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

MID-OCTOBER 2018 IMMIGRATION UPDATE

Posted on October 18, 2018 by Cyrus Mehta

Headlines:

F-1 'Cap-Gap' Status, Work Authorization Extension No Longer Valid as of October 1 – USCIS reminded F-1 students who have an H-1B petition that remained pending on October 1, 2018, that they risk accruing unlawful presence if they continue to work on or after October 1 (unless otherwise authorized to continue employment) because their "cap-gap" work authorization was only valid through September 30.

USCIS to Begin Implementing NTA Policy – As of October 1, USCIS could start removal proceedings against some foreign nationals without underlying immigration status if their applications are denied and they do not leave the United States. Employment-based petitions and humanitarian applications are not currently subject to the policy.

DOL OIG Finds ETA's Lack of Key Controls Over H-2B Process Jeopardizes Businesses – The Employment and Training Administration's lack of controls over the H-2B applications process has jeopardized businesses that depend on H-2B workers, the OIG has found.

Judge Temporarily Blocks Termination of TPS for Sudan, El Salvador, Haiti, Nicaragua – The judge said in his ruling that there was "evidence that this may have been done in order to implement and justify a pre-ordained result desired by the White House."

Department of State No Longer Issuing Visas for Unmarried Same-Sex Partners – Only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes, the Department said.

President Trump Signs 'KIWI Act' With New Zealand on Nonimmigrant

Treaty Traders/Investors – The KIWI Act will allow eligible New Zealand nationals to enter the United States as nonimmigrant traders and investors provided New Zealand grants reciprocal treatment to U.S. nationals.

USCIS Provides Guidance on Implementing New Law re Foreign Workers on Guam, Northern Marianas – USCIS recently provided guidance on the implementation of a new law allowing certain H-2B workers on Guam and in the Northern Mariana Islands to qualify for an exemption to the "temporary need" requirement if they begin employment by December 30, 2023.

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F-1 'Cap-Gap' Status, Work Authorization Extension No Longer Valid as of October 1

U.S. Citizenship and Immigration Services (USCIS) issued an alert on September 28, 2018, reminding F-1 students who have an H-1B petition that remained pending on October 1, 2018, that they risk accruing unlawful presence if they continue to work on or after October 1 (unless otherwise authorized to continue employment) because their "cap-gap" work authorization was only valid through September 30. Due to increased demand for immigration benefits, resulting in higher caseloads as well as a significant surge in premium processing requests, USCIS noted in the late-September alert that it might not be able to adjudicate H-1B change of status petitions for all F-1 students by October 1.

USCIS noted that its regulations allow an F-1 student who is the beneficiary of a timely filed
H-1B cap-subject petition requesting a change of status to H-1B on October 1 to have his or her F-1 status and any current employment authorization extended through September 30. This is referred to as filling the "cap-gap," USCIS explained, meaning the regulations provide a way of filling the gap between the end of F-1 status and the beginning of H-1B status that might otherwise occur. The "cap-gap" period starts when an F-1 student's status and work authorization expire, and they are extended through September 30, with October 1 being the requested start date of their H-1B employment, unless otherwise terminated or the H-1B petition is rejected or denied before October 1.

USCIS said that while the temporary suspension of premium processing of certain types of
H-1B petitions has allowed the agency to allocate additional resources to prioritize the adjudication of these cap-gap cases, if a cap-gap H-1B petition remains pending on or after October 1, the F-1 student is no longer authorized to work under the cap-gap regulations. However, USCIS said, "the F-1 student generally may remain in the United States while the change of status petition is pending without accruing unlawful presence, provided they do not work without authorization." If an F-1 student with a pending change of status petition has work authorization (such as an I-765 with valid dates) that extends past September 30, USCIS explained, he or she may continue to work as authorized.

The USCIS notice is at https://www.uscis.gov/news/alerts/f-1-cap-gap-status-and-work-authorization-extension-only-valid-through-sept-30-2018. Additional information on the cap-gap is at https://bit.ly/1ob5Dfz.

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USCIS to Begin Implementing NTA Policy

As of October 1, U.S. Citizenship and Immigration Services (USCIS) could start removal proceedings against some foreign nationals without underlying immigration status if their applications are denied and they do not leave the United States.

USCIS first announced the Notice to Appear (NTA) policy in July 2018, but decided to delay its implementation. USCIS said it will initially apply the policy to Form I-485 permanent residence applicants and to Form I-539 applicants to extend or change nonimmigrant status. Employment-based petitions (including H-1B, L-1, O, and E petitions) are not currently subject to the policy. The NTA policy also exempts humanitarian applications. Existing guidance for employment-based and humanitarian case types will remain in effect, USCIS noted.

