each case in which an alien's removability has been established must be either a removal order or a grant of relief or protection from removal provided for under our immigration laws, as appropriate and consistent with applicable law.
- Meritless cases or motions pending before the immigration courts or the Board of Immigration Appeals should be promptly resolved consistent with applicable law.
- The efficient and timely completion of cases and motions before EOIR is aided by the use of performance measures to ensure that EOIR adjudicates cases fairly, expeditiously, and uniformly in accordance with its mission.
- The attempted perpetration of fraud upon the United States government in our immigration court system can lead to delays, inefficiencies, and the improper provision of immigration benefits. Therefore, any and all suspected instances of fraud should be promptly documented and reported to EOIR management, and any other agency with an interest in the identification of and response to such fraud (including the appropriate state bar(s) in cases of attorney misconduct), consistent with applicable law.

A "backgrounder" asserts, among other things, that the Deferred Action for Childhood Arrivals (DACA) program, prosecutorial discretion, and provisional waivers have "slowed down the adjudication of existing cases and incentivized further illegal immigration that led to new cases." The backgrounder also charges that "epresentatives of illegal aliens have purposely used tactics designed to delay the adjudication of their clients' cases."

The backgrounder states that EOIR plans to pilot video teleconferencing, where immigration judges will adjudicate cases from around the country. Also

planned is a review of "existing EOIR regulations and policies to determine changes that could streamline current immigration proceedings (e.g. the on continuances issued on July 31, 2017; regulatory changes that will allow immigration judges to deny unmeritorious cases regardless if the annual limit for relief has been met)."

In reaction to the memo and accompanying documents, the American Immigration Lawyers Association (AILA) condemned "attacks by AG Sessions on the immigration courts and the due process rights of immigrants," stating that "or the AG to blame immigration lawyers for imagined trespasses is both malicious and wrong. We will not let that misinformation pass without setting the record straight." Benjamin Johnson, AILA Executive Director, said, "Once again, the Attorney General cites flawed facts to castigate the immigration bar for the significant case backlog and inefficiencies in our immigration court system. He blames immigration attorneys for seeking case continuances, disregarding the fact that continuances are also routinely requested by counsel for the government, or are issued unilaterally by the court for administrative reasons." Mr. Johnson noted, "The number one reason a continuance is requested by a respondent is to find counsel. Other reasons include securing and authenticating documentary evidence from foreign countries, or...locating critical witnesses. And when the government refuses to share information from a client's immigration file and instead makes them go through the lengthy process of a Freedom of Information/Privacy Act request, a continuance is often a client's only lifeline to justice." AILA recommends removing EOIR from the Department of Justice.

The memorandum is at https://www.justice.gov/opa/press-release/file/1015996/download. The backgrounder is at https://www.justice.gov/opa/press-release/file/1016066/download. A related press release from the Department of Justice (DOJ) is at https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-outlining-principles-ensure-adjudication-immigration. A DOJ statement is at https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-outlining-principles-ensure-adjudication-immigration. AILA's statement is at http://www.aila.org/advo-media/press-releases/2017/ag-sessions-cites-flawed-facts-imm-court-system.

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5. **OFLC Releases Tips on H-2A Labor Certification Process for Employers**

The Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) released a presentation including tips on the H-2A labor certification process for employers. Among other things, the presentation notes that the DOL issues a final determination 30 days before the start date of work if all program requirements are met. Reasons for delaying an H-2A final determination include the employer or authorized representative not providing:

- Proof of valid workers' compensation coverage
- Housing documentation for farmworkers
- Valid farm labor contractor licenses
- Valid surety bond for labor contractors
- Recruitment report

The presentation notes that an employer's post-recruitment obligations include, among other things:

- Employers must continue to cooperate with the State Workforce Agency in recruiting for the job opportunity and provide employment to any qualified U.S. worker who applies for the job opportunity
- Employer must continue to update the initial recruitment report submitted to the CO for certification throughout the entire recruitment period
- Employer must sign and date the final written recruitment report and be prepared to submit it when requested by the Certifying Officer in the event of an audit examination or other request from the Department

The OFLC presentation is at https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Webinar-October-2017.pdf. A "Quick Start Guide for H-2A Mandatory Documents Upload" is at https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Quick_Start_Guide.pdf.

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6. **U.S. Mission in Canada Implements New Appointment Scheduling System for E Visas**

On December 5, 2017, the U.S. Mission in Canada (E Visa Unit, American Consulate General, Toronto) sent an alert announcing a new appointment scheduling system for E visa applications. The Mission said this is "strictly a

processing change that will allow us to receive and review E-visa applications before the applicant schedules an in-person interview (as opposed to the old system, which permitted applicants to schedule an appointment before submitting an application or supporting documentation)."

Under the new system, the U.S. Mission explained, E visa applications will be sorted into two processing streams based on the time needed to review the required documentation:

- New Cases and Renewals—First-time applicants and those wishing to renew the registration status of their E visa company will be offered a "deferred interview" appointment. While applicants will still need to first create an appointment profile and pay the required visa application fee online at https://ais.usvisa-info.com, the interview will be deferred until applicants have electronically submitted their application and supporting documents to the U.S. Consulate in Toronto via evisacanada@state.gov. Once their application has been reviewed, which requires at least 10 business days, the U.S. Mission will send applicants instructions on how to make an appointment for an in-person interview. Applicants will be unable to schedule an appointment until then. Only applications in the queue for "New Cases and Renewals" will be considered for company registration or re-registration.
- Employees of Registered Companies and Dependents—Employees of currently registered E visa companies, and qualifying family members of current E visa holders, may schedule the next available appointment in Calgary, Montreal, Ottawa, Vancouver, or Toronto.

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7. **Firm In the News**

Cyrus D. Mehta was a Speaker, *Protecting Your EB-5 Practice: Ethical Issues and Minimizing Risk*, 2017 AILA EB-5 Investors Summit, Las Vegas, NV, December 8, 2017.

Cyrus D. Mehta was a Speaker, *Opportunities and Challenges in H-1B Practice – Outsourcing, the H-1B Cap, and Increased Labor Condition application (LCA) Enforcement,* 50th Annual Immigration and Naturalization Institute 2017, New York, NY December 6, 2017.

Cyrus D. Mehta was a Speaker, *New Administration, New Rules*, AILA Latin America and Caribbean Chapter telephone conference, December 5, 2017.

Cyrus D. Mehta published **Breakthrough in Matter of V-S-G- Inc.: AC21 Beneficiaries Given Opportunity to Be Heard When I-140 is Revoked** on November 27, 2017; **Making Sense of the Acquittal in Kate Steinle's Case: Why Anti-Immigrant Rhetoric Equating Immigrants with Criminals Must Stop** on December 4, 2017; and **New York State Bar Association v Avvo: Will the Uberization of Immigration Law Practice Overcome Outdated Advertising Rules Governing Lawyers** on December 11, 2017

Cyrus D. Mehta along with Sophia Genovese published **Calling Out President Trump's Hoax: The Green Card Lottery and Family Fourth Preference Have No Connection To Terrorism** On December 18, 2017.

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