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

MID-JANUARY 2018 IMMIGRATION UPDATE

Posted on January 16, 2018 by Cyrus Mehta

Headlines:

1. Former DHS Secretaries Urge Congress To Act on DACA Now; Administration Begins Accepting DACA Renewal Applications – Former DHS Secretaries Michael Chertoff, Jeh Johnson, and Janet Napolitano sent a letter to Republican and Democratic congressional leaders urging swift passage of legislation to allow the 690,000 "Dreamers" under the Deferred Action for Childhood Arrivals program to continue to live and work in the United States. Also, USCIS resumed accepting renewal applications for DACA based on a federal court order.
2. DHS To Terminate TPS for El Salvador in September 2019, Suggests 'Legislative Solution' – Temporary protected status TPS designation for El Salvador will be terminated on September 9, 2019. DHS suggested the possibility of a legislative solution in the meantime.
3. New I-94 Feature Reminds VWP Travelers of Number of Remaining Days – A new feature added to the I-94 website allows Visa Waiver Program (VWP) travelers to check the status of their admission to the United States. This check informs travelers of the number of days remaining in their lawful period of admission or the number of days they have remained past that period. In addition, CBP said it will now send email notifications to VWP travelers who are still in the United States 10 days before the expiration of their lawful admission period.
4. OFLC Alerts Employers, Stakeholders Re High Volume of H-2B Temporary Labor Certification Requests – OFLC alerted employers and stakeholders about the high volume of applications received requesting temporary labor certification under the H-2B visa program.
5. CBP Updates Directive on Border Searches of Electronic Devices – The new directive supersedes the previous directive released in August 2009.

6. USCIS Clarifies Proxy Vote Use for Certain Intracompany Transferee Visa Petitions – USCIS issued updated policy guidance clarifying that a proxy vote must be irrevocable to establish the requisite control of a company in an L-1 visa petition.
7. DOJ Clarifies Policy on EADs for TPS Hondurans and Nicaraguans – DOJ recently clarified policy with respect to employment authorization documents based on USCIS's automatic extension of their validity for individuals with temporary protected status from Honduras and Nicaragua.
8. DOJ Settles U.S. Worker Discrimination Claims Against Colorado Agricultural Company – Among other things, the complaint alleged that although U.S. citizens had to complete a background check and a drug test before starting work, H-2A visa workers were allowed to begin working without completing them and, in some cases, never completed them.
9. Firm In The News...

Details:

1. **Former DHS Secretaries Urge Congress To Act on DACA Now; Administration Begins Accepting DACA Renewal Applications**

On January 3, 2018, former Department of Homeland Security Secretaries Michael Chertoff, Jeh Johnson, and Janet Napolitano sent a letter to Republican and Democratic congressional leaders urging swift passage of legislation to allow the 690,000 "Dreamers" under the Deferred Action for Childhood Arrivals (DACA) program to continue to live and work in the United States.

Specifically, the DHS secretaries urged passage of a DACA bill by January 19, 2018, as a "best-case deadline." They noted that this would provide enough time for U.S. Citizenship and Immigration Services (USCIS) to process applications "before tens of thousands of DACA recipients are negatively impacted by the loss of their work authorization or removal from the United States." They warned that by the Trump administration's March 5 deadline, the number of DACA recipients losing status "skyrockets to an average of 1,200 a day."

The DHS secretaries further warned that if DACA recipients lose their work authorization, this would create uncertainty and negatively affect the business

community that has hired 90 percent of them. "Congressional delay past the next few weeks will force the employers of hundreds of thousands of DACA recipients into a state of instability" in which they must plan to lose employees, the letter said.

On January 13, 2018, USCIS resumed accepting renewal applications for DACA based on a federal court order: "Until further notice, and unless otherwise provided in this guidance, the DACA policy will be operated on the terms in place before it was rescinded on Sept. 5, 2017." The notice states:

> Individuals who were previously granted deferred action under DACA may request renewal by filing Form I-821D (PDF), Form I-765 (PDF), and Form I-765 Worksheet (PDF), with the appropriate fee or approved fee exemption request, at the USCIS designated filing location, and in accordance with the instructions to the Form I-821D (PDF) and Form I-765 (PDF). USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA. USCIS will not accept or approve advance parole requests from DACA recipients.
>
> If you previously received DACA and your DACA expired on or after Sept. 5, 2016, you may still file your DACA request as a renewal request. Please list the date your prior DACA ended in the appropriate box on Part 1 of the Form I-821D.
>
> If you previously received DACA and your DACA expired before Sept. 5, 2016, or your DACA was previously terminated at any time, you cannot request DACA as a renewal (because renewal requests typically must be submitted within one year of the expiration date of your last period of deferred action approved under DACA), but may nonetheless file a new initial DACA request in accordance with the Form I-821D and Form I-765 instructions. To assist USCIS with reviewing your DACA request for acceptance, if you are filing a new initial DACA request because your DACA expired before Sept. 5, 2016, or because it was terminated at any time, please list the date your prior DACA expired or was terminated on Part 1 of the Form I-821D, if available.

