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

OCTOBER 2018 IMMIGRATION UPDATE

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Headlines:

DHS Announces Controversial Proposed Rule on Changes to Public Charge Definition – DHS has announced that it will soon publish a controversial proposed rule that would make it much more difficult for many who have lower incomes or less education, or who have received public benefits, to become permanent residents.

USCIS Proposes Change in Fee Waiver Evidence – USCIS would reduce the evidence required for the I-912 to only a person's household income. The agency would no longer require proof of whether an individual receives a means-tested benefit.

USCIS Is Conducting Site Visits to H-2B Employers – According to reports, USCIS is conducting site visits to H-2B employers nationwide in a variety of industry sectors.

State Dept. Opens Registration for Diversity Visa Program for 2020 – The online registration period for the DV-2020 diversity visa lottery program begins in early October.

President Signs Temporary Funding Bill Extending Four Immigration Provisions Until December 7 – The E-Verify, Conrad State 30 J-1 waiver program for certain foreign physicians, EB-5 regional center and special immigrant non-minister religious worker programs have been extended past the September 30 deadline by late-breaking legislation.

USCIS, OFLC Note Relief Available to Hurricane/Typhoon Survivors – USCIS and OFLC recently released information about immigration services and relief that may help people affected by emergency situations, including severe storms such as Hurricane Florence and Typhoon Mangkhut.

Justice Dept. Announces Settlement in H-2B Discrimination Case – The DOJ investigation determined that a company failed to consider applications from qualified U.S. workers for its housekeeper positions.

USCIS Revises G-28 Notice of Entry of Appearance –USCIS has published a revised version of Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with an edition date of 09/17/18, and has extended the grace period for prior versions.

Global: Spain – Spain has implemented a European Union directive on research and student permits.

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DHS Announces Controversial Proposed Rule on Changes to Public Charge Definition

The Department of Homeland Security (DHS) has announced that it will soon publish a controversial proposed rule that would make it much more difficult for many who have lower incomes or less education, or who have received public benefits, to become permanent residents, obtain visas, or extend or change/adjust their nonimmigrant visa status. Reportedly, rumors of the impending rule have already resulted in some immigrants in the United States dropping out of social services for fear of potential complications to their efforts to stay in the country.

Currently, those who are likely to become a burden on the government can already be excluded if they accept certain cash benefits. The proposed rule would greatly expand the definition of public benefits to be considered when public charge determinations are made. DHS explained that the public benefits proposed to be designated in this rule include federal, state, local, or tribal cash assistance for income maintenance, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Medicaid (with limited exceptions for Medicaid benefits paid for an "emergency medical condition," and for certain disability services related to education), Medicare Part D Low Income Subsidy, the Supplemental Nutrition Assistance Program (SNAP, or food stamps), institutionalization for long-term care at government expense, Section 8 Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance,

and public housing. The first three benefits listed above are cash benefits that are already covered under current policy, DHS said.

There are some exclusions. DHS noted that by statute, asylees, refugees, and other categories of vulnerable individuals are not subject to the public charge ground of inadmissibility. When considering receipt of public benefits in the public charge inadmissibility determination, DHS would also not consider any public benefits received by those serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or the spouse or child of the service member. Additionally, DHS would not consider disaster relief, emergency medical assistance, benefits received by a person's U.S. citizen children, or Medicaid benefits received by children of U.S. citizens and potential adoptive children of U.S. citizens.

Among other things, the proposed rule would also require an immigrant to earn at least 125 percent of the federal poverty guidelines, and states that a household income of 250 percent of that level would be deemed "heavily positive." Heavily weighted positive factors would include "significant income, assets, and resources." Income and financial status would be considered as part of the "totality of the circumstances." Some deemed inadmissible on public charge grounds might be allowed to pay for a public charge bond at the risk of losing it if they use any of the listed benefits. Negative considerations would include limited English proficiency and adverse physical or mental health conditions.

The proposed rule would also 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. The proposed rule would impose new costs on people applying to get green cards using Form
I-485 who are subject to the public charge grounds of inadmissibility. DHS would require any adjustment applicants subject to the public charge inadmissibility ground to submit new Form
I-944 with their Form I-485 to demonstrate they are not likely to become a public charge.

The proposed rule would also impose additional costs for seeking extension of stay or change of status by filing Form I-129 (Petition for a Nonimmigrant Worker), Form I-129CW (Petition for a CNMI-Only Nonimmigrant Transitional Worker), or Form I-539 (Application to Extend/Change Nonimmigrant Status), as

applicable. These applicants would have to demonstrate that they have not received, are not currently receiving, and are not likely in the future to receive, public benefits as described. DHS noted that these applicants may also incur additional costs if the agency determines that they must submit Form I-944 in support of their applications for extension of stay or change of status. Moreover, the proposed rule would impose new costs associated with the proposed public charge bond process, including new costs for completing and filing Form I-945 (Public Charge Bond) and Form I-356 (Request for Cancellation of Public Charge Bond).

In addition to the effects on individuals, DHS said it recognizes that anticipated reductions in federal and state transfers under federal benefit programs as a result of the proposed rule may have "downstream and upstream impacts on state and local economies, large and small businesses, and individuals." For example, DHS explained, the rule might result in reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.

Current or past applications for or receipt of public benefits as defined "suggests that the alien's overall financial status is so weak that he or she is or was unable to fully support him or herself without government assistance, i.e., that the alien will receive such benefits in the future. DHS, therefore, proposes to consider any current and past receipt of certain public benefits "as a negative factor in the totality of the circumstances, because it is indicative of a weak financial status and increases the likelihood that the alien will become a public charge in the future." DHS proposes that past receipt of a fee waiver be considered as part of the financial status factor. "Requesting or receiving a fee waiver for an immigration benefit suggests a weak financial status. Since fee waivers are based on an inability to pay, a fee waiver for an immigration benefit suggests an inability to be self-sufficient," DHS said.

DHS also said that an applicant's education and skills "are mandatory statutory factors that must be considered when determining whether an alien is likely to become a public charge in the future." In general, DHS said, someone with educational credentials and skills "is more employable and less likely to

become a public charge." DHS, therefore, proposes that when considering this factor, the agency would consider "whether the alien has adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment," to include consideration of the applicant's history of employment, English proficiency, licenses, certifications, and academic degrees.

Another proposed "heavily weighed negative factor" would be a lack of "private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work." A person may provide evidence of the prospect of obtaining health insurance, such as pending employment that provides employer-sponsored health insurance, DHS said. With respect to a person's general state of health, DHS said the agency "would rely on panel physician and civil surgeon medical examination for purposes of whether an individual's circumstances rise to this heavily weighted negative factor." Age would also be considered, with an age of less than 18 or greater than 61 requiring a demonstration of employment or sufficient household assets and resources.

The categories and programs could change under the final rule, which could take many months up to a year or longer before it is finalized. Among other things, the Trump administration will need to review potentially thousands of comments before it can finalize the rule. Moreover, the rule is likely to be subject to litigation.

DHS said the proposed rule will be published in the Federal Register "in the coming weeks." Once it is published, a comment period will last 60 days. A DHS press release announcing the proposed rule is at https://www.dhs.gov/news/2018/09/22/dhs-announces-new-proposed-immigration-rule-enforce-long-standing-law-promotes-self. A copy of the proposed rule marked "unofficial" and provided by DHS is at https://www.dhs.gov/sites/default/files/publications/18_0921_USCIS_Proposed-Rule-Public-Charge.pdf.

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USCIS Proposes Change in Fee Waiver Evidence

U.S. Citizenship and Immigration Services (USCIS) has proposed revising evidence requirements for Form I-912, Request for Fee Waiver. Specifically, USCIS would reduce the evidence required for the I-912 to only a person's household income and no longer require proof of whether an individual receives a means-tested benefit.

USCIS explained that its policy since 2011 has been to permit a fee waiver where an applicant received a means-tested benefit, even for a short period of time. USCIS said it has found that the various income levels used in states to grant means-tested benefits "result in inconsistent income levels being used to determine eligibility for a fee waiver." Therefore, the revised form "will not permit a fee waiver based on receipt of a means-tested benefit, but will retain the poverty-guideline threshold and financial hardship criteria."

USCIS said that if it decides to proceed with the form revision after considering public comments, it will rescind Policy Memorandum PM-602-0011.1, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11-26 (Mar. 13, 2011) and issue new guidance on the documentation acceptable for individuals to present to demonstrate that they are unable to pay a fee when requesting a fee waiver. The applications and petitions that are eligible for a fee waiver will not be changed by this form and policy change, USCIS said.

USCIS will accept comments on this proposed change until November 27, 2018. Instructions on how to send comments are at https://www.govinfo.gov/content/pkg/FR-2018-09-28/html/2018-21101.htm.

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USCIS Is Conducting Site Visits to H-2B Employers

According to reports, U.S. Citizenship and Immigration Services (USCIS) is conducting site visits to H-2B employers nationwide in a variety of industry sectors. A site inspector may ask to review documentation and interview staff and the H-2B worker. There may be follow-up contacts and the agency will document the findings in a Compliance Review Report and determine whether further investigation is warranted.

Among the questions being asked of employers are the H-2B workers' job titles, dates of beginning and ending of employment, daily job duties, physical locations where the work is performed, the onsite point of contact for the workers at the worksite, how the workers are monitored to determine whether they are appearing for work as required, whether any of the workers failed to complete the full employment period and, if so, whether the employer reported this failure to USCIS (including documentary evidence such as copies of emails or mailed letters), whether the employer offers housing to H-2B workers and if so, where, what type, and at what cost, and whether the employer offers transportation to and from the worksite.

General information on site visits (which does not mention H-2B workers specifically) is at https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program.

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State Dept. Opens Registration for Diversity Visa Program for 2020

The Department of State has announced that the online registration period for the DV-2020 diversity visa lottery program begins on Wednesday, October 3, 2018, at 12 noon EDT (GMT-4), and concludes on Tuesday, November 6, 2018, at 12 noon EST (GMT-5). Individuals who submit more than one entry during the registration period will be disqualified. The Department advises applicants not to wait until the last week of the registration period to enter because heavy demand may result in website delays. No late entries or paper entries will be accepted.

There are no changes concerning eligible countries from the previous fiscal year. For DV-2020, natives of the following countries are not eligible to apply, because more than 50,000 natives of these countries immigrated to the United States in the previous five years: Bangladesh, Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Nigeria, Pakistan, Peru, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

There are two other ways in which those who were not born in an eligible country might be able to qualify, the Department said:

- Was your spouse born in a country whose natives are eligible? If yes, you can claim your spouse's country of birth—provided that both you and your spouse are named on the selected entry, are found eligible and issued diversity visas, and enter the United States simultaneously.
- Were you born in a country whose natives are ineligible, but in which neither of your parents was born or legally resident at the time of your birth? If yes, you may claim the country of birth of one of your parents if it is a country whose natives are eligible for the DV-2020 program.

Instructions on the DV-2020 program and additional details on eligibility, including education/work experience requirements, are at https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-instructions.html. An English-language version of the instructions in PDF format is at https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf. The related Federal Register notice is at https://www.gpo.gov/fdsys/pkg/FR-2018-09-25/pdf/2018-20796.pdf.

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President Signs Temporary Funding Bill Extending Four Immigration Provisions Until December 7

The E-Verify, Conrad State 30 J-1 waiver program for certain foreign physicians, EB-5 regional center, and special immigrant non-minister religious worker programs have been extended past the September 30 deadline by late-breaking legislation. President Donald Trump signed a combined "minibus" appropriations bill and continuing resolution on September 28, 2018, to continue funding these and other programs until December 7, 2018.

More information on the legislation is at https://www.congress.gov/bill/115th-congress/house-bill/6157/text. The Visa Bulletin for October 2018 is at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-october-2018.html.

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USCIS, OFLC Note Relief Available to Hurricane/Typhoon Survivors

U.S. Citizenship and Immigration Services (USCIS) and the Office of Foreign Labor Certification (OFLC) of the Department of Labor's Employment and Training Administration recently released information about immigration services and relief that may help people affected by emergency situations, including severe storms such as Hurricane Florence and Typhoon Mangkhut.

USCIS. The following USCIS services may be available on a discretionary basis upon request for individuals who have been directly affected by Hurricane Florence or Typhoon Mangkhut, USCIS said:

- Changing nonimmigrant status or extending nonimmigrant stay for an individual currently in the United States. If a person does not apply for the extension or change before his or her authorized period of admission expires, USCIS may excuse the delay if it was due to extraordinary circumstances beyond the applicant's control;
- Re-parole for those to whom USCIS previously granted parole;
- Expedited processing of advance parole requests;
- Expedited adjudication of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship;
- Expedited adjudication of employment authorization applications, where appropriate;
- Consideration of fee waivers due to an inability to pay;
- Extension of response time or acceptance of a late response to a Request for Evidence or a Notice of Intent to Deny;
- Rescheduling an interview with USCIS;
- Expedited replacement of lost or damaged immigration or travel documents issued by USCIS, such as a Permanent Resident Card (Green Card); and
- Rescheduling a biometrics appointment.

USCIS said that when making such a request, the applicant should explain how Hurricane Florence or Typhoon Mangkhut is related to the need for the requested relief.

OFLC. Hurricane Florence generated significant damage to businesses in South Carolina, North Carolina, Virginia, and other states, OFLC noted. The agency accordingly established internal procedures that recognize, as a result of the storm, that employers and/or their representative(s) may not be able to timely

respond to a request for information or documentation, such as an audit. OFLC said it "will extend the time to respond for employers affected by the storm." Extensions will be granted "for issues that arise from storm-related conditions, including delays caused as a result of the storm, as well as those delays that may have occurred as a result of storm preparations in the week before the storm," OFLC said.

The OFLC announcement discusses the effects of the storm on mail delivery, email delivery, advising OFLC of new mailing addresses and contact information, and applicability of due date deadline extensions.

For applications in the H-2A, H-2B, and PERM programs, and requests for prevailing wages, where either the employer or its attorney or agent is located in a Hurricane Florence major disaster area (the counties and parishes that have been or are later designated by the Federal Emergency Management Agency as disaster areas eligible for individual or public assistance), OFLC said it is postponing certain regulatory and procedural deadlines. Specifically, OFLC "is extending deadlines for employer responses to Atlanta National Processing Center (ANPC), Chicago National Processing Center (CNPC), and National Prevailing Wage Center issued audit requests, requests for additional information, requests for reconsideration, and similar requests that have deadlines," OFLC said. Extensions of time to appeal either (1) agency denials of labor certifications, debarments, revocations, or other agency actions related to the labor certification to the Office of Administrative Law Judges, or (2) adverse final agency actions on such matters to a federal court, must be made in each case to the presiding authority, the agency said.

The USCIS announcement is at https://bit.ly/2plPy9b. The OFLC announcement, which includes additional information, is at https://www.foreignlaborcert.doleta.gov/pdf/Guidance_for_Hurricane_Florence.pdf.

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Justice Dept. Announces Settlement in H-2B Discrimination Case

The Department of Justice (DOJ) reached a settlement agreement on September 18, 2018, with Palmetto Beach Hospitality LLC (Palmetto), a company that provides housekeeping services to hotels in the Myrtle Beach, South Carolina, area. The agreement resolves the Department's investigation

into whether Palmetto unlawfully denied employment to qualified and available U.S. workers because it preferred to hire temporary foreign workers on H-2B visas.

DOJ said it is the fourth settlement under the Civil Rights Division's "Protecting U.S. Workers Initiative," which is aimed at targeting, investigating, and taking enforcement actions against companies that discriminate against U.S. workers in favor of temporary visa workers.

