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

FEBRUARY 2019 IMMIGRATION UPDATE

Posted on February 12, 2019 by Cyrus Mehta

Headlines:

DHS Prioritizes U.S. Advanced Degrees in H-1B Final Rule; Electronic Registration Requirement Postponed – DHS has published a final rule amending regulations governing H-1B cap-subject petitions, including those that may be eligible for the advanced degree exemption. The final rule reverses the order by which USCIS selects H-1B petitions under the H-1B regular cap and the advanced degree exemption and introduces an electronic registration requirement for petitioners seeking to file H-1B cap-subject petitions. The rule is effective April 1, 2019, although the electronic registration requirement will be suspended for one year.

Tens of Thousands of Immigration Court Hearings Canceled Due to Shutdown; Trump Announces Three-Week Reopening of Federal Government – More than 80,000 immigration court hearings were canceled due to the partial federal government shutdown, which added to an already large backlog.

USCIS Resumes Premium Processing for FY 2019 H-1B Cap Petitions – USCIS has resumed premium processing for all FY 2019 H-1B cap petitions, including those eligible for the advanced degree exemption (master's cap).

USCIS Announces Countries Eligible for H-2A and H-2B Visa Programs – U.S. Citizenship and Immigration Services and the Department of Homeland Security, in consultation with the Department of State, have announced the list of countries whose nationals are eligible to participate in the H-2A and H-2B visa programs in 2019.

State Dept. Suspends Visa Services in Caracas, Venezuela – The U.S. Embassy in Caracas has suspended routine visa services due to the ordered

departure of non-emergency personnel. Due to continued unrest, U.S. citizens are advised to either leave Venezuela or prepare to shelter in place.

Trump Administration Implements Remain-in-Mexico Asylum Procedure – The Trump administration is implementing a procedure to force certain asylum-seekers wishing to come to the United States to remain in Mexico while their cases are processed. The plan, to begin at the San Ysidro border crossing, reportedly includes busing asylum-seekers to their hearings at a courthouse in San Diego, California, from Tijuana, Mexico.

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DHS Prioritizes U.S. Advanced Degrees in H-1B Final Rule; Electronic Registration Requirement Postponed

The Department of Homeland Security has published a final rule amending regulations governing H-1B cap-subject petitions, including those that may be eligible for the advanced degree exemption. The final rule reverses the order by which U.S. Citizenship and Immigration Services (USCIS) selects H-1B petitions under the H-1B regular cap and the advanced degree exemption and introduces an electronic registration requirement for petitioners seeking to file H-1B cap-subject petitions. The rule is effective April 1, 2019, although the electronic registration requirement will be suspended for one year, USCIS said.

Starting on April 1, USCIS will first select H-1B petitions (or registrations, once the registration requirement is implemented) submitted on behalf of all beneficiaries, including those that may be eligible for the advanced degree exemption. USCIS will then select from the remaining eligible petitions a number projected to reach the advanced degree exemption. Changing the order in which USCIS counts these allocations will likely increase the number of petitions for beneficiaries with a master's or higher degree from a U.S. institution of higher education to be selected under the H-1B numerical allocations, USCIS said. Specifically, the agency noted, the change will result in an estimated increase of up to 16 percent (or 5,340 workers) in the number of selected petitions for H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education.

USCIS will begin accepting H-1B cap petitions for fiscal year (FY) 2020 on April 1, 2019. The reverse selection order will apply to petitions filed for the FY 2020 H-1B cap season. Petitioners may file an H-1B petition no more than six months before the employment start date requested for the beneficiary. USCIS said it will provide H-1B cap filing instructions in advance of the filing season.

As noted above, after considering public feedback, USCIS has suspended the electronic registration requirement for the FY 2020 cap season "to complete user testing and ensure the system and process are fully functional." Once implemented, the electronic registration requirement will require petitioners seeking to file H-1B cap petitions, including those that may be eligible for the advanced degree exemption, to first electronically register with USCIS during a designated registration period. Only those whose registrations are selected will be eligible to file an H-1B cap-subject petition. USCIS said it expects that the electronic registration requirement, once implemented, "will reduce overall costs for petitioners and create a more efficient and cost-effective H-1B cap petition process for USCIS and petitioners."

Additionally, USCIS said it will publish a notice in the Federal Register to announce the initial implementation of the H-1B registration process in advance of the cap season in which it will implement the requirement. Before implementation, USCIS "will conduct outreach to ensure petitioners understand how to access and use the system." USCIS said it will announce the designated electronic registration period at least 30 days in advance for each fiscal year it is required.

According to reports, DHS pushed through the proposed rule to finalization quickly. The agency had published a notice of proposed rulemaking on December 3, 2018. Public comments were due January 2; USCIS was not closed during the federal government shutdown because it is funded by fees.

Cyrus D. Mehta & Partners PLLC recommends that employers assess their need for H-1B employees and begin working on their H-1B petitions now. Annual demand typically far outstrips availability, so the visas are snapped up immediately.

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

The final rule is at https://www.govinfo.gov/content/pkg/FR-2019-01-31/pdf/2019-00302.pdf. The

USCIS notice is at https://www.uscis.gov/news/news-releases/dhs-announces-final-rule-a-more-effective-and-efficient-h-1b-visa-program.

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Tens of Thousands of Immigration Court Hearings Canceled Due to Shutdown; Trump Announces Three-Week Reopening of Federal Government

According to a report by Syracuse University's Transactional Records Access Clearinghouse (TRAC), more than 80,000 immigration court hearings were canceled due to the partial federal government shutdown, which began at midnight on December 22, 2018, and ended on January 25. President Donald Trump has announced a reopening of the government for three weeks, until February 15.

