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

MID-AUGUST 2018 IMMIGRATION UPDATE

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Headlines:

Controversial DHS Draft Rule Proposes Changes to Public Charge Definition – A controversial Department of Homeland Security (DHS) draft rule leaked to the media would make more immigrants inadmissible or deportable for receiving public benefits.

EB-1 Green Cards Backlogged Worldwide – The worldwide backlog for EB-1 visas is expected to continue through at least October and potentially into 2019.

USCIS Revises Final Guidance on Unlawful Presence for Students and Exchange Visitors – Under the revised memo, effective August 9, 2018, F and M nonimmigrants who fall out of status and file within five months for reinstatement of that status will have their accrual of unlawful presence suspended while their application is pending.

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Controversial DHS Draft Rule Proposes Changes to Public Charge Definition

A controversial Department of Homeland Security (DHS) draft proposed rule leaked to the media would make it more difficult for legal immigrants who have received public benefits to become U.S. citizens or permanent residents. Immigrants and their immediate family members, including U.S. citizen children, would be included. Currently, immigrants who are likely to become a

burden on the government can already be excluded, but the draft rule would expand the definition of impermissible public benefits to include programs like certain Affordable Care Act subsidies, SNAP (formerly Food Stamps), subsidized benefits under Medicaid, and the Children's Health Insurance Program.

Also included in the draft rule is a proposal to amend the extension of stay and change of status regulations to allow U.S. Citizenship and Immigration Services (USCIS) to consider whether an applicant is using or receiving, or likely to use or receive, public benefits. If implemented, the rule could affect an estimated 20 million immigrants.

The draft rule states that one of the principal problems with the current definition of public charge is that it tests whether the noncitizen is "primarily dependent on the government." "Primary dependence entails a finding that an applicant for admission or adjustment of status is 50 percent or more dependent on the government. DHS does not believe that an alien must be 50 percent or more dependent on the government to be considered a public charge," the draft rule notes. DHS is also proposing to define "public "benefit as "any government assistance in the form of cash, checks or other forms of money transfers, or instruments and non-cash government assistance in the form of aid, services, or other relief, that is means-tested or intended to help the individual meet basic living requirements such as housing, food, utilities, or medical care. This includes certain non-cash as well as cash public assistance."

The draft rule also proposes to codify the "totality of the circumstances" standard used in making public charge determinations. DHS's proposed standard would involve weighing all the positive and negative considerations related to a person's "age, health, family status, assets and resources, financial status, education and skills, any required affidavit of support, and any other factor or circumstance that may warrant consideration in the determination." DHS would also consider the noncitizen's immigration status as part of this determination. The draft rule proposes that certain factors and circumstances would carry heavy weight. Otherwise, the weight given to an individual factor would depend on the particular facts and circumstances of each case and the relationship of the factor to other factors in the analysis. "For negative factors, some facts and circumstances may be mitigating while other facts and circumstances may be aggravating. Any factor or circumstance that decreases the likelihood of an applicant becoming dependent on public benefits is mitigating. Similarly, any factor or circumstance that increases the likelihood of

an applicant becoming dependent on public benefits is aggravating," the draft rule states.

The draft rule also would propose that USCIS consider a past request or receipt of a fee waiver as part of the financial status factor: "Requesting or receiving a fee waiver for an immigration benefit suggests a weak financial status. In general, a fee waiver is granted based on an alien's inability to pay the fee. An inability to pay a fee for an immigration benefit suggests an inability to be self-sufficient," the draft rule states.

The draft rule notes that some immigrant and nonimmigrant immigrant categories are exempt from public charge inadmissibility. According to the draft, DHS plans to propose listing these categories in the regulation. In addition, DHS proposes to list in the regulation the applicants whom the law allows to apply for a waiver of the public charge inadmissibility ground. DHS also proposes to exclude certain public benefits, such as public education, from consideration for purposes of this draft rule.

"Heavily weighted negative factors" under the draft rule would include a lack of employability; receipt or use of one or more public benefits; medical condition(s) without non-subsidized health insurance; a previous finding of inadmissibility or deportability based on public charge. Heavily weighted positive factors include significant income, assets, and resources. "DHS proposes to consider it a heavily weighted positive factor if the alien has financial assets, resources, support, or annual income of at least 250 percent of the ." Benefits excluded from consideration would include Federal Old-Age, Survivors, and Disability Insurance benefits; veterans' benefits; government pension benefits, government employee health insurance; government employee transportation benefits; unemployment and worker's compensation; Medicare benefits ("unless the premiums are partially or fully paid by a government agency); state disability insurance; in-state college tuition; government student loans; and small amounts of public benefits as defined in the draft rule.