The DOJ investigation determined that Palmetto failed to consider applications from qualified U.S. workers for its housekeeper positions, even though employers must recruit and hire available and qualified U.S. workers before they receive permission to hire temporary foreign workers under the H-2B visa program. After ignoring applications from U.S. workers, Palmetto represented to the Department of Labor (DOL) that it could not find qualified U.S. workers and obtained authorization to employ temporary visa workers, DOJ said.

Under the settlement, Palmetto must engage in several types of enhanced recruiting and job advertising efforts to attract qualified U.S. workers, far beyond those required by the H-2B visa rules. Palmetto also must set aside $35,000 to pay any wages lost by U.S. workers whose applications it improperly rejected or ignored and pay $42,000 in civil penalties to the United States. Palmetto also is subject to DOJ monitoring.

Under the initiative, DOJ's Civil Rights Division has opened dozens of investigations, filed one lawsuit, and reached settlement agreements with four employers. Since the initiative's inception, employers have agreed to pay or have distributed over $320,000 in back pay to affected U.S. workers. The Division has also increased its collaboration with other federal agencies, including a new formalized partnership with DOL to combat discrimination and abuse by employers using foreign workers.

The DOJ announcement is at https://www.justice.gov/opa/pr/justice-department-announces-fourth-settlement-protecting-us-workers-discrimination. The Palmetto settlement agreement is at https://www.justice.gov/opa/press-release/file/1094886/download. Information on the formalized partnership between DOJ and DOL is at https://www.justice.gov/opa/pr/departments-justice-and-labor-formalize-new-partnership-protect-us-workers-discrimination-a-0.

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USCIS Revises G-28 Notice of Entry of Appearance

U.S. Citizenship and Immigration Services (USCIS) has published a revised version of Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with an edition date of 09/17/18. This revised version removes the geographic requirement for sending an original notice to a U.S. address for attorneys and representatives that had been added to the 05/05/16 and 05/23/18 versions of the form.

USCIS is also extending the grace period for prior versions of Form G-28. The 05/05/16 and 03/04/15 versions of the form are valid until November 19, 2018. Starting on that date, USCIS will only accept Forms G-28 with the edition dates of 09/17/18 or 05/23/18. The edition date appears at the bottom of the page on the form and instructions.

The USCIS notice is at https://www.uscis.gov/news/alerts/uscis-publishes-revised-form-g-28-and-extends-grace-period-prior-versions.

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Global: Spain

Spain has implemented an EU directive on research and student permits.

Spain has finally implemented, or "transposed," European Union (EU) Directive 2016/801/EC through the Royal Decree-Law 11/2018, effective September 4, 2018. The Directive's goal is to continue to attract talented and skilled people to the EU.

The transposition introduces into the Spanish legal framework the regulation of an EU research permit granting the right to intra-EU mobility, with validity for 12 months to enable researchers to seek employment once the research permit has expired.

Regarding students, the transposition introduces a permit valid for 12 months for students to seek employment once their student permits have expired, the possibility of their obtaining student permits through an in-country process (skipping the visa step process), and sponsoring of the student permit application by the Study Center instead of by the student. Also, a new training

permit for students is valid for up to two years after obtaining a university degree.

In a nutshell, new permits have been implemented under Spain's legal framework to facilitate foreign nationals' research activity in Spain and their intra-EU mobility and to facilitate the training of foreign students and, under certain circumstances, their incorporation into the Spanish labor market.

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Firm in the News

Cyrus Mehta was quoted by *Times of India* in an article entitled "The new US deportation policy gives H-1B visa holders a temporary recess." The article is at http://www.thehansindia.com/posts/index/National/2018-09-28/The-new-US-deportation-policy-gives-H-1B-visa-holders-a-temporary-recess/415121

Mr. Mehta was also an invited speaker in an *Ethics Training* program organized by the Immigration Justice Corps in New York on September 18, 2018.

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