The report notes that the active case backlog was already at 809,041 as of the end of November 2018. Judge Dana Leigh Marks termed the shutdown's effect "devastating" and estimated that it could add three or four years to the wait before those canceled hearings can be rescheduled. According to TRAC figures as of January 11, immigration courts in California experienced the most hearing cancellations: an estimated 9,424. New York had the second highest number of cancellations, at 5,320. Texas was close behind New York with an estimated 5,141 immigration court proceedings canceled.

The fee-based U.S. Citizenship and Immigration Services remained open during the shutdown. Systematic Alien Verification for Entitlements (SAVE) program services remained operational during the shutdown, and SAVE said users should continue to submit cases to verify an applicant's immigration or citizenship status. The Department of State said that scheduled passport and visa services in the United States and at U.S. embassies and consulates overseas continued during the shutdown "as the situation permit." E-Verify announced, "E-Verify has resumed operations. Given that E-Verify was unavailable for over a month, we ask for your patience as we reinstate the service."

The TRAC report is at https://trac.syr.edu/immigration/reports/543/. Information about the growing backlog is at https://trac.syr.edu/immigration/reports/542/.

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USCIS Resumes Premium Processing for FY 2019 H-1B Cap Petitions

U.S. Citizenship and Immigration Services (USCIS) announced that it has resumed premium processing as of Monday, January 28, 2019, for all fiscal year (FY) 2019 H-1B cap petitions, including those eligible for the advanced degree exemption (master's cap). Petitioners who have received requests for evidence (RFEs) for pending FY 2019 cap petitions should include their RFE response with any request for premium processing they may submit.

When a petitioner requests the agency's premium processing service, USCIS guarantees a 15-day processing time. If USCIS does not take certain adjudicative action within the 15-calendar day processing time, the agency refunds the petitioner's premium processing service fee and continues with expedited processing of the petition. USCIS said this service is only available for pending petitions, not new submissions, "because we have already received enough petitions to meet the FY 2019 cap."

The previously announced temporary suspension of premium processing remains in effect for all other categories of H-1B petitions to which it applied. USCIS said it plans "to resume premium processing for the remaining categories of H-1B petitions as agency workloads permit."

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-resumes-premium-processing-fiscal-year-2019-h-1b-cap-petitions. The previous notice about the suspension of premium processing and who is affected is at https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays.

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USCIS Announces Countries Eligible for H-2A and H-2B Visa Programs

U.S. Citizenship and Immigration Services (USCIS) and the Department of Homeland Security (DHS), in consultation with the Department of State (DOS), have announced the list of countries whose nationals are eligible to participate in the H-2A and H-2B visa programs in 2019.

For 2019, the agencies have agreed to:

- Add Mozambique and Samoa to the list of countries eligible to participate in the H-2A and H-2B visa programs;
- Add Paraguay to the list of countries eligible to participate in the H-2A visa program;
- No longer designate Ethiopia and the Philippines as eligible countries because they no longer meet the regulatory standards for the H-2A and H-2B visa programs; and
- No longer designate the Dominican Republic as an eligible country for the H-2B visa program because it no longer meets the regulatory standards for that program.

USCIS said factors that could result in the exclusion of a country or the removal of a country from the list include but are not limited to fraud, abuse, denial rates, overstay rates, human trafficking concerns, and other forms of noncompliance with the terms and conditions of the H-2 visa programs by nationals of that country.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-announces-countries-eligible-h-2a-and-h-2b-visa-programs-0. The related Federal Register notice is at https://www.federalregister.gov/documents/2019/01/18/2019-00074/identification-of-foreign-countries-whose-nationals-are-eligible-to-participate-in-the-h-2a-and-h-2b.

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State Dept. Suspends Visa Services in Caracas, Venezuela

The U.S. Embassy in Caracas has suspended routine visa services due to the ordered departure of non-emergency personnel.

Due to the unrest in Venezuela, on January 24, 2019, the U.S. Department of State ordered non-emergency U.S. government employees to leave Venezuela. The U.S. embassy said the U.S. government has limited ability to provide emergency services to U.S. citizens in Venezuela. U.S. citizens are directed to contact U.S. Embassy Caracas for consular assistance. U.S. citizens residing or traveling in Venezuela "should strongly consider departing Venezuela," the embassy said. Commercial flights remained available. U.S. citizens in Venezuela are advised that if they stay in Venezuela, they ensure that they have adequate supplies to shelter in place, review personal security plans, and monitor local

media for updates. The embassy's Twitter account notes that demonstrations are scheduled to take place throughout Venezuela on February 2, 2019, and may continue in the following days. Movement of U.S. government personnel will be restricted to the vicinity of the U.S. embassy.

The Department's announcement is at https://travel.state.gov/content/travel/en/News/visas-news/20190125_routine-visa-services-suspended-in-caracas.html. The U.S. embassy's security alert is at https://ve.usembassy.gov/security-alert-u-s-embassy-caracas-venezuela-january-24-2019/.

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Trump Administration Implements Remain-in-Mexico Asylum Procedure

According to reports, the Trump administration is implementing a procedure to force certain asylum-seekers wishing to come to the United States to remain in Mexico while their cases are processed. The plan, to begin at the San Ysidro border crossing, reportedly includes busing asylum-seekers to their hearings at a courthouse in San Diego, California, from Tijuana, Mexico.

This activity follows a December 2018 announcement by Homeland Security Secretary Kirstjