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US IMMIGRATION & NATIONALITY LAW

JANUARY 2019 IMMIGRATION UPDATE

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Headlines:

January Visa Bulletin Shows Significant Progress in EB-1, EB-3, and Other Workers India – The Department of State's Visa Bulletin for January 2019 shows significant progress in the EB-1 category for all chargeability areas, as well as in the EB-3 and Other Workers India categories. Other priority dates remain Current or backlogged with little to no movement.

Federal Government Shutdown: Agency-by-Agency Update – The partial federal government shutdown continues unabated. Several departments have issued related announcements about the specifics of which immigration services have closed and which remain open.

USCIS Discontinues Case-Specific Assistance Via Service Center Email – USCIS is closing its case-specific assistance email boxes and directing people to its online self-help tools and the USCIS Contact Center instead.

USCIS Closes Havana Field Office – USCIS permanently closed its field office in Havana, Cuba, as of December 10, 2018.

Global: Update on Brexit vs. Freedom of Movement (for Workers) – This article provides a summary of highlights of "Brexit" and the outlook for the near future with respect to the free movement of affected workers.

Details:

Back to Top

January Visa Bulletin Shows Significant Progress in EB-1, EB-3, and Other Workers India

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and Other Workers India categories. Other priority dates remain Current or backlogged with little to no movement.

Continuing its policy since the September 2018 Visa Bulletin, U.S. Citizenship and Immigration Services (USCIS) confirmed that adjustment-of-status applications may be filed based on the filing cut-off dates rather than the final action cut-off dates.

Many applicants and their dependent family members physically residing in the United States whose priority dates are significantly backlogged continue to benefit from this policy to be able to receive employment authorization documents and advance parole documents, and to potentially become eligible sooner for immigrant visa portability to change jobs while their employment-based adjustment of status is pending.

Although USCIS will continue to accept adjustment of status applications under the typically earlier filing cut-off dates, the applicant's priority date must be current under the "final action cut-off date" before USCIS can finally approve the application.

The changes in the Final Action Cut-Off Dates from the December 2018 to the January 2019 Visa Bulletin include:

- EB-1: All Chargeability Areas (except China and India)—Forward progress of three months to October 1, 2017
- EB-1: China and India—Forward progress of three months and two weeks, to December 15, 2016
- EB-2: China—Forward progress of two weeks to August 1, 2015
- EB-3: Philippines—Forward progress of one week to June 22, 2017
- Other Workers: China—Forward progress of one month to July 1, 2007
- Other Workers: Philippines—Forward progress of one week to June 22, 2017
- EB-5: China—Forward progress of one week to September 1, 2014
- EB-5: Vietnam—Forward progress of one month to June 1, 2016

In both the EB-5 Regional Center and the EB-5 Non-Regional Center categories, the "Filing Cut-Off Dates" are Current for applicants born in all countries except for mainland China, which is backlogged to October 1, 2014, allowing for filing of adjustment-of-status applications for those with approved I-526 petitions who are residing in the United States.

In the EB-5 Non-Regional Center category, the "Final Action Dates" are current for all countries except China and Vietnam, which continue to be backlogged but with slight forward movement: currently backlogged at September 1, 2014, for China, and June 1, 2016, for Vietnam. However, the "Final Action Dates" for the EB-5 Regional Center category for all countries are "Unavailable" and immigrant visas cannot be issued right now because of the partial government shutdown discussed in the next article.

Applicants whose priority dates are backlogged should review the filing cut-off dates in the bulletin to determine if they may be eligible to file during the month of January. Applicants who will become eligible to file immigrant visa applications in January should initiate applications now with their Alliance of Business Immigration Lawyers attorney to plan for the earliest possible filing date.

The Visa Bulletin for January 2019 is at https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_january2019.pdf.

Back to Top

Federal Government Shutdown: Agency-by-Agency Update

The partial federal government shutdown that began at 12:01 a.m. on Saturday, December 22, 2018, continues unabated. Several departments have issued related announcements about the specifics of which immigration services have closed and which remain open, summarized below in alphabetical order:

Department of Labor. DOL's announcement at https://www.dol.gov/general/lapse refers people to its extensive contingency plan at https://www.dol.gov/dol/Contingency_Plan.pdf.

Department of Justice. DOJ released the following statement: "Due to the lapse in appropriations, Department of Justice websites will not be regularly updated. The Department's essential law enforcement and national security functions will continue. Please refer to the Department of Justice's contingency plan for more information." The contingency plan, dated September 2018, is at https://www.justice.gov/jmd/page/file/1015676/download.

