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

DECEMBER 2018 IMMIGRATION UPDATE

Posted on December 6, 2018 by Cyrus Mehta

Headlines:

DHS to Propose 'Merit-Based' Rule for H-1B Visa Program – The proposed rule, to be published on December 3, 2018, is intended to increase the number of beneficiaries with master's or higher degrees from U.S. institutions of higher education to be selected for H-1B cap numbers and to introduce "a more meritorious selection of beneficiaries."

New Developments at Southern Border: Temporary Restraining Order Bars Trump Administration From Changing Asylum Law; Trump Spars With Chief Justice; No Agreement With Mexico Yet – The temporary restraining order will remain in effect until a court hearing on December 19, 2018.

DHS, DOL Publish Joint Proposed Rule to Require Electronic Advertising Instead of Print for H-2B Recruitment – The proposed rule would require electronic advertisements to be posted on the Internet for at least 14 days, replacing the print newspaper advertisements that regulations currently require.

USCIS Clarifies L-1 One-Year Foreign Employment Requirement – USCIS has published a policy memorandum, effective November 29, 2018, clarifying the requirement that a qualifying organization employ a principal L-1 beneficiary abroad for one continuous year out of the three years before the time of petition filing

DHS Extends TPS for Sudan, Nicaragua, Haiti, El Salvador Under Preliminary Injunction – Beneficiaries under the temporary protected status designations for Sudan, Nicaragua, Haiti, and El Salvador will retain their TPS while the preliminary injunction remains in effect.

Global: Italy – The work holiday visa is a special type of visa, issued for 12 months, that allows the holder to travel to Italy and work there for up to six months. It is an opportunity for youth of each participating country to experience the language, lifestyle, culture, and job environment of the receiving country.

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DHS to Propose 'Merit-Based' Rule for H-1B Visa Program

The Department of Homeland Security (DHS) will publish a notice of proposed rulemaking on December 3, 2018, that would require petitioners seeking to file H-1B cap-subject petitions to first electronically register with U.S. Citizenship and Immigration Services (USCIS) during a designated registration period. USCIS said the proposed rule would also reverse the order by which the agency selects H-1B petitions under the H-1B cap and the advanced degree exemption, with the goal of increasing the number of beneficiaries with master's or higher degrees from U.S. institutions of higher education to be selected for H-1B cap numbers and introducing "a more meritorious selection of beneficiaries."

USCIS noted that the H-1B program allows companies in the United States to temporarily employ foreign workers in specialty occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specialty, or its equivalent. When USCIS receives more than enough petitions to reach the congressionally mandated H-1B cap, a computer-generated random selection process, or lottery, is used to select the petitions that are counted toward the number of petitions projected as needed to reach the cap.

The proposed rule includes a provision that would enable USCIS to temporarily suspend the registration process during any fiscal year in which USCIS "may experience technical challenges with the H-1B registration process and/or the new electronic system." The proposed temporary suspension provision would also allow USCIS to "up-front delay the implementation of the H-1B registration process past the fiscal year (FY) 2020 cap season, if necessary to complete all requisite user testing and vetting of the new H-1B registration system and process." If the rule is finalized as proposed but there is insufficient time to

implement the registration system for the FY 2020 cap selection process, USCIS said it would likely suspend the proposed registration requirement for the FY 2020 cap season.

Currently, in years when the H-1B cap and the advanced degree exemption are both reached within the first five days in which H-1B cap petitions may be filed, the advanced degree exemption beneficiaries are selected before the H-1B cap beneficiaries. The proposed rule would reverse the selection order and count all registrations or petitions toward the number projected as needed to reach the H-1B cap first. Once a sufficient number of registrations or petitions have been selected for the H-1B cap, USCIS would then select registrations or petitions toward the advanced degree exemption. This proposed change "would increase the chances that beneficiaries with a master's or higher degree from a U.S. institution of higher education would be selected under the H-1B cap and that H-1B visas would be awarded to the most-skilled and highest-paid beneficiaries," USCIS said. The proposed process would result in an estimated increase of up to 16 percent (or 5,340 workers) in the number of selected H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education, the agency noted.

