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

MID-JUNE 2018 IMMIGRATION UPDATE

Posted on June 17, 2018 by Cyrus Mehta

Lottery Has Begun for Increased H-2B Petitions – USCIS began accepting H-2B petitions under the temporary final rule increasing the numerical limit, or cap, on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of FY 2018.

Labor Dept. Adds Time Received to Receipt Date for Review of H-2B Temporary Labor Certification Applications; Related News – OFLC released information on how H-2B applications for temporary employment certification filed by employers on or after July 3, 2018, will be assigned to staff for review.

USCIS Sends Letter on B-1/B-2 Upcoming Proposed Regulation – Proposed regulatory revisions will clarify the criteria for according B-1 or B-2 nonimmigrant classification to applicants for admission to the United States.

Expect Retrogression of Mexico E-4 and SR Final Action Dates in July, State Dept. Says – There continues to be high demand in the Mexico E-4 and SR categories, which is expected to result in the Mexico E-4 per-country limit being reached during June.

132 Members of Congress Urge DHS to Continue Allowing H-4 Spouses of H-1B Nonimmigrants to Work – The letter notes that providing work authorization for accompanying spouses helps U.S. employers recruit and retain highly qualified employees.

USCIS Announces Launch of Online FOIA Request Processing System – USCIS is commencing digital delivery of this service in phases. Initially, requestors who have an immigration court date pending and file a request for documents can create an account within myUSCIS to receive documents digitally.

SAVE Goes Paperless – Benefit-granting agencies using USCIS' Systematic Alien Verification for Entitlements program, used to verify a benefit applicant's

immigration status, can no longer submit paper versions of verification requests.

Firm in the News

Lottery Has Begun for Increased H-2B Petitions

USCIS began accepting H-2B petitions on May 31, 2018, under the temporary final rule increasing the numerical limit, or cap, on H-2B nonimmigrant visas by up to 15,000 additional visas through the end of fiscal year (FY) 2018.

USCIS said that in the first five business days of filing, USCIS received petitions for more beneficiaries than the number of H-2B visas available under the FY 2018 supplemental cap. Accordingly, USCIS said it is required by regulation to use a computer-generated process, commonly known as a lottery, to randomly select the number of petitions required to meet the increased cap for FY 2018.

The lottery will include all H-2B cap-subject petitions received between May 31, 2018, and June 6, 2018. USCIS said it will reject and return all unselected petitions with their filing fees, as well as any cap-subject petitions received after June 6.

All selected petitions will be assigned the same receipt date once the lottery is completed. Premium processing service for accepted petitions will begin on that receipt date, USCIS said.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-conduct-lottery-temporary-increase-fy-2018-h-2b-cap. USCIS said it would post another Web alert once the lottery is completed.

Back to Top

Labor Dept. Adds Time Received to Receipt Date for Review of H-2B Temporary Labor Certification Applications; Related News

On June 1, 2018, the Department of Labor's Office of Foreign Labor Certification (OFLC) released information on how H-2B applications for temporary employment certification filed by employers on or after July 3, 2018, will be

assigned to staff for review. Applications filed on or after that date will be sequentially assigned to analysts based on both the calendar date and time (eastern time zone) on which the applications are received. The receipt time will be measured to the millisecond.

OFLC explained that it continues to experience significant increases in the number of H-2B applications requesting temporary labor certification. Those submissions are generally received on the earliest day employers seeking to obtain visas for their workers under the semi-annual allotments are permitted by regulation to file (i.e., 75 to 90 days before the start date of work), OFLC noted. For example, in the past several second-half semi-annual filing cycles, the overwhelming majority of H-2B applications were received on January 1, which is the earliest date on which an H-2B application may be filed for a period of need beginning on April 1. Because of the intense competition for H-2B visas in recent years, the semi-annual visa allocation, and the regulatory time frames for filing a request for temporary labor certification, stakeholders have also raised questions regarding the earliest **time** of day on which an application can be submitted to OFLC. To process the significant surge of applications that OFLC expects to receive in a short period of time during the semi-annual visa allotment periods in a more equitable manner and to clarify the time at which an application is received, OFLC will be implementing the new procedures.

The announcement, which includes examples, is at https://www.foreignlaborcert.doleta.gov/ (scroll to June 1, 2018).

In other news, the Labor Condition Application for Nonimmigrant Workers (Form ETA-9035/9035E) has been extended through June 30, 2018. OFLC said its request for a three-year extension is under review with the Office of Management and Budget (OMB), and that OFLC will continue to extend the form in one-month increments until approved by OMB.

