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

MID-JANUARY 2019 IMMIGRATION UPDATE

Posted on January 17, 2019 by Cyrus Mehta

Headlines:

Begin Work on H-1B Petitions Now, the Firm's Attorneys Urge; H-1B Tips for Employers – Employers should assess their need for H-1B employees and begin working on their H-1B petitions now. Filing season is expected to open April 1, 2019, for FY 2020 cap-subject H-1B visas.

DOL's iCERT System Crashed on January 1, Preventing H-2B Application E-Filings – The iCERT website crashed early on January 1, 2019, preventing employers from e-filing their application packets for the 33,000 H-2B visas with an April 1, 2019, start date for temporary nonagricultural H-2B workers.

USCIS Launches New Online Fee Calculator – The Online Fee Calculator will determine the exact filing and biometric fees to include with forms and "will always have the most up-to-date fee information," the agency said.

State Dept. Releases Outlook for Visa Number Availability Through May – The Visa Bulletin for February 2019 includes information on employment-based visa number availability on a monthly basis through May.

Interview Waiver Guidance Revised for Petitions to Remove Conditions on Residence – The new guidance addresses when officers may consider interview waivers.

State Dept. Issues Travel Advisory for China – The Department of State warned U.S. citizens to exercise increased caution when traveling to China due to "arbitrary enforcement of local laws as well as special restrictions on dual U.S.-Chinese nationals." The travel advisory states that Chinese authorities have asserted broad authority to prohibit U.S. citizens from leaving China by using "exit bans," sometimes "keeping U.S. citizens in China for years."

USCIS Terminates Categorical Parole Programs for Certain Individuals

Present in CNMI – The termination affects USCIS parole programs for immediate relatives of U.S. citizens and certain stateless individuals in CNMI; CNMI permanent residents, immediate relatives of CNMI permanent residents, and immediate relatives of citizens of the Freely Associated States (Federated States of Micronesia, Republic of the Marshall Islands, or Palau); and certain in-home foreign worker caregivers of CNMI residents.

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Begin Work on H-1B Petitions Now, the Firm's Attorneys Urge; H-1B Tips for Employers

Cyrus D. Mehta & Partners PLLC recommends that employers assess their need for H-1B employees and begin working on their H-1B petitions now. Filing season is expected to open April 1, 2019, for fiscal year (FY) 2020 cap-subject H-1B visas. Annual demand typically far outstrips availability, so the visas are snapped up immediately.

The Firm recommends the following ways for employers to maximize their H-1B chances:

- Apply based on a master's degree from a U.S. nonprofit university as long as all degree requirements were completed before April 1
- Ensure a close match between the course of study and job duties
- Apply concurrently for optional practical training (OPT) or STEM OPT and H-1B
- Apply for "consular notification," not change of status, to preserve OPT if OPT lasts beyond October 1
- Apply for "change of status" if OPT expires before October 1 to preserve work eligibility under "cap gap" policy, but avoid travel
- Choose O*NET code and wage level carefully
- If more than one field of study could qualify a person for the position, explain task by task how the position requires the education
- Be careful of Level 1 wages. Instead, obtain an acceptable prevailing wage from a legitimate source other than the Department of Labor, offer to pay a higher wage from the outset, or explain why this particular job is both entry level and qualifies as a "specialty occupation"

- Consider other visa options if your employee is not selected in the H-1B lottery
- Check the USCIS website for changes to form, fee, and filing location

The Department of Homeland Security (DHS) published 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 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." It is unclear, however, if the rule will be finalized and implemented in time for the start of the H-1B filing season on April 1.

Contact our firm for advice and help with preparing H-1B petitions.

The proposed rule published in December 2018 is at https://www.govinfo.gov/content/pkg/FR-2018-12-03/pdf/2018-26106.pdf.

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DOL's iCERT System Crashed on January 1, Preventing H-2B Application E-Filings

The Department of Labor's (DOL) iCERT website crashed early on January 1, 2019, preventing employers from e-filing their application packets for the 33,000 H-2B visas with an April 1, 2019, start date for temporary nonagricultural H-2B workers. Employers and their attorneys reported working late on New Year's Eve to be able to submit their applications at midnight ET, only to be thwarted repeatedly while hitting "submit."