The draft rule lists several categories of noncitizens who are exempt from admissibility based on public charge considerations, including refugees and asylees; Amerasian immigrants; Afghan and Iraqi Special Immigrants serving as translators with the U.S. Armed Forces; those applying for adjustment of status under the Cuban Adjustment Act; those adjusting status under certain sections

of the Nicaraguan Adjustment and Central American Relief Act; and Haitians adjusting status under the Haitian Refugee Immigration Fairness Act.

The categories and programs could change under any final rule. Any changes would come out first as a proposed rule with time for comments, and it could be a year or longer before any new rule is finalized. Moreover, any final rule could be subject to litigation.

The Alliance of Business Immigration Lawyers recommends that immigrants comply with current rules in the meantime. For example, it appears that California residents are required to sign up for the Affordable Care Act. Even if that were to change under a final rule, they should comply with today's rules.

The draft rule, which has not yet been published in the Federal Register, is available at https://assets.documentcloud.org/documents/4413837/Read-the-Trump-administration-s-draft-proposal.pdf.

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EB-1 Green Cards Backlogged Worldwide

The Department of State (DOS) announced recently that the worldwide limits on the highest-preference green cards, EB-1s, was reached for the fiscal year.

The worldwide backlog for EB-1 visas is expected to continue through at least October and potentially into 2019. While the EB-1 backlog for Indian and Chinese nationals was already expected to last well beyond October, earlier comments from the DOS Visa Control and Reporting Division suggested that the EB-1 worldwide backlog was likely to clear in October with the arrival of the new fiscal year. However, USCIS is now creating demand for visas by prioritizing EB-1 green cards for in-person interviews, and the backlog is not expected to clear for several months.

The final action date for EB-1 worldwide (except for India and China) is expected to be cut off at or before September 30, 2018, and stay there through at least December. The final action date indicates the priority date at which *new* applications for permanent resident status will no longer be accepted and at which existing applications will cease to move forward through processing.

An October 2018 final action date would give petitioners who file their I-140s between now and the end of September an advantage—provided they are not

Indian or Chinese nationals—because they would be able to proceed with filing their applications for permanent resident status if EB-1 does indeed move forward in the new fiscal year.

A number of factors appear to be influencing this ongoing backlog, including the requirement that all employment-based green card applicants must undergo a personal interview at the nearest USCIS District Office. As applicants queue up for interviews with no certain outcome, it muddies the waters by which the DOS judges visa availability for its monthly assessment.

The Visa Bulletin for September notes:

WORLDWIDE, EL SALVADOR, GUATEMALA, HONDURAS, MEXICO, AND PHILIPPINES EMPLOYMENT-BASED SECOND (E2), Third (E3), and Third Other Worker (EW) PREFERENCES: As readers were advised in item F of the July Visa Bulletin, there has been an extremely high rate of demand for Employment numbers, primarily for USCIS adjustment of status applicants as a result of the successful implementation of their new interview process. Therefore, pursuant to the Immigration and Nationality Act, it has been necessary to impose E2, E3, and EW Final Action Dates for the month of September with these dates being imposed immediately for new requests for visa numbers. This action will allow the Department to hold worldwide number use within the maximum allowed under the FY-2018 annual limits.

The implementation of the above mentioned dates will only be temporary and in October, the first month of fiscal year 2019, the final action dates will be returned to those established for August.

Readers were also advised in item F of the July Visa Bulletin that some retrogression might occur prior to the end of the fiscal year. It has been necessary to retrogress the September Final Action Dates for the China Employment-based Second, and India Employment Second, Third, and Third Other Worker preferences in an effort to hold worldwide number use within the maximum allowed under their FY-2018 annual limits. This will only be temporary and in October, the first month of fiscal year 2019, the final action dates will be returned to those established for August.

The Visa Bulletin also provides the following information on potential monthly movement in the employment-based categories for the next few months:

Employment First:

WORLDWIDE (all countries): October Final Action Dates will be imposed for all countries. Limited, if any forward movement can be expected prior to December.

Employment Second:

Worldwide: Current for the foreseeable future.

China: Slow movement pending receipt of demand from recent advances

India: Up to two weeks

Employment Third:

Worldwide: Current

China: Up to three weeks

India: Slow movement pending receipt of demand from recent advances

Mexico: Current

Philippines: Minimal

Employment Fourth: Current for most countries

El Salvador, Guatemala, and Honduras: Little, if any forward movement

Mexico: Up to three months

Employment Fifth: The category will remain "Current" for most countries

China-mainland born: Up to one week

Vietnam: Steady forward movement

The above final action date projections...indicate what is likely to happen on a monthly basis through January. The determination of the actual monthly final action dates is subject to fluctuations in applicant demand and a number of other variables.