Also, OFLC has published an attestation form (ETA Form 9142-B-CAA-2) and accompanying instructions in support of the temporary rule issued jointly on May 31, 2018, by the Departments of Homeland Security and Labor, "Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program." That rule increased the H-2B cap for FY 2018 by up to 15,000 additional visas for U.S. businesses that are likely to suffer irreparable harm (i.e., permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on their

petitions before the end of FY 2018. Affected employers must submit the new attestation to USCIS along with Form I-129 in support of an H-2B application subject to the H-2B cap before the end of FY 2018.

The attestation form is at https://www.foreignlaborcert.doleta.gov/pdf/Form_ETA-9142-B-CAA-2_05.25.18.pdf. The announcement is at https://www.foreignlaborcert.doleta.gov/ (scroll to May 31, 2018).

Back to Top

USCIS Sends Letter on B-1/B-2 Upcoming Proposed Regulation

On May 30, 2018, L. Francis Cissna, Director of U.S. Citizenship and Immigration Services (USCIS), sent a letter to Rep. Paul Mitchell (R-Mich.), who had hosted a May 16, 2018, roundtable on B-1 visa issues. The letter notes that USCIS is reviewing existing regulations, policies, and programs and developing a combination of rulemaking, policy memoranda, and operational changes to implement President Trump's "Buy American and Hire American" executive order. Among other things, the letter states:

One area of focus is the B visa program. As noted in the Spring 2018 Unified Agenda, the Department of Homeland Security (DHS) is working on a proposed regulation pertaining to nonimmigrants admitted to the United States as temporary visitors for business (B-1) or pleasure (B-2). The proposed regulatory revisions will clarify the criteria for according B-1 or B-2 nonimmigrant classification to applicants for admission to the United States. As stated in the Unified Agenda, "Such clarification is necessary to ensure fair and consistent adjudication and enforcement, as well as to make the criteria more transparent."

The letter states that this rulemaking is a "priority" and that USCIS is "taking a lead role in drafting the proposed regulation," which will include an opportunity for public comment.

The letter also references discussion of "B-1 in lieu of H" issues during the roundtable:

As explained, USCIS adjudicates applications from individuals who are already

here and wish to extend a stay in B status or change to another nonimmigrant status (that is, change either to or from B status). USCIS also adjudicates employer petitions in H nonimmigrant visa classifications. As part of the above-described regulatory process, we are, in coordination with the Department of State and other immigration components within DHS, reviewing existing policy with respect to "B-1 in lieu of H-1," as well as "B-1 in lieu of H-3."

Director Cissna's letter, copied to six Republicans and two Democrats, refers to a meeting "in the near future" with Rep. Mitchell to "discuss our efforts to improve the B visa program, as well as our other regulatory initiatives and statutory suggestions."

The letter is at https://www.uscis.gov/sites/default/files/files/nativedocuments/B-1_Visa_abuse_-_Representative_Mitchell.pdf.

Back to Top

Expect Retrogression of Mexico E-4 and SR Final Action Dates in July, State Dept. Says

The Department of State's Visa Bulletin for the month of June 2018 notes that there continues to be high demand in the Mexico employment-based fourth preference (E-4) and special religious (SR) categories, which is expected to result in the Mexico E-4 per-country limit being reached during June. This means that retrogression of the July E-4 and SR Final Action Dates for Mexico is expected, the bulletin states. "This action will allow the Department to hold worldwide number use within the maximum allowed under the FY-2018 annual limits," the bulletin notes.

The Visa Bulletin for June 2018 is at https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_June2018.pdf.

Back to Top

132 Members of Congress Urge DHS to Continue Allowing H-4 Spouses of H-1B Nonimmigrants to Work

One hundred and thirty-two members of Congress sent a letter on May 16,

2018, to Kirstjen Nielsen, Secretary of Homeland Security, urging maintenance of the current regulation granting work authorization to certain H-4 dependent spouses of H-1B nonimmigrant workers. The letter states that the opportunity for H-4 visa holders to work "has made our economy stronger, while providing relief and economic support to thousands of spouses—mostly women—who have resided in the United States for years." The letter notes that many are on the path to permanent residence and would already be permanent residents if not for decades-long employment backlogs. "Rescinding the rule will hurt the competitiveness of U.S. employers and the U.S. economy, as well as H-4 accompanying spouses and their families," the letter states.

The letter notes that providing work authorization for accompanying spouses helps U.S. employers recruit and retain highly qualified employees, "putting U.S. policy on par with other countries—such as Canada and Australia—competing to attract foreign nationals." The letter notes additional reasons for allowing H-4 spouses to continue to work in the United States.

U.S. Citizenship and Immigration Services Director L. Francis Cissna responded on May 24, 2018, on Secretary Nielsen's behalf. He stated that the Department of Homeland Security is committed to growing the U.S. economy and creating jobs for U.S. workers, and that the public will be given the opportunity to provide feedback during a notice-and-comment period "on any revisions to regulations that DHS determines appropriate, including revisions relating to the rule providing employment authorization to certain H-4 nonimmigrants."