DOL subsequently posted the following iCERT announcement:

IMPORTANT ANNOUNCEMENT:

We sincerely apologize for the major service interruption in the iCERT System early in the morning of January 1, 2019. Due to overwhelming filing demand, the Department's technology staff is working diligently to investigate the cause of the system outage and has temporarily taken the iCERT System down for the remainder of January 1st and until further notice. The Department will provide another update on the status of the iCERT System around 12:00PM EST, January

2nd, and separate advance public notice regarding when the iCERT System will be operational once again.

DOL's Office of Foreign Labor Certification (OFLC) announced on January 7, 2019, that the system was back up as of 2 p.m. ET that day.

OFLC announced on January 8, 2019, that it had received approximately 5,276 H-2B applications covering more than 96,400 worker positions, which was nearly three times greater than the 33,000 semiannual visa allotment for fiscal year 2019. To process this "significant surge," OFLC said it would sequentially assign H-2B applications to analysts based on the calendar date and time on which the applications were received, measured to the millisecond.

On January 11, 2019, OFLC posted the following additional announcements:

The Department has received questions about the difference between timestamps displayed in iCERT and timestamps contained in emails confirming the submission of applications. When an applicant submits an application, the system generates a courtesy email to the applicant which confirms the submission. *The date and time in the courtesy email, however, does not represent the official date and time of the applicant's submission*. Rather, it indicates the time at which the email was generated. To reiterate, the official date and time of each application may be viewed in the applicant's H-2B Portfolio Screen through the applicant's iCERT system account.

The Department undertook an after-action analysis of the iCERT system's January 7, 2019 performance. Through a review of the data logs, the Department has determined that 186 applicants submitted the same application more than once in the iCERT system. Because the iCERT database overwrites the previous date and time stamp when a new submission is made, the official date and time saved in the iCERT database is the date and time of the final submission. For these 186 applications, the Department was able to determine the time of the first submission down to the second. For the 152 applicants with multiple submissions within the same second, the final time stamp to the millisecond is reflected in the official date and time. In the remaining 34 cases, the submissions were made outside of the same second. Those applications are now at the first submission's second. These time stamps are reflected in the official receipt date and time that may be viewed on the H-2B Portfolio Screen through an iCERT system account.

Some users received an outage banner which delayed or blocked access to the H-2B page in the iCERT system. To increase processing capacity on January 7, 2019, the Department scaled up iCERT infrastructure to 50 load-balanced servers. One of the pathways to these servers did not allow access to the iCERT's H-2B module system at the 2:00 p.m. EST opening of the system, and for approximately two and half hours thereafter. All iCERT users were randomly assigned to a server at log-on as per a standard load-balancing algorithm. As a result, users assigned to this particular pathway experienced the outage banner and may have been delayed from getting into iCERT's H-2B module.

In addition, the Department received questions regarding whether there was a restoration of data due to data corruption. There was no restoration of data from back-up and no data corruption found connected to the system disruption of January 1, 2019.

The Department was notified that some applicants were missing certain required data or attachments from their applications. As per standard practice, applicants are encouraged to log into their iCERT accounts and verify that their applications are complete and accurate. If any attachments are missing, applicants may upload them at any time. If any required data fields on the ETA-9142B are missing or inaccurate, applicants may contact the Office of Foreign Labor Certification (OFLC) help desk at tlc.chicago@dol.gov and provide the relevant H-2B case number and explain the necessary corrections.

In light of the unprecedented demand for H-2B labor certifications, the Department is considering rulemaking changing the process by which applications are ordered for processing, including randomization and other methods. In the interim, the Department welcomes comments and suggestions from the public on these matters. Comments and suggestions should be directed to ... H2BReform.Comments@dol.gov.

Some attorneys said the agency had been warned in advance about the capacity issue, and that lawsuits were pending. The system is at https://icert.doleta.gov/. OFLC's announcements are at https://www.foreignlaborcert.doleta.gov/.