USCIS said it expects that shifting to electronic registration would reduce overall costs for petitioners and create a more efficient and cost-effective H-1B cap petition process for the agency. The proposed rule would "help alleviate massive administrative burdens on USCIS since the agency would no longer need to physically receive and handle hundreds of thousands of H-1B petitions and supporting documentation before conducting the cap selection process," USCIS said. "This would help reduce wait times for cap selection notifications." The proposed rule also would limit the filing of H-1B cap-subject petitions to the beneficiary named on the original selected registration, "which would protect the integrity of this registration system."

USCIS indicated that the proposed rule is being issued in response to an April 18, 2017, executive order instructing DHS to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system." The executive order specifically mentioned the H-1B program and directed DHS and other agencies to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."

Public comments must be received by January 2, 2019. The announcement is at https://www.uscis.gov/news/news-releases/dhs-proposes-merit-based-rule-more-effective-and-efficient-h-1b-visa-program. An advance copy of the proposed rule is at https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-26106.pdf.

For the Firm's commentary on the proposal, see H-1B Contest: Advance Degree v. Other Degree, http://blog.cyrusmehta.com/2018/12/h-1b-visa-contest-us-masters-degree-v-foreign-degree.html

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New Developments at Southern Border: Temporary Restraining Order Bars Trump Administration From Changing Asylum Law; Trump Spars With Chief Justice; No Agreement With Mexico Yet

U.S. District Judge Jon Tigar, of San Francisco, California, has issued a temporary restraining order blocking President Trump's presidential proclamation and a new rule preventing certain types of asylum claims along the southern border of the United States. The order will remain in effect until a court hearing on December 19, 2018.

President Trump had issued the presidential proclamation targeting potential mass migration through the southern border of the United States with Mexico in response to reports of a "caravan" of a large number of people primarily from Central America with a stated goal of entering the United States. Several thousand members of the caravan are waiting in Tijuana, Mexico, and more are expected. On November 9, 2018, the Departments of Justice and Homeland Security published a related interim final rule limiting asylum claims, and the Executive Office for Immigration Review and U.S. Citizenship and Immigration Services released guidance. The American Civil Liberties Union, the Southern Poverty Law Center, the Center for Constitutional Rights, and other groups immediately sued, claiming that the proclamation and rule violated asylum applicants' rights.

The court agreed: "The rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the and the expressed intent of Congress. Whatever the scope of the President's authority,

he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden." The court also said that the government offered nothing in support of the new rule that outweighed the need to avoid harm to potential asylum seekers, including increased risk of violence and other harms at the border. Among other things, the court also noted that "the application of the Rule will result in the denial of meritorious claims for asylum that would otherwise have been granted. That means that persons who are being persecuted on the basis of their religion, race, or other qualifying characteristic, to whom the United States would otherwise have offered refuge, will be forced to return to the site of their persecution."

After the ruling, President Trump said, "This was an Obama judge, and I'll tell you what, it's not going to happen like this anymore. Everybody that wants to sue the U.S.—almost—they file their case in the Ninth Circuit, and it means an automatic loss. No matter what you do, no matter how good your case is. And the Ninth Circuit is really something we have to take a look at, because it's not fair." In an unusual move, John Roberts, Chief Justice of the U.S. Supreme Court, admonished President Trump for referring to Judge Tigar as an "Obama judge." "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."

On November 24, 2018, President Trump tweeted, "Migrants at the Southern Border will not be allowed into the United States until their claims are individually approved in court. We only will allow those who come into our Country legally. Other than that our very strong policy is Catch and Detain. No 'Releasing' into the U.S."

Initial reports following the court's order said that Mexican officials had agreed to hold migrants in Mexico while their asylum claims were processed in the United States. But the incoming foreign minister, Marcelo Ebrard, reportedly said the United States had not yet sent a "specific proposal" and that such an agreement had not been reached. The new president of Mexico, Andres Manuel Lopez Obrador, took office on December 1, 2018. Reportedly, he hopes to negotiate an agreement with the United States to contain Central American migration in exchange for U.S. aid to the region.

Meanwhile, many migrants moved to a new border shelter in the Tijuana,

Mexico, area near the U.S. border, where thousands have congregated, while others decided to return home. Some said they would look for work in Mexico. A group of several hundred reportedly attempted to rush the border but were turned back by U.S. border agents.

The temporary restraining order is at https://ccrjustice.org/sites/default/files/attach/2018/11/Order%20Granting%20TRO.pdf.

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DHS, DOL Publish Joint Proposed Rule to Require Electronic Advertising Instead of Print for H-2B Recruitment

The Departments of Homeland Security and Labor (Departments) have published a joint notice of proposed rulemaking (NPRM) that would "modernize" the recruitment requirements for employers seeking H-2B nonimmigrant workers to fill temporary nonagricultural jobs "to make it easier for U.S. workers to find and fill these open jobs."

The proposed rule would require electronic advertisements to be posted on the Internet for at least 14 days, replacing the print newspaper advertisements that regulations currently require. The Departments said they believe "this is a more effective and efficient way to disseminate information about job openings to U.S. workers." The Departments believe that electronic advertisements, posted on websites that U.S. workers in the area of the job opportunity would use, would best ensure that U.S. workers learn of job opportunities. The joint rule proposes phasing out the current requirements with a limited transition period. During the transition, employers would be able to choose between print and electronic advertisements. According to the Departments, this provision should provide flexibility for employers who may have already purchased print advertising or have advertising contracts in place.

The proposed rule would not mandate that an employer post its advertisement on a specific website but rather would allow an employer to place an advertisement on any of a variety of websites that are widely viewed and appropriate for use by workers who are likely to apply for the job opportunity in the area of intended employment, including websites that specialize in advertising job opportunities for the specific industry or occupation, and websites that specifically serve the local area, such as localized online job listing

services and digital classified sections of local newspapers. The proposed rule also contemplates the use of websites that are not specifically directed at workers in the area of intended employment or the particular occupation, so long as the website is appropriate for the occupation and adequately serves the area of intended employment.

To assure that the job opportunity described in the advertisement is readily available to U.S. workers, the proposed rule would require that the advertisement be publicly accessible at no cost to an applicant. To meet this requirement, the website on which the advertisement is placed cannot require U.S. workers to pay fees to establish personal accounts or make payments of any kind to view the advertisement. The website must also be functionally compatible with the latest commercial Web browser platforms and easily viewable on mobile smartphones and similar portable devices.

The proposed rule would require an employer to print and retain screen shots of the Web pages on which its advertisement appears and screen shots of the Web pages establishing the path used to access the advertisement. Although the proposed rule does not require employers to submit this documentation with their recruitment reports, an employer must nevertheless retain this documentation and provide it to the Department of Labor in the event of an audit or other review, the NPRM states.

A transition provision would permit an employer submitting an *Application for Temporary Employment Certification* with a date of need before October 1, 2019, to place either (a) an electronic advertisement in accordance with the requirements in the proposed rule, or (b) two newspaper advertisements in accordance with existing requirements. Because the Departments are proposing to have this rule take effect immediately upon publication of the final rule, the Departments are including this transition period "to provide flexibility to employers that seek additional time to understand and comply with the proposed regulatory revisions, while simultaneously permitting employers that wish to place electronic advertisements immediately upon the effective date of the final rule the ability to do so," the NPRM states. The transition provision is intended "to better ensure, among other things, that employers who have purchased newspaper advertising space in advance do not lose the benefit of such purchase."

The Departments invite comments on whether they should establish qualifying

criteria (*e.g.,* the minimum number of unique visitors per month), or define the types of websites on which an employer may place an electronic advertisement under the proposed rule, and whether the rule should exclude websites maintained by the employer and/or the employer-client of a job contractor seeking to employ H-2B workers. The Departments also solicit comments on whether, instead of eliminating print newspaper advertisements, they should offer electronic advertisements as an alternative means of satisfying the existing print advertising requirement. The Departments are not proposing this option, but they invite comments on whether there are employers that lack the technology or Internet access necessary to place the electronic advertisements described in the proposed rule, and if so, how the Departments should determine whether such employers have met their obligation to recruit U.S. workers. For example, the Departments noted that they could leave current recruitment requirements in place as an option for such employers. The Departments solicit comments on whether there are alternative methods that would more broadly and effectively disseminate information about available job opportunities to U.S. workers.

Comments may be submitted, using one of the methods provided in the NPRM, by December 10, 2018. The NPRM is at https://www.gpo.gov/fdsys/pkg/FR-2018-11-09/pdf/2018-24498.pdf.