The letter and Director Cissna's response are at https://www.uscis.gov/sites/default/files/files/nativedocuments/H-4_dependents_of_H-1B_Visa_holders_-_Representative_Jayapal.pdf.

Back to Top

USCIS Announces Launch of Online FOIA Request Processing System

U.S. Citizenship and Immigration Services (USCIS) recently announced the launch of its "Freedom of Information Act (FOIA) Immigration Records SysTem (FIRST)," which the agency said "will eventually allow users to submit, manage, and receive FOIA requests entirely online." Before this change, USCIS only accepted FOIA requests by mail, fax, and email, and requestors typically

received their documents on a CD by mail.

USCIS is rolling out FIRST's digital delivery of services in phases. Initially, requestors who have an immigration court date pending and file a request for documents can create an account within myUSCIS to receive documents digitally. Through their accounts, requestors can track the status of their FOIA cases and will receive an email notification when USCIS has uploaded their records. In the coming months, USCIS said, this digital delivery option will be expanded to all FOIA and Privacy Act (PA) requestors. When FIRST is fully operational, requestors will be able to use a completely digital FOIA/PA system, from online submission to retrieving and downloading responsive documents. USCIS will notify the public as additional services become available.

USCIS said that FIRST is part of the agency's "ongoing effort to move the nation's legal immigration system away from paper-based services to digital transactions."

The announcement is at https://www.uscis.gov/news/uscis-implement-online-processing-foia-requests.

Back to Top

SAVE Goes Paperless

As of June 1, 2018, benefit-granting agencies using U.S. Citizenship and Immigration Services' (USCIS) Systematic Alien Verification for Entitlements (SAVE) program, used to verify a benefit applicant's immigration status, can no longer submit paper versions of Form G-845, Verification Request. Previously, agencies submitted paper forms to request immigration status verification and for additional verification requests. Now all agencies must submit their requests and institute additional verification electronically, which USCIS said would "drastically" reduce case processing time.

"Without the use of paper during the verification process, SAVE will improve its efficiencies by reducing mailroom workloads and the time spent receiving and reviewing paper documents," said Tammy Meckley, associate director of the Immigration Records and Identity Services Directorate (IRIS) at USCIS. "As a result, we will see a faster resolution of cases for both the requesting agency and the intended benefit recipient."

The SAVE paperless initiative is part of a larger effort by USCIS to eliminate paper-based forms, as the agency transitions to online submission of benefit requests. The agency said the SAVE Paperless Initiative "will eliminate 170,000 paper form submissions and returned responses annually, reducing resource costs and postal fees. Additionally, the transition to a paperless environment will reduce case completion time from 20 days to less than five days."

The USCIS announcement is at https://www.uscis.gov/news/save-goes-completely-paperless.

Back to Top

Think Tank Report Notes 150-year Wait for Indian Immigrants With Advanced Degrees

A new blog entry by the Cato Institute notes that as of April 20, 2018, U.S. Citizenship and Immigration Services (USCIS) reported that there were 632,219 Indian immigrants and their spouses and minor children waiting for green cards (U.S. permanent residence). The shortest wait is for the highest skilled category for EB-1 immigrants with "extraordinary ability." The blog states that extraordinary immigrants from India will have to wait "only" six years. EB-3 immigrants—those with bachelor's degrees—will have to wait about 17 years. The biggest backlog, the blog notes, is for EB-2 workers who have advanced degrees. At current rates of visa issuances, the blog estimates that they will have to wait 151 years for a green card. "Obviously, unless the law changes, they will have died or left by that point," the blog notes. It is available at https://www.cato.org/blog/150-year-wait-indian-immigrants-advanced-degrees. The USCIS report referred to in the blog is at https://bit.ly/2LEALzt

Firm In The News

Cyrus Mehta (bio: http://www.abil.com/lawyers/lawyers-mehta.cfm) received the 2018 Edith Lowenstein Memorial Award from the American Immigration Lawyers Association (AILA) for excellence in advancing the practice of immigration law. He received the award during AILA's Annual Conference in San Francisco, California. For more information, see https://bit.ly/2HRrFgH.

Mr. Mehta was quoted in "USCIS Change Could Bar Many International Students," published by *Forbes*. "There has always been a strict distinction

between violating status and being unlawfully present in the United States. One can be in violation of status without being unlawfully present. Even if an F, J and M student dropped out of school or engaged in unauthorized work, he or she would be considered to have been in violation of status but not accruing unlawful presence. This is because an F, M and J nonimmigrant is usually admitted for a Duration of Status (D/S) rather than up to a certain date." The article is at https://bit.ly/2LAI9vR.

Mr. Mehta authored a new blog entry. "Can the Beneficiary Pay the Fee in Federal Court Litigation Challenging an H-1B Visa or Labor Certification Denial?" is at https://bit.ly/2JU8Mi6.