Department of State. DOS announced on December 22, 2018, that scheduled passport and visa services in the United States and at U.S. embassies and

consulates overseas will continue "during the lapse in appropriations as the situation permits." The agency said it will not update its website until full operations resume, with the exception of urgent safety and security information. The National Visa Center, National Passport Information Center, and Kentucky Consular Center will still accept telephone calls and inquiries from the public.

All passport agencies and centers and acceptance facilities (such as U.S. post offices, libraries, and county clerk's offices) are still accepting applications for U.S. passport books and passport cards during the shutdown, and passports can be renewed by mail, DOS said. Processing times remain the same: four to six weeks for routine service and two to three weeks for expedited service.

Those who have scheduled appointments at a DOS passport agency or center should plan on keeping their appointments, the agency said. Those who need to cancel their appointments at those places may do so by calling 1-877-487-2778 or visiting the Online Passport Appointment System at https://passportappointment.travel.state.gov/. Those who have scheduled appointments at a passport acceptance facility and need to cancel should contact the facility directly; see https://iafdb.travel.state.gov/ to search for a local facility.

The DOS passport notice is at https://travel.state.gov/content/travel/en/traveladvisories/ea/passport-services-government-shutdown.html.

Executive Office for Immigration Review—immigration courts. With respect to the operating status of immigration courts during the shutdown, EOIR said that detained docket cases will proceed as scheduled. Non-detained docket cases will be reset for a later date after funding resumes. Immigration courts will issue an updated notice of hearing to respondents or, if applicable, respondents' representatives of record for each reset hearing.

The EOIR notice is at https://www.justice.gov/eoir/file/1122956/download.

U.S. Citizenship and Immigration Services. USCIS said that the shutdown does not affect USCIS's fee-funded activities. USCIS offices remain open and all applicants should attend their interviews and appointments as scheduled, the agency said. The lapse in government appropriations does not affect Form I-9 Employment Eligibility Verification requirements. Employers must still complete

Form I-9 no later than the third business day after an employee starts work for pay, and comply with all other I-9 requirements.

USCIS noted that several USCIS programs have either expired or suspended operations, or are otherwise affected, until they receive appropriated funds or are reauthorized by Congress. The program-specific announcements are summarized below:

- **EB-5 Immigrant Investor Regional Center Program.** The EB-5 Immigrant Investor Regional Center Program expired at the end of the day on December 21, 2018, due to a lapse in congressional authorization to continue the program. All regional center applications and individual petitions are affected. USCIS will not accept new Forms I-924, Application for Regional Center Designation Under the Immigrant Investor Program, as of December 21, 2018. Any pending Forms I-924 as of that date will be put on hold until further notice. Regional centers should continue to submit Form I-924A, Annual Certification of Regional Center, for fiscal year 2018. USCIS said it will continue to receive regional center-affiliated Forms I-526, Immigrant Petition by Alien Entrepreneur, and Forms I-485, Application to Register Permanent Residence or Adjust Status. USCIS has put unadjudicated regional center-affiliated Forms I-526 and I-485 (whether filed before or after the expiration date) on hold for an undetermined length of time. All Forms I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, filed before or after the expiration date will not be affected by the expiration of the program. USCIS said it will provide further guidance if legislation is enacted to reauthorize, extend, or amend the regional center program.

The announcement about the EB-5 program is at https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers, in English with a link to a PDF in simplified Chinese.

- **E-Verify.** Services are unavailable due to the shutdown, USCIS said. Employers' E-Verify accounts are also unavailable, so employers will not be able to enroll in E-Verify; create an E-Verify case; view or take action on any case; add, delete, or edit any user account; reset a password; edit company information; terminate an account; or run reports. Also, employees will

not be able to resolve E-Verify Tentative Nonconfirmations (TNCs). E-Verify said that the agency understands that E-Verify's unavailability may have a "significant impact on employer operations." To minimize the burden on both employers and employees, the agency has implemented the following policies:

- The "three-day rule" for creating E-Verify cases is suspended for cases affected by the unavailability of E-Verify.
- The time period during which employees may resolve TNCs will be extended. The number of days E-Verify is not available will not count toward the days the employee has to begin the process of resolving a TNC.
- USCIS said it will provide additional guidance regarding the "three-day rule" and time period to resolve TNC deadlines once operations resume.
- **Employers may not take adverse action against an employee because the** E-Verify **case is in an interim case status, including while the employee's case is in an extended interim case status due to the unavailability of** E-Verify**.**
- Federal contractors with the Federal Acquisition Regulation (FAR) E-Verify clause should ask their contracting officer about extending federal contractor deadlines.
- MyE-Verify accounts are unavailable and employees will not be able to access their accounts to use self-check, self-lock, case history, or case tracker.
- Upcoming webinars are canceled.
- Telephone and email support for Form I-9, E-Verify, and MyE-Verify is unavailable.