USCIS said it "will send denial letters for status-impacting applications that ensures benefit seekers are provided adequate notice when an application for a benefit is denied." If a person is not in a period of authorized stay and does not leave the United States, he or she may be issued an NTA. USCIS said it "will

provide details on how applicants can review information regarding their period of authorized stay, check travel compliance, or validate departure from the United States." An immigration judge would determine whether the person should be removed or is entitled to relief that would allow him or her to remain in the U.S. USCIS noted that "xcept as specifically provided by law, the issuance, service, or filing of an NTA to commence removal proceedings does not negate any right to seek administrative review, whether by motion to the USCIS office that issued the unfavorable decision, or by appeal to the USCIS Administrative Appeals Office."

USCIS noted that it "will continue to prioritize cases of individuals with criminal records, fraud, or national security concerns. There has been no change to the current processes for issuing NTAs on these case types, and USCIS will continue to use its discretion in issuing NTAs for these cases."

Specifically, USCIS said the updated policy affects the following categories of cases where the individual is removable:

- Cases where fraud or misrepresentation is substantiated, and/or cases where there is evidence the applicant abused any program related to receiving public benefits. USCIS said it will issue an NTA in these cases, "even if we deny the case for reasons other than fraud."
- Criminal cases where an applicant is charged with (or convicted of) a criminal offense, or has committed acts that are chargeable as a criminal offense, even if the criminal conduct was not the basis for the denial or the ground of removability. USCIS said it will, where circumstances warrant, refer cases to U.S. Immigration and Customs Enforcement without issuing an NTA or adjudicating immigration benefits.
- Cases where USCIS has denied a Form N-400, Application for Naturalization, on good moral character grounds because of a criminal offense.
- Cases where an applicant will be unlawfully present in the United States when USCIS denies the petition or application.

USCIS did not change its policy for the following categories:

- Cases involving national security concerns;
- Cases where issuing an NTA is required by statute or regulation;
- Temporary protected status (TPS) cases, except where, after applying TPS

regulatory provisions, a TPS denial or withdrawal results in an individual having no other lawful immigration status; and

- Cases involving Deferred Action for Childhood Arrivals (DACA) recipients and requestors when (1) processing an initial or renewal DACA request or DACA-related benefit request or (2) processing a DACA recipient for possible termination of DACA. A policy memorandum on DACA recipients referenced by USCIS's NTA announcement is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0161-DACA-Notice-to-Appear.pdf.

The USCIS guidance is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf. A related announcement is at https://www.uscis.gov/news/alerts/uscis-begin-implementing-new-policy-memorandum-notices-appear. A related Web page is at https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum.

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DOL OIG Finds ETA's Lack of Key Controls Over H-2B Process Jeopardizes Businesses

The Department of Labor's Office of Inspector General (OIG) recently found that the Employment and Training Administration's (ETA) lack of controls over the H-2B applications process has jeopardized businesses that depend on H-2B workers. The OIG investigated this issue after members of Congress expressed concerns over reported delays in the H-2B application process, which allows U.S. employers to hire temporary nonimmigrant workers for nonagricultural labor and services. H-2B application processing delays "could prevent employers from obtaining foreign workers by their date of need" or "obtain U.S. workers to fill those positions," the OIG said.

The OIG noted that ETA did not evaluate the impact of its overall H-2B process on two other agencies (the Departments of Homeland Security and State) that are part of the overall process, hold staff accountable for meeting internal application processing goals, or manage resources appropriately, potentially affecting jobs in numerous industries, such as shrimp and crab, landscaping, housekeeping, construction, amusement parks, forestry, and meat and poultry. The OIG review found ETA's mean time to process applications at prevailing

wage was 5 days more than the internal goal, and at the processing center it was 41 days over the internal goal. "These delays, particularly in seasonal industries, would have serious adverse effects on business owners and local economies," the OIG said. As a result, ETA could not demonstrate whether it ensured that employers' needs for temporary foreign labor were being met.

The delays potentially affected up to 148,000 positions and could have had adverse effects on business owners who rely on this labor, whether a foreign laborer or U.S. worker would fill the position, the OIG said. For fiscal year (FY) 2016, for example, the OIG identified about 100,000 positions potentially affected that were not processed timely. In addition, for FY 2017, the OIG found that about 48,000 positions were affected because ETA did not timely review 36 percent of the applications (133,985 positions total certified).