The court's preliminary injunction noted, among other things:

> For the reasons DACA was instituted, and for the reasons tweeted by President Trump, this order finds that the public interest will be served by

> DACA's continuation (on the conditions and exceptions set out below). Beginning March 5, absent an injunction, one thousand individuals per day, on average, will lose their DACA protection. The rescission will result in hundreds of thousands of individuals losing their work authorizations and deferred action status. This would tear authorized workers from our nation's economy and would prejudice their being able to support themselves and their families, not to mention paying taxes to support our nation. Too, authorized workers will lose the benefit of their employer-provided healthcare plans and thus place a greater burden on emergency healthcare services.
>
> On provisional relief motions, district judges must also weigh the balance of hardships flowing from a grant versus denial of provisional relief. The hardship to plaintiffs need not be repeated. The only hardship raised by defendants is interference with the agency's judgment on how best to allocate its resources in keeping our homeland secure, as well as its judgment in phasing out DACA. Significantly, however, the agency's judgment here was not based on a policy change. It was based on a mistake of law. If the instant order is correct that DACA fell within the statutory and constitutional powers of the Executive Branch, then a policy supported as high up as our Chief Executive has been the victim of a colossal blunder. A preliminary injunction will set that right without imposing any policy unwanted by the Executive Branch.

The DHS secretaries' letter is at https://assets.documentcloud.org/documents/4342660/Letter-on-DACA-From-Former-Homeland-Security.pdf. USCIS' announcement about resumption of acceptance of renewal applications, which states that "dditional information will be forthcoming," is at https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction. The preliminary injunction is at https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/234_Order_Entering_Preliminary_Injunction.pdf.

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2. DHS To Terminate TPS for El Salvador in September 2019, Suggests 'Legislative Solution'

On January 8, 2018, Secretary of Homeland Security Kirstjen Nielsen announced that the temporary protected status (TPS) designation for El Salvador will be terminated on September 9, 2019. The Department of Homeland Security (DHS) said that the "substantial disruption of living conditions caused by earthquake no longer exist."

DHS said that to allow for an orderly transition for the estimated 200,000 affected people, the effective date of the termination of TPS for El Salvador will be delayed 18 months, to September 9, 2019, "to provide time for individuals with TPS to arrange for their departure or to seek an alternative lawful immigration status in the United States, if eligible."

DHS said that the 18 months "will also provide time for El Salvador to prepare for the return and reintegration of its citizens." During this time frame, DHS plans to work with the Department of State and the government of El Salvador "to help educate relevant stakeholders and facilitate an orderly transition." In addition to posting materials online, DHS components will participate in teleconferences, town halls, and roundtables "to ensure that affected populations have a full and accurate understanding of their rights and obligations," DHS said.

DHS also noted, "Only Congress can legislate a permanent solution addressing the lack of an enduring lawful immigration status of those currently protected by TPS who have lived and worked in the United States for many years. The 18-month delayed termination will allow Congress time to craft a potential legislative solution."

Salvadorans with TPS will be required to re-register for TPS and apply for employment authorization documents to legally work in the United States until the termination of El Salvador's TPS designation becomes effective September 9, 2019. DHS said that further details, including the re-registration period, will appear in a Federal Register notice. Salvadoran TPS beneficiaries should not submit re-registration applications until the re-registration period is announced through the Federal Register notice.

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3. **New I-94 Feature Reminds VWP Travelers of Number of Remaining Days**

U.S. Customs and Border Protection (CBP) recently launched two new "traveler

compliance initiatives" on January 5, 2018. A new feature added to the I-94 website, under the "View Compliance" tab, allows Visa Waiver Program (VWP) travelers to check the status of their admission to the United States. This check informs travelers of the number of days remaining in their lawful period of admission or the number of days they have remained past that period. In addition, CBP said it will now send email notifications to VWP travelers who are still in the United States 10 days before the expiration of their lawful admission period.

CBP noted that the Arrival-Departure Record (Form I-94) provides nonimmigrant visitors with evidence that they have been lawfully admitted to the United States, which is necessary to verify alien registration, immigration status, and employment authorization. To use the online system to check days remaining or overstayed, travelers enter their biographic and passport information. Days remaining and days overstayed are calculated using the authorized period of admission date designated by a CBP officer when a traveler arrived in the country.