The E-Verify announcement is at https://www.e-verify.gov/e-verify-and-e-verify-services-are-unavailable.

- **Conrad 30 waiver for J-1 doctors.** This program allows J-1 doctors to apply for a waiver of the two-year residence requirement after completing the J-1 exchange visitor program. The expiration only affects the date by which the J-1 doctor must have entered the United States; it is not a shutdown of the Conrad 30 program entirely.

More information about the Conrad 30 waiver program is at https://www.uscis.gov/working-united-states/students-and-exchange-visitors/c

onrad-30-waiver-program.

- **Non-minister special immigrant religious workers.** This category allows non-ministers in religious vocations and occupations to immigrate or adjust status in the United States to perform religious work in a full-time, compensated position. The EB-4 non-minister special immigrant religious worker program expired due to a lapse in congressional authorization to continue the program. USCIS will reject any Form I-360 Special Immigrant petitions for Non-Minister Religious Workers received on or after December 22, 2018. Petitions received by USCIS before that date but not issued a final decision before December 22, 2018, will be placed on hold in case the program is reauthorized.

More information about the special immigrant religious workers program and expiration is at https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-religious-workers.

The USCIS announcement is at https://www.uscis.gov/archive/archive-news/lapse-federal-funding-certain-uscis-operations.

Back to Top

USCIS Discontinues Case-Specific Assistance Via Service Center Email

U.S. Citizenship and Immigration Services (USCIS) announced that it is discontinuing use of USCIS service center emailboxes for case-specific questions as of January 21, 2019. Instead, USCIS is directing people to its online self-help tools and the USCIS Contact Center.

The service center email addresses being discontinued are:

- California Service Center: csc-ncsc-followup@uscis.dhs.gov
- Vermont Service Center: vsc.ncscfollowup@uscis.dhs.gov
- Nebraska Service Center: NSCFollowup.NCSC@uscis.dhs.gov
- Potomac Service Center: psc.ncscfollowup@uscis.dhs.gov
- Texas Service Center: tsc.ncscfollowup@uscis.dhs.gov

The announcement, which includes information about USCIS's online tools, is at

https://www.uscis.gov/news/alerts/update-case-assistance-service-centers.

Back to Top

USCIS Closes Havana Field Office

U.S. Citizenship and Immigration Services (USCIS) permanently closed its field office in Havana, Cuba, as of December 10, 2018. The USCIS field office in Mexico City, Mexico, will assume the Havana field office's jurisdiction over U.S. immigration matters for individuals who are in Cuba. The U.S. Department of State in Havana "will also assume responsibility for certain services previously handled by USCIS," the agency said.

USCIS noted that U.S. embassy visa services in Havana have been almost entirely suspended since November 2017 due to a drawdown in staffing as a result of attacks affecting the health of U.S. embassy employees there. The Department of State and USCIS "continue to explore options to resume consular and other immigration services in alternate locations," USCIS said.

The announcement, which includes details on filing instructions for individuals who live in Cuba or who petition for residents in Cuba, is at https://www.uscis.gov/news/alerts/uscis-closes-havana-field-office-dec-10-2018. Information on the USCIS Mexico City field office is at https://www.uscis.gov/about-us/find-uscis-office/international-offices/mexico-uscis-mexico-city-field-office.

Back to Top

Global: Update on Brexit vs. Freedom of Movement (for Workers)

This article provides a summary of highlights of "Brexit" and the outlook for the near future with respect to the free movement of affected workers.

It has now been over two and a half years since the United Kingdom (UK) resolved in a referendum held on June 23, 2016, by a slim majority (51.9% to 48.1%), to leave the European Union (EU). Following submission of the written Withdrawal Declaration to the European Council on March 29, 2017, effective after two years, negotiations on the terms and conditions of the withdrawal were initiated with some delay. An initial breakthrough in the negotiations was achieved about a year ago, and the first draft of the UK-EU Withdrawal Agreement was presented in the spring. The debate nevertheless continued to

be highly controversial. Finally, in November 2018, despite all the adversity, a decisive breakthrough was achieved. On November 14, 2018, the EU and the UK reached an agreement on the revised version of the Withdrawal Agreement, which includes a transitional arrangement until December 31, 2020, which may be extended once by mutual agreement for a period that has not been specified.