The OIG recommended that the Deputy Assistant Secretary for ETA develop policy to ensure that H-2B applications are processed timely, develop a method for tracking and reporting on processing timeliness for H-2B applications, and develop a staffing plan to address peak seasons for receipt of H-2B applications. The OIG noted that the Principal Deputy Assistant Secretary for Employment and Training stated that the agency has taken actions to address these recommendations. The OIG noted that "ETA disagreed with some of our conclusions; however, nothing in their response changed our report."

The report, "ETA's Lack of Key Controls Over the H-2B Application Process Jeopardized Businesses That Depend on H-2B Workers" (06-18-002-03-321, issued September 28, 2018) is at https://www.oig.dol.gov/public/reports/oa/2018/06-18-002-03-321.pdf.

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Judge Temporarily Blocks Termination of TPS for Sudan, El Salvador, Haiti, Nicaragua

U.S. District Judge Edward Chen, for the Northern District of California, issued a preliminary injunction on October 3, 2018, temporarily blocking the Trump administration from terminating temporary protected status (TPS) for Sudan, El Salvador, Haiti, and Nicaragua while a legal challenge continues.

The judge said in his ruling that there was "evidence that this may have been done in order to implement and justify a pre-ordained result desired by the White House. Plaintiffs have also raised serious questions whether the actions taken by the Acting Secretary or Secretary was influenced by the White House

and based on animus against non-white, non-European immigrants in violation of Equal Protection guaranteed by the Constitution. The issues are at least serious enough to preserve the status quo."

A Department of Justice statement reportedly countered, "The court contends that the duly elected President of the United States cannot be involved in matters deciding the safety and security of our nation's citizens or in the enforcement of our immigration laws. The Justice Department completely rejects the notion that the White House or the Department of Homeland Security did anything improper. We will continue to fight for the integrity of our immigration laws and our national security."

Evidence in the lawsuit, *Ramos v. Nielsen*, includes email exchanges that appear to indicate that a predetermined goal of terminating TPS was set in advance of a substantial improvement in country conditions. The emails also appear to reflect internal discrepancies in some assessments of conditions with the conclusion that TPS should be terminated. For example, one email notes that under the TPS statute, TPS must be extended for an additional period of 6, 12, or 18 months if the statutory conditions supporting a country's designation continue to exist, and that a review of conditions in Sudan indicated that it remained unsafe and that the statutory requirements for TPS designation continued to be met. The email includes remarks that the decision memo for Sudan "reads like one person who strongly supports extending TPS for Sudan wrote everything up to the recommendation section, and then someone who opposes extension snuck up behind the first guy, clubbed him over the head, pushed his senseless body out of the way, and finished the memo."

The court's decision is at https://www.uscis.gov/sites/default/files/USCIS/Laws/ramos-v-nielsen-order-granting-preliminary-injunction-case-18-cv-01554-emc.pdf. Some of the email exchanges noted above are at https://www.pacermonitor.com/view/NEFG44I/Ramos_et_al_v_Nielsen_et_al__candce-18-01554__0096.2.pdf?mcid=tGE3TEOA and https://www.pacermonitor.com/view/MZ5CE2A/Ramos_et_al_v_Nielsen_et_al__candce-18-01554__0096.1.pdf?mcid=tGE3TEOA.

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Department of State No Longer Issuing Visas for Unmarried Same-Sex Partners

Effective October 1, 2018, the Department of State says it will no longer issue visas for unmarried same-sex partners of diplomats and others. U.S. embassies and consulates will now adjudicate visa applications that are based on a same-sex marriage in the same way as applications are adjudicated for opposite-gender spouses, the Department said. The notice advises prospective applicants to "reference the specific guidance on the visa category for which you are applying for more details on documentation required for derivative spouses." A Department FAQ, "U.S. Visas for Same-Sex Spouses," notes that "only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes."

The FAQ also states that "the same sex spouse of a visa applicant coming to the United States for any purpose—including work, study, international exchange or as a legal immigrant—will be eligible for a derivative visa. Likewise, stepchildren acquired through same sex marriages can also qualify as beneficiaries or for derivative status." A FAQ notes that a U.S. citizen who is engaged to be married to a foreign national of the same sex and cannot marry that person in the fiancé(e)'s country can file a Form I-129F to apply for a fiancé(e) K visa. "As long as all other immigration requirements are met, a same-sex engagement may allow your fiancé to enter the United States for the purpose of marriage," the FAQ states.

Some observers noted that since only 25 countries currently allow same-sex marriage, this could effectively take same-sex partners away from their families or push them into marriages that are prohibited by law in their home countries.