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USCIS Launches New Online Fee Calculator

U.S. Citizenship and Immigration Services (USCIS) has launched the Online Fee

Calculator to assist in calculating the correct fee amount to include when filing forms with USCIS at an agency Lockbox facility.

USCIS said it developed the new Online Fee Calculator to help reduce the number of applications rejected due to incorrect fee amounts. Fee issues, including incorrect fee amounts, are consistently a leading cause of rejection. For applications that require fees, USCIS rejects forms submitted with an incorrect payment amount. The Online Fee Calculator will determine the exact filing and biometric fees to include with forms and "will always have the most up-to-date fee information," the agency said.

When using the Online Fee Calculator, filers select a form or combination of forms and answer a series of questions. The calculator then calculates the correct fee amount that the filer must submit.

USCIS said the Online Fee Calculator works on all browsers and on both desktop and mobile devices. To protect privacy, the agency noted, "it does not collect user data."

For forms filed at Lockbox facilities, USCIS accepts payment via check, money order, or credit card with Form G-1450, Authorization for Credit Card Transactions.

The Online Fee Calculator is at https://www.uscis.gov/feecalculator. The USCIS announcement is at https://www.uscis.gov/news/news-releases/new-uscis-tool-calculates-fees-helps-avoid-incorrect-payments. For more information on payment, see the USCIS webpage on paying USCIS fees at https://www.uscis.gov/forms/paying-uscis-fees. G-1450 is available at https://www.uscis.gov/g-1450.

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State Dept. Releases Outlook for Visa Number Availability Through May

The Department of State's Visa Bulletin for the month of February 2019 notes the following with respect to employment-based visa number availability on a monthly basis through May:

EMPLOYMENT-based categories (potential monthly movement)

Employment First:

WORLDWIDE (most countries): Up to two months.
China and India: Up to one month.

Employment Second:

Worldwide: Current for the foreseeable future.
China: Up to three months.
India: Up to one week

Employment Third:

Worldwide: Current
China: Up to three weeks.
India: Up to three months.
Mexico: Current
Philippines: Rapid movement to generate demand.

Employment Fourth: Current for most countries.

El Salvador, Guatemala, and Honduras: Up to one week.
Mexico: Rapid forward movement until limit is reached.

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

China-mainland born: Up to one week.
Vietnam: Up to three weeks.

The above final action date projections for the indicate what is likely to happen on a monthly basis through May. The determination of the actual monthly final action dates is subject to fluctuations in applicant demand and a number of other variables. It is also important to remember that by no means has every applicant with a priority date earlier than a prevailing final action date been processed for final visa action, with applicants often processing at their own initiative and convenience.

The Visa Bulletin for February 2019 is at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-february-2019.html.

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Interview Waiver Guidance Revised for Petitions to Remove Conditions on Residence

U.S. Citizenship and Immigration Services (USCIS) has released a policy

memorandum revising interview waiver guidance for Form I-751, Petition to Remove Conditions on Residence. The guidance applies to all USCIS officers adjudicating Forms I-751, and supersedes previous guidance issued in 2005. The memo explains that in general, officers must interview a conditional permanent resident who has obtained lawful permanent resident status on a conditional basis and who is the principal petitioner on an I-751, unless the interview is waived. The new guidance addresses when officers may consider interview waivers.

The memo explains that USCIS officers may consider waiving an interview if they are satisfied that:

- They can make a decision based on the record because it contains sufficient evidence about the bona fides of the marriage and that the marriage was not entered into for the purpose of evading the immigration laws of the United States;
- For Form I-751 cases received on/after December 10, 2018, USCIS has previously interviewed the I-751 principal petitioner (for example, for a Form I-485 or Form I-130);
- There is no indication of fraud or misrepresentation in the Form I-751 or the supporting documentation; and
- There are no complex facts or issues that require an interview to resolve questions or concerns.

When determining whether to waive an interview, the considerations listed above apply regardless of whether the I-751 is filed as a joint petition or as a waiver of the joint filing requirement, the memo states. Cases involving fraud or national security concerns must be referred to the Fraud Detection and National Security Directorate according to local procedures.

The memo, which includes additional information, is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-30-PM-602-0168-revised-interview-waiver-guidance-for-form-I-751.pdf.

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State Dept. Issues Travel Advisory for China

The Department of State warned U.S. citizens on January 3, 2019, to exercise increased caution when traveling to China due to "arbitrary enforcement of

local laws as well as special restrictions on dual U.S.-Chinese nationals." The travel advisory states that Chinese authorities have asserted broad authority to prohibit U.S. citizens from leaving China by using "exit bans," sometimes "keeping U.S. citizens in China for years."

The travel advisory states that China uses exit bans coercively to compel U.S. citizens to participate in Chinese government investigations, to lure individuals back to China from abroad, and to aid Chinese authorities in resolving civil disputes in favor of Chinese parties. In most cases, U.S. citizens become aware of the exit ban only when they attempt to leave China, the advisory states, and there is no way to find out how long the ban may continue. "U.S. citizens under exit bans have been harassed and threatened," the advisory notes.

The advisory warns that U.S. citizens may be detained without access to U.S. consular services or information about their alleged crimes. U.S. citizens may be subjected to prolonged interrogations and extended detention for reasons related to "state security." Security personnel may detain and/or deport U.S. citizens for sending private electronic messages critical of the Chinese government.

The advisory also notes that China does not recognize dual nationality. U.S.-Chinese citizens and U.S. citizens of Chinese heritage may be subject to "additional scrutiny and harassment," and China may prevent the U.S. Embassy from providing consular services, the advisory states.

Among other things, the advisory recommends that those traveling to China enter on their U.S. passports with a valid Chinese visa; enroll in the Smart Traveler Enrollment Program; and have a contingency plan.

The advisory, which includes additional information, is at https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html.

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USCIS Terminates Categorical Parole Programs for Certain Individuals Present in CNMI

Effective immediately, the categorical Commonwealth of the Northern Mariana Islands (CNMI) parole programs are terminated. This affects USCIS parole programs for immediate relatives of U.S. citizens and certain stateless individuals in CNMI; CNMI permanent residents, immediate relatives of CNMI

permanent residents, and immediate relatives of citizens of the Freely Associated States (Federated States of Micronesia, Republic of the Marshall Islands, or Palau); and certain in-home foreign worker caregivers of CNMI residents.

After any parole authorized through these programs expires, USCIS will not renew that parole. Although USCIS will not otherwise authorize re-parole under these programs, it will allow a transitional parole period and extension of employment authorization (if applicable) for up to 180 days for affected individuals, with parole not extending beyond June 29, 2019. The transitional parole period of up to 180 days "will help ensure an orderly wind-down of the programs and provide an opportunity for individuals to prepare to depart or seek another lawful status," USCIS said.

Current parolees who have requested an extension of parole from USCIS will receive a letter granting an additional 180 days of transitional parole, unless there is a specific reason to deny the request as determined on a case-by-case basis, USCIS said. For those parolees with an Employment Authorization Document (EAD) expiring at the same time as their parole, that letter and the EAD will serve as evidence of identity and work authorization for employment eligibility verification (Form I-9) purposes during the 180-day period.

USCIS will also issue a new EAD valid for the duration of the re-parole period to those parolees who request an extension of parole. The new EAD will be issued automatically upon approval for the period of re-parole, and no new employment authorization application or fee will be required, the agency said. Current parolees with upcoming expiration dates who have not yet requested an extension of parole, and who desire to receive the additional period of transitional parole, should request such transitional parole "as soon as possible."

The USCIS announcement is at https://www.uscis.gov/news/alerts/termination-categorical-parole-programs-certain-individuals-present-commonwealth-northern-mariana-islands-cnmi. Information on eligibility requirements and how to complete a request is available at https://www.uscis.gov/laws/immigration-commonwealth-northern-mariana-islands-cnmi/parole-immediate-relatives-us-citizens-and-certain-stateless-individuals.

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Firm in the News

Mr. Mehta was quoted by *Qrius* in an article entitled "Trump promises potential citizenship to H-1B workers: What it means for India?" The article is at https://qrius.com/trump-promises-potential-citizenship-to-h-1b-workers-what-it-means-for-india/

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