The September 2018 Visa Bulletin is at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-september-2018.html.

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USCIS Revises Final Guidance on Unlawful Presence for Students and Exchange Visitors

U.S. Citizenship and Immigration Services (USCIS) has published a revised final policy memorandum related to unlawful presence after considering feedback received during a 30-day public comment period. Under the revised memo, effective August 9, 2018, F and M nonimmigrants who fall out of status and file within five months for reinstatement of that status will have their accrual of unlawful presence suspended while their application is pending, USCIS said.

On May 10, 2018, USCIS posted a draft policy memorandum changing the way the agency calculates unlawful presence for those who were in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status. The revised memo supersedes that memorandum and describes the rules for counting unlawful presence for F and M nonimmigrants with timely filed or approved reinstatement applications, as well as for J nonimmigrants who were reinstated by the Department of State.

"As a result of public engagement and stakeholder feedback, USCIS has adjusted the unlawful presence policy to address a concern raised in the public's comments, ultimately improving how we implement the unlawful presence ground of inadmissibility as a whole and reducing the number of overstays in these visa categories," said Director L. Francis Cissna. "USCIS remains dedicated to protecting the integrity of our nation’s immigration system and ensuring the faithful execution of our laws. People who overstay or violate the terms of their visas should not remain in the United States. Foreign students who are no longer properly enrolled in school are violating the terms of their student visa and should be held accountable."

USCIS noted that on August 7, 2018, the Department of Homeland Security released the FY 2017 Entry/Exit Overstay Report. The estimated total overstay rates were lower in FY 2017 for F and J nonimmigrants, but the F, M, and J categories continue to have significantly higher overstay rates than other nonimmigrant visa categories, USCIS noted, "supporting the need to address the calculation of unlawful presence for this population." For purposes of counting unlawful presence, a timely reinstatement application for F or M status is one where the student "has not been out of status for more than five months at the time of filing," USCIS said. Under the revised memo, the accrual of unlawful presence "is suspended when the F or M nonimmigrant files a

reinstatement application within the five month window and while the application is pending with USCIS."

USCIS noted that "if the reinstatement application is denied, the accrual of unlawful presence resumes on the day after the denial. It is incumbent on the nonimmigrant to voluntarily leave the United States to avoid accruing more unlawful presence that could result in later inadmissibility under section 212(a)(9) of the Immigration and Nationality Act." Whether or not the application for reinstatement is timely filed, USCIS said, an F, J, or M nonimmigrant "whose application for reinstatement is ultimately approved will generally not accrue unlawful presence while out of status."

USCIS also noted that the Department of State (DOS) administers the J-1 exchange visitor program, to include reinstatement requests. If DOS approves the reinstatement application of a J nonimmigrant, "the individual will generally not accrue unlawful presence from the time the J nonimmigrant fell out of status from the time he or she was reinstated," USCIS said.

Some immigration attorneys believe the revision to the policy is insufficient, especially for those students who may have violated their status earlier. Other potential stumbling blocks may include errors by USCIS or an educational entity entering information into the SEVIS system inaccurately, or students in optional practical training who may be found to have violated status if their training is later found inconsistent with their degrees or who worked at third-party sites that inadequately supervised them.

USCIS plans to hold a national stakeholder engagement regarding this policy memo on August 23, 2018. To receive an invitation to this engagement, submit your email address at https://public.govdelivery.com/accounts/USDHSCISINVITE/subscriber/new?preferences=true.

The USCIS announcement is at https://www.uscis.gov/news/uscis-issues-revised-final-guidance-unlawful-presence-students-and-exchange-visitors. The revised memo is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf. Additional information on the revised memo is also available at https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibilit

y.

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Cyrus Mehta was quoted extensively by the *Times of India* in "Tough Policy for International Students in U.S." The article is at https://m.timesofindia.com/india/tough-policy-for-international-students-in-us/amp_articleshow/65360658.cms.

Mr. Mehta has authored a new blog entry. "USCIS Finalizes Unlawful Presence Policy Putting F, J and M Nonimmigrants in Great Jeopardy" is at https://bit.ly/2PbVxJA.

Sophia Genovese has authored a new blog entry. "Indirect Refoulement: Why the U.S. Cannot Create a Safe Third Country Agreement with Mexico" is at https://bit.ly/2P7QJou.

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