All emails regarding traveler compliance checks will be sent from Staycompliance-donotreply@cbp.dhs.gov. CBP warned that if a notification email did not come from this address, "it may be a phishing scam or other fraudulent email.:

CBP said it encourages travelers to plan ahead to ensure a smooth and efficient processing experience. The announcement about the new feature is at https://www.cbp.gov/newsroom/national-media-release/cbp-reminds-travelers-time-remaining-us-expanded-i-94-website. Additional information on the I-94 and traveler compliance checks is at https://I94.cbp.dhs.gov.

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4. **OFLC Alerts Employers, Stakeholders Re High Volume of H-2B Temporary Labor Certification Requests**

The Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) made a "public service announcement" on January 3, 2018, to alert employers and other interested stakeholders about the high volume of applications received requesting temporary labor certification under the H-2B visa program.

On January 1, 2018, the earliest date on which an employer seeking an employment start date of April 1 may file an H-2B application requesting

temporary labor certification, OFLC received approximately 4,500 applications covering more than 81,600 worker positions. Except where a statutory exemption applies, the Department of Homeland Security (DHS) may only issue up to 33,000 H-2B visas for employers seeking to hire H-2B workers during the second half of FY 2018 (April 1 to September 30).

The OFLC said it "takes each request for temporary labor certification seriously and administers the labor certification program in a manner that protects the wages and working conditions of both H-2B and U.S. workers who support the seasonal workforce needs of U.S. small businesses, consumers, and communities." The agency said it is "working as expeditiously as possible to issue first case actions, review responses to Notices of Deficiency (NODs), and issue Notices of Acceptance where possible. First case actions are taken on a first filed basis and responses to NODs are evaluated in the order in which they are received."

The announcement is at https://www.foreignlaborcert.doleta.gov/news.cfm.

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5. **CBP Updates Directive on Border Searches of Electronic Devices**

On January 4, 2018, U.S. Customs and Border Protection issued an update to the agency's directive governing border searches of electronic devices. The new directive supersedes the previous directive released in August 2009.

John Wagner, CBP Deputy Executive Assistant Commissioner for Field Operations, noted that the updated directive "includes provisions above and beyond prevailing constitutional and legal requirements. CBP's authority for the border search of electronic devices is and will continue to be exercised judiciously, responsibly, and consistent with the public trust."

Among other things, the directive states that "s a constitutional matter, border search authority is premised in part on a reduced expectation of privacy associated with international travel." The directive states that border searches of electronic devices may include searches of the information stored on the device when it is presented for inspection or during its detention by CBP for an inbound or outbound border inspection. Officers may not intentionally use the device to access information that is solely stored remotely. An advanced search may be conducted if activity violating laws enforced by CBP, or a national security concern, is suspected. The directive includes information on handling

assertions of attorney-client privilege, attorney work product, work-related information carried by journalists, medical records, business confidential information, passwords, or other sensitive material.

CBP explained that in FY 2017, CBP conducted 30,200 border searches, both inbound and outbound, of electronic devices. Approximately 0.007 percent of arriving international travelers processed by CBP officers (more than 397 million) had their electronic devices searched (more than 29,200). In FY 2016, 0.005 percent of arriving international travelers (more than 390 million) had their electronic devices searched (more than 18,400).

CBP said its border searches of electronic devices "have resulted in evidence helpful in combating terrorist activity, child pornography, violations of export controls, intellectual property rights violations, and visa fraud."

The new directive is at https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/cbp-directive-3340-049a-border-search-electronic-media.pdf. A related announcement is at https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and.

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6. **USCIS Clarifies Proxy Vote Use for Certain Intracompany Transferee Visa Petitions**

U.S. Citizenship and Immigration Services (USCIS) issued updated policy guidance on January 3, 2018, clarifying that a proxy vote must be irrevocable to establish the requisite control of a company in an L-1 visa petition.

USCIS explained that a U.S. or foreign employer may file an L-1 visa petition to temporarily transfer a foreign employee to the United States from one of its operations outside the country. The employer must prove that a qualifying relationship exists between the foreign employer and the U.S. company when the petition is filed by showing that either the two companies are the same employer or the companies are related as a parent, subsidiary, or affiliate company.

To determine if a qualifying relationship exists, USCIS officers examine ownership and control of the entities. In some cases, a petitioner may seek to

establish control based on the use of proxy votes, USCIS noted. Proxy votes are obtained when one or more equity holders irrevocably grant the ability to vote their equity to another equity holder, thereby effectively and legally giving the other equity holder "control" over the company or companies in question.

The new policy memorandum clarifies that when proxy votes are a determining factor in establishing control, the petitioner must now show that the proxy votes are irrevocable from the time of filing through the time USCIS adjudicates the petition, along with evidence the relationship will continue during the approval period requested. Previous guidance did not address whether proxy votes must be irrevocable to establish control, USCIS said.

The agency noted that this policy update "does not change the requirement for petitioners to file an amended petition when the ownership or control of the organization changes after its original L-1 petition was approved. Amended petitions must also comply with the clarified guidance regarding irrevocable proxy votes."