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USCIS Clarifies L-1 One-Year Foreign Employment Requirement

U.S. Citizenship and Immigration Services (USCIS) has published a policy memorandum, effective November 29, 2018, clarifying the requirement that a qualifying organization employ a principal L-1 beneficiary abroad for one continuous year out of the three years before the time of petition filing ("one-year foreign employment requirement"). USCIS said this clarification is intended to ensure consistent adjudication of L-1 petitions by providing a standard basis for calculating time for the one-year foreign employment requirement.

USCIS explained that the L-1 nonimmigrant classification allows a U.S. employer to transfer an executive or manager (L-1A) or an employee with specialized knowledge (L-1B) from one of its qualifying foreign offices to one of its offices in the United States. This classification also allows a foreign company that does not yet have a U.S. office to send an executive or manager, or specialized

knowledge employee, to the United States to establish one.

Specifically, the policy memo explains that:

- The L-1 beneficiary must be physically outside the United States during the required one continuous year of employment, except for brief trips to the United States for business or pleasure; and
- The petitioner and the beneficiary must meet all requirements, including the one year of foreign employment, *when the petitioner files the initial L-1 petition.*

Except as noted in the memo, the one year of foreign employment must occur within the three-year period preceding the date the L-1 petition is *filed*. USCIS will calculate the three-year period during which the beneficiary must meet the one-year foreign employment requirement. The memo also clarifies what time will be taken into consideration in determining when the three-year period begins.

In a related announcement, USCIS said, "In support of the Buy American and Hire American Executive Order, USCIS is reviewing all employment-based immigration programs to eliminate fraud and ensure consistent adjudications. USCIS has not previously provided specific policy guidance with respect to the conditions by which the three-year clock may be stopped for purposes of determining whether the one-year foreign employment requirement for L-1 beneficiaries has been met. This improves the process for adjudicating the L-1 nonimmigrant benefit by clarifying the calculation guidelines to ensure they are applied consistently to all L-1 petitions."

The announcement is at https://www.uscis.gov/news/alerts/uscis-clarifies-l-1-one-year-foreign-employment-requirement. The policy memo is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-15-PM-602-0167-L-1-foreign-employment-requirement.pdf.

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DHS Extends TPS for Sudan, Nicaragua, Haiti, El Salvador Under Preliminary Injunction

The Department of Homeland Security (DHS) has announced actions to comply with the preliminary injunction order of the U.S. District Court for the Northern District of California in *Ramos* v. *Nielsen*. Beneficiaries under the temporary

protected status (TPS) designations for Sudan, Nicaragua, Haiti, and El Salvador will retain their TPS while the preliminary injunction remains in effect, provided that an individual's TPS status is not withdrawn under INA § 244(c)(3) or 8 CFR § 244.14 because of ineligibility.

DHS is automatically extending through April 2, 2019, the validity of TPS-related employment authorization documents (EADs), Forms I-797, Notice of Action (Approval Notice), and Forms
I-94 (Arrival/Departure Record) (collectively "TPS-related documentation"), as specified in the notice, for beneficiaries under the TPS designations for Sudan and Nicaragua, provided that the affected TPS beneficiaries remain otherwise individually eligible for TPS. The notice also explains DHS's plans to issue a subsequent notice that will describe the steps DHS will take after April 2, 2019, to continue its compliance with the preliminary injunction.

The TPS designations of Sudan, Nicaragua, Haiti, and El Salvador will remain in effect as long as the preliminary injunction remains in effect. TPS for those countries will not be terminated unless and until any superseding, final, non-appealable judicial order permits the implementation of such terminations, DHS said.

Further, DHS is automatically extending the validity of TPS-related documentation for those beneficiaries under the TPS designations for Sudan and Nicaragua, as specified in the notice. Those documents will remain in effect for six months from the issuance of the preliminary injunction (which occurred on October 3, 2018), through April 2, 2019, provided the individual's TPS is not withdrawn under INA § 244(c)(3) or 8 CFR § 244.14 because of ineligibility, DHS said. In the event the preliminary injunction is reversed and that reversal becomes final, DHS will allow for an "orderly transition period."

The Federal Register notice is at
https://www.gpo.gov/fdsys/pkg/FR-2018-10-31/pdf/2018-23892.pdf.
Information on the status of the preliminary injunction is available at
https://www.uscis.gov/humanitarian/temporary-protected-status.