However, this arrangement can only enter into force once it has been ratified by both the UK and the EU. Unless the Council agrees otherwise with the withdrawing Member State, Article 50, para. 3, TEU, states that European contracts will no longer apply after two years from the date of the formal application, i.e., after March 28, 2019, unless all Member States mutually agree on an extension. This is commonly referred to as "hard BREXIT" or "no deal" and would be accompanied by significant trade barriers between the UK and mainland Europe, with huge economic ramifications.

All of this is reason enough to take a closer look at the effects of the withdrawal from a residency law perspective and to appraise the (probable) future legal situation.

What is the law now and what will it be in the future? "The deal"

With regard to the freedom of movement (for workers), it is first necessary to bear in mind the regulations that will continue to apply until at least March 29, 2019, under the current legal situation and what would (probably) change in the future under the Withdrawal Agreement.

Legal Situation Before the Withdrawal

UK citizens continue to be (even after the Withdrawal Declaration on March 29, 2017) EU citizens or, more precisely, citizens of the Union. Article 17 of the Treaty on the Functioning of the European Union (TFEU) states that any person who is a citizen of a Member State is also a citizen of the Union. This is the situation until two years after the declaration of withdrawal, i.e., until March 28, 2019. At present, this means that the privileges granted to UK citizens with regard to the right to free movement and residence (for workers) continue to apply. This includes the right of workers:

- to apply for jobs offered on the market
- to move unrestrictedly within the territory of the Member States for that purpose

- to reside in a Member State in order to pursue employment there in accordance with the laws, regulations, and administrative provisions applicable to employees in that State
- to remain within the territory of a Member State after having been employed there under conditions laid down by the Commission by means of regulations

However, these privileges with regard to the right to free movement and residence of workers will continue to apply without restriction for a period of two years (subject to a mutually agreed extension of this period) after the UK submitted its declaration of withdrawal.

Anticipated Legal Situation After the Withdrawal

The Withdrawal Agreement includes transition provisions ("Implementation Period") until December 31, 2020, to mitigate the effects of the withdrawal on Union citizens and British citizens and contains the following detailed regulations:

Free Movement of Workers

EU citizens residing legally, temporarily, or permanently in the UK at the time of the EU withdrawal may continue to live, work (or become unemployed with no fault of their own, self-employed, study or seek employment within the meaning of Article 7(3) of the Free Movement Directive), or study in the UK. The same applies to British citizens who live in an EU member state.

Persons living temporarily or permanently in the United Kingdom at the time of the withdrawal or the date of the Withdrawal Agreement may also remain in the country. The same applies analogously to British citizens who are legally residing in an EU member state, including persons living with them in non-marital relationships. EU negotiators rejected a request by negotiators from the United Kingdom that a regulation be provided for with regard to British citizens who move to an EU member state after the date of record, stating that they had no mandate to provide for such regulation and that such matters would be provided for in a later agreement.

EU and UK citizens must be legal residents in the host Member State at the end of the transitional period in accordance with EU law on the free movement of persons. However, the Withdrawal Agreement does not require a personal presence in the host country at the end of the transitional period—temporary

absences do not affect the right of residence, and longer absences that do not restrict the right of permanent residence are permitted.

According to the Withdrawal Agreement, the above rights will not expire after the transitional period. This means that Union citizens retain their right of residence essentially under the same substantive conditions as under the EU right of free movement, but must apply to the UK authorities for a new UK residence status. After five years of legal residence in the UK, the UK residence status will be upgraded to a permanent status with more rights and enhanced protection.

The same applies to British citizens who continue to legally reside in an EU Member State after a period of five years.

Family Members

EU citizens who are already legal residents in the UK either temporarily or permanently, at the time of the country's withdrawal from the EU, have a right to family unification, including with family members who do not live with them yet. In addition to spouses (or persons with equivalent status), this also concerns parents and children (including children born after the date of record). The applicable regulations under national law will apply to any other family members.

Social Security

EU citizens who are already living in the United Kingdom at the time of the country's withdrawal from the EU, as well as British citizens who live in an EU Member State, will retain their entitlements from health and pension insurance plans, as well as other social security benefits, or these entitlements are mutually taken into account.

Administrative Procedures

The United Kingdom promises its resident EU citizens a special residential status that secures their rights and can be applied for easily and at a low cost. EU citizens living permanently or temporarily in the United Kingdom can have their status clarified by the responsible administrative authorities until two years after the date of record. Decisions are to be made exclusively on the basis of the Withdrawal Agreement, without any further discretionary powers. The procedure is proposed to be quick, simple, convenient, and free of charge.

Case Law

Under the Withdrawal Agreement, the European Court of Justice (ECJ) retains jurisdiction for pending cases and questions referred by British courts until the end of the transitional period. EU citizens can only litigate their rights before British courts; these courts, however, will give consideration to the case law of the ECJ for a transitional period of eight years after the expiration of the transitional period, and may also continue to submit questions to the ECJ.