The FAQ on U.S. visas for same-sex spouses is at https://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs%20-%202015%20Supreme%20Court%20Ruling.pdf. More details are at https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/visas-diplomats.html.

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President Trump Signs 'KIWI Act' With New Zealand on Nonimmigrant Treaty Traders/Investors

The Knowledgeable Innovators and Worthy Investors (KIWI) Act was signed into

law on August 1, 2018. The KIWI Act will allow eligible New Zealand nationals to enter the United States as nonimmigrant traders and investors provided New Zealand grants reciprocal treatment to U.S. nationals.

Scott Brown, the U.S. Ambassador to New Zealand, said, "With this addition of New Zealand to our eligible Treaty Traders and Investors visa program, we look forward to even greater bilateral commerce and entrepreneurship. The KIWI Act received overwhelming, bipartisan support in the U.S. Congress, showing the broad and unshakable support for the U.S.-New Zealand partnership. This legislation demonstrates the United States' continuing recognition of the value of Kiwi investment and innovation."

Mr. Brown said he agrees with New Zealand's Minister of Foreign Affairs Winston Peters that this action will "improve access to the United States for New Zealand businesspeople and investors, further developing our trading relationship to the benefit of both countries." He also agrees with the New Zealand United States Council that the KIWI Act will "lower the barriers to success" for New Zealand businesses to have success in the growing United States economy.

A statement from the U.S. Embassy in New Zealand is at https://nz.usembassy.gov/signing-of-the-kiwi-act/. A White House statement is at https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signs-s-2245-s-2850-law/.

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USCIS Provides Guidance on Implementing New Law re Foreign Workers on Guam, Northern Marianas

U.S. Citizenship and Immigration Services (USCIS) recently published a policy memorandum providing guidance on the implementation of a new law allowing certain H-2B workers on Guam and in the Commonwealth of the Northern Mariana Islands (CNMI) to qualify for an exemption to the "temporary need" requirement if they begin employment on or before December 30, 2023.

USCIS said it is accepting H-2B petitions filed pursuant to the provision, part of the National Defense Authorization Act for Fiscal Year 2019, which exempts the temporary need requirement for certain health care workers on Guam and in the CNMI, as well as for workers directly connected to, or directly associated

with, the planned military realignment of U.S. Marines from Okinawa, Japan, to Guam. The new law also eliminated the annual cap of 4,000 H-2B workers for Guam and the CNMI that were permitted to use the temporary need exemption.

The policy memorandum provides detailed information on how petitioners may demonstrate eligibility for the exemptions under the new law. Petitioners must continue to comply with other H-2B requirements, including submission of an approved temporary labor certification issued by Guam's Department of Labor or the U.S. Department of Labor, as appropriate. Employers on Guam and in the CNMI remain exempt from the national H-2B cap until December 31, 2029.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-provides-guidance-implementing-new-law-related-foreign-workers-guam-northern-mariana-islands. The policy memorandum, dated October 1, 2018, is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-10-01-PM-602-0164-H-2B-Policy-Memorandum-to-Interpret-Guam.pdf.

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Firm in the News

Cyrus Mehta received the Advocate Award at the annual gala of the Northern Manhattan Improvement Corporation (NIMC) on October 4, 2018. Since 1979, NMIC has been a source of support and opportunities for the most vulnerable community members in upper Manhattan, and now the Bronx. NIMC provides immigration services, preserves and develops affordable housing, and supports survivors of intimate partner violence. For more information, see http://www.nmic.org/benefit2018/.

Mr. Mehta spoke at the New York City Bar on "Stress Testing International Law: A Time of Archipelagos, Moats, and Walls" on October 9, 2018. For more information, see https://services.nycbar.org/EventDetail?EventKey=REFL100918&WebsiteKey=f71e12f3-524e-4f8c-a5f7-0d16ce7b3314.

Mr. 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. He was also quoted in "Sponsoring U.S. Green

Card for Parents to Get Tougher" at https://bit.ly/2RRrvMa and "Draft Proposes Fresh U.S. Immigration Curb" at https://bit.ly/2QKOM1c.

Cora-Ann V. Pestaina served as a moderator at the American Immigration Lawyers Association (AILA) New York Chapter CLE entitled “The H-1B & Public Access Files” on October 9, 2018.

David Isaacson spoke on a panel entitled “Petitions for Review and Petitions for Certiorari” at the 2018 AILA Federal Court Conference and Webcast: Removal Litigation, in Washington, D.C., on September 21, 2018.

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