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Global: Italy

The work holiday visa is a special type of visa, issued for 12 months, that allows the holder to travel to Italy and work there for up to six months. It is an opportunity for

youth of each participating country to experience the language, lifestyle, culture, and job environment of the receiving country.

Italy has bilateral agreements on work holiday visas with New Zealand, Australia, Canada, and South Korea. Each bilateral agreement sets the conditions for participation in the program and also the maximum number of visas that can be issued in a year.

The procedure consists of two steps:

- File the visa application at the Italian consulate having jurisdiction over the place of residency abroad
- Once in Italy, file the residence permit application within 8 days of arrival

If and when the applicant finds an employer willing to hire him or her, a work permit is not necessary. The work holiday residence permit allows the holder to work up to a total of 6 months, and up to 3 months with the same employer.

Below are details of the existing agreements with Italy:

New Zealand agreement

Who can apply: New Zealand citizens between the age of 18 and 30

Duration of allowed stay: 12 months, not renewable

Type of work activity allowed: No restrictions but no longer than 3 months with the same employer and 6 months in total

Number of visas per year: Up to 1,000

Australia agreement

Who can apply: Australian citizens between the age of 18 and 30

Duration of allowed stay: 12 months, not renewable

Type of work activity allowed: No restrictions but no longer than 3 months with the same employer and 6 months in total

Number of visas per year: Up to 1,500 for Australian citizens

Canada agreement

Who can apply: Canadian citizens between the age of 18 and 35

Duration of allowed stay: 12 months, not renewable

Type of work activity allowed: No restrictions but no longer than 3 months with the same employer and 6 months in total

Number of visas per year: Up to 1,000

South Korea agreement

Who can apply: South Korean citizens between the age of 18 and 30

Duration of allowed stay: 12 months, not renewable

Type of work activity allowed: No restrictions but no longer than 6 months (up to 6 months with the same employer allowed)

Number of visas per year: Up to 500

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Firm in the News

Cyrus D. Mehta & Partners PLLC was listed in U.S. News & World Report's Best Law Firms as National Tier 1 & New York City Tier 1 Immigration law firm. The national rankings are at https://bestlawfirms.usnews.com/immigration-law. The regional rankings are under each firm's profile.

Mr. Mehta spoke on a panel entitled "Challenges in H-1B Practice – Outsourcing, the H-1B Cap and Increased LCA Enforcement" at the 51st Annual PLI Immigration & Naturalization Institute, Practising Law Institute, in New York, NY, on December 5, 2018.

Mr. Mehta was a speaker at the Green Card Backlog Awareness Campaign Featuring "From the Land of Gandhi" Film, in New York, NY, on November 29, 2018.

Mr. Mehta spoke on a panel entitled "Dealing With the Difficult Case In the No Deference Era" at the AILA Latin America and Caribbean District Chapter Conference, in Lima, Peru, on November 16, 2018.

Mr. Mehta spoke on a panel entitled "H-1B Policy Changes" at the New Jersey Institute for Continuing Legal Education, Advanced Corporate Immigration, in Newark, NJ, on November 14, 2018.

Cyrus Mehta was quoted by *The Times of India* in an article entitled "US brings in new norm on L-1 visa, provides leeway". The article is at https://timesofindia.indiatimes.com/india/us-brings-in-new-norm-on-l-1-visa-pr

ovides-leeway/articleshow/66913190.cms

Cyrus Mehta was quoted by *The Financial Examiner* in an article entitled "Band, baaja, baarat smoothens US entry for girls". The article is at https://finexaminer.com/2018/12/03/band-baaja-baarat-smoothens-us-entry-for-girls/

Cyrus Mehta was quoted by *The American Bazaar* in an article entitled "Waiting for the Wait to End: The human face of Indian immigrants in the Green Card backlog". The article is at https://www.americanbazaaronline.com/2018/12/04/from-the-land-of-gandhi-green-card-backlog-435786/

Cyrus Mehta was quoted by *Money Control* in an article entitled "New H-1B proposal mixed bag for India, say experts". The article is at https://www.moneycontrol.com/news/business/new-h-1b-proposal-mixed-bag-for-india-say-experts-3247031.html

Cyrus Mehta was quoted by *Flecha 123* in an article entitled " Consulting, audit cos biggest users of H-1Bs". The article is at https://flecha123.com/2018/12/03/consulting-audit-cos-biggest-users-of-h-1bs/

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