The USCIS announcement, which includes a link to the updated policy guidance, is at https://www.uscis.gov/news/news-releases/uscis-clarifies-proxy-vote-use-certain-intracompany-transferee-visa-petitions.

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7. DOJ Clarifies Policy on EADs for TPS Hondurans and Nicaraguans

The Immigrant & Employee Rights Section of the Department of Justice's (DOJ) Civil Rights Division recently clarified policy with respect to employment authorization documents (EADs) based on U.S. Citizenship and Immigration Services' (USCIS) automatic extension of their validity for individuals with temporary protected status from Honduras and Nicaragua. An email to the related DOJ listserv sent January 5, 2018, stated:

> If your employee has an Employment Authorization Document (Form I-766, often referred to as an "EAD") with an original expiration date of January 5, 2018 and containing the category code "A-12" or "C-19," this EAD is automatically extended and the employee may continue to work without a new one (and without a receipt notice) through the end of the automatic extension period. TPS Honduras EADs have been automatically extended for six months, through July 4, 2018. TPS Nicaragua EADs have been

automatically extended for 60 days, through March 6, 2018.

The email notes that in addition, some EAD holders, including those with TPS who already applied to renew an EAD, may choose to show their existing EADs with a qualifying I-797C receipt notice. For both TPS Honduras and TPS Nicaragua, this combination of documents allows the employee to work through July 4, 2018 (instead of until March 6 for a TPS Nicaragua employee who chooses to show their automatically-extended EAD only), DOJ said.

For employers that have an existing employee who presented an EAD that has now been automatically extended, the employee's Form I-9 should be updated to reflect the extension:

1. **For Section 1, the employee may:**

- Draw a line through the expiration date.
- Write the new expiration date above the previous date.

  - TPS Honduras employees as well as TPS Nicaragua employees who choose to show their EAD and qualifying receipt notice should write, "July 4, 2018."

  - TPS Nicaragua employees who choose to show only their automatically-extended EAD should write, "March 6, 2018."

  - Initial and date the correction in the margin of Section 1.

2. For Section 2, employers should:

- Draw a line through the expiration date written in Section 2.
- Write the new expiration date above the previous date.

  - "July 4, 2018" for all TPS Honduras employees as well as TPS Nicaragua employees who show their EAD and qualifying receipt notice.

  - "March 6, 2018" for TPS Nicaragua employees who choose to show only their automatically extended EAD.

  - Initial and date the correction in the margin of Section 2.

The new announcement referenced additional information on when an employee can choose to show their EAD and I-797C, in a USCIS fact sheet issued last year, at

https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/Fact-Sheet-AutoExtendEAD.pdf.

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8. DOJ Settles U.S. Worker Discrimination Claims Against Colorado Agricultural Company

The Department of Justice (DOJ) recently announced that it has reached a settlement agreement with Crop Production Services Inc. (Crop Production), an agricultural company headquartered in Loveland, Colorado. The settlement resolves a lawsuit the DOJ filed against the company on September 28, 2017, alleging that the company discriminated against U.S. citizens because of a preference for foreign workers, in violation of the Immigration and Nationality Act (INA).

The Department's lawsuit alleged that in 2016, Crop Production discriminated against at least three U.S. citizens by refusing to employ them as seasonal technicians at its El Campo, Texas, location because the company preferred to employ temporary foreign workers under the H-2A visa program. According to the DOJ complaint, Crop Production imposed more burdensome requirements on U.S. citizens than it did on H-2A visa workers to discourage U.S. citizens from working at the facility. For example, the complaint alleged that although U.S. citizens had to complete a background check and a drug test before starting work, H-2A visa workers were allowed to begin working without completing them and, in some cases, never completed them. The complaint also alleged that Crop Production refused to consider a limited-English-proficient U.S. citizen for employment yet hired H-2A visa workers with limited-English proficiency. Ultimately, all of Crop Production's 15 available seasonal technician jobs in 2016 went to H-2A visa workers instead of U.S. workers.

The settlement agreement requires Crop Production to pay civil penalties of $10,500 to the United States, undergo DOJ-provided training on the antidiscrimination provision of the INA, and comply with departmental monitoring and reporting requirements. In a separate agreement with workers represented by Texas RioGrande Legal Aid, Crop Production agreed to pay $18,738.75 in lost wages to affected U.S. workers.

The settlement is part of the Division's Protecting U.S. Workers Initiative, an initiative aimed at targeting, investigating, and bringing enforcement actions

against companies that discriminate against U.S. workers in favor of foreign workers.

The settlement agreement is at https://www.justice.gov/opa/press-release/file/1018286/download.

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9. **Firm In The News**

Cyrus D. Mehta published No-Win Immigration Policy Denying H-1B Extensions to Skilled Workers From India So That They Self-Deport on January 6, 2018.