Right to Permanent Residency

The right of EU citizens to permanent residency after they have been in the UK for five years will be retained, with regulations under European law continuing to be authoritative for the eligibility requirements. Time spent in the country before the withdrawal will be taken into account, and periods of temporary absence (of up to six months within a period of 12 months) from the United Kingdom for important reasons will not count toward this period. EU citizens living outside of the UK will only lose their right of permanent residency after a period of five years. Existing permanent residency permits are proposed to be converted free of charge, subject to an identity check, a criminal background and security check, and the assurance and confirmation of ongoing residency.

The State of Play

The road to the possible conclusion and entry into force of the Withdrawal Agreement remains rocky and almost impassable. To make things worse, all of this is playing out in a political minefield. Now that the EU has adopted the Withdrawal Agreement, it is the UK's turn. The Parliament's decision on the adoption of the Withdrawal Agreement was initially scheduled for December 11, 2018. In the meantime, however, British Prime Minister Theresa May held a crisis meeting and announced that she was postponing the vote until an unspecified later point in time. This is probably because recent surveys indicated that the Withdrawal Agreement would fail to attract a majority. According to press reports, the vote is proposed to take place by January 21, 2019.

Meanwhile, the EU has reiterated that the bloc will not be available for renegotiations on the Withdrawal Agreement. In the meantime, Ms. May held talks with German Chancellor Angela Merkel in Berlin and with leaders of other EU member states in Amsterdam, Holland, and Brussels, Belgium. So far, these

talks have been without success. It is more than symbolic that Ms. May was unable to disembark upon arrival in Berlin due to a technical defect that prevented her car's door from being opened. The times in which a "handbag" moment (this refers to former UK Prime Minister Margaret Thatcher, who "forced" a decision in a brash appearance in Brussels) is enough to persuade the EU to give in seem to be over. There is unanimous consent on the EU side that renegotiations are categorically excluded. Meanwhile, growing reports point to an imminent motion of censure in the British Parliament. The political pressure on Ms. May's shoulders is therefore as heavy as it could possibly be despite of having survived the vote of no confidence on December 12, 2018.

A further possible way out of this dilemma that has now been suggested by the ECJ did not come as a surprise, given the opinion of the Advocate General published recently. In its judgment handed down on December 10, 2018, the ECJ, on the basis of a referral made at the request of Scotland's highest civil court in the matter of *Wightman et al. vs. Secretary of State for Exiting the European Union* (C-621/18), ruled that it is possible under certain conditions for the UK to unilaterally revoke the Withdrawal Declaration issued to the EU on March 29, 2017. It would be possible for as long as there is no binding withdrawal agreement and the period of two years stipulated in Article 50(3) TFEU has not expired, for as long as the revocation is made by a unilateral, unequivocal, and unconditional written declaration to the European Council after the concerned Member State has enacted the revocation decision in accordance with its constitutional requirements. Irrespective of this fundamental possibility established in this judgment, it is questionable whether this would happen before March 29, 2019, as the decision to issue such a revocation would also be subject to a majority in the British Parliament and, in all likelihood, could not ever be validly declared without the consent of the majority of Parliament.

Given all of these circumstances, both sides (but more on the UK side than on the EU side) continue to find themselves under massive pressure. This is all the more true as the Withdrawal Agreement still needs to be ratified by the Member States. Any extension of the two-year negotiation window, which would only be possible by mutual agreement, seems highly unlikely and would always entail the risk of a Member State "throwing a wrench into things" or demanding significant concessions in other areas before agreeing to such an extension. In this context, the possibility of a unilateral revocation of the

Withdrawal Declaration could gain significance.

Assessment—"The Complete Mess"

The current situation seems hopeless from the point of view of the UK. The ratification of the Withdrawal Agreement seems such a remote possibility that the British Prime Minister is apparently too afraid of even putting it to a vote. The negotiating partners at the EU are not willing to make any further concessions. The alternative of withdrawing from the EU without a transitional arrangement appears to entail unpredictable economic disadvantages for the UK. On the other hand, the outcome of a second referendum, once again conceivable after the ECJ ruling on the possibility of unilaterally revoking the Withdrawal Declaration, is not as clear-cut as may be suggested in some newspapers. Calling all of this a "complete mess" would probably be a fair assessment.

The history of the EU tells us that the negotiations likely will eventually come to an end with a compromise that is bearable for both sides, even though we cannot predict the details. There might even be a chance that the United Kingdom will in the end remain in the EU. Stay tuned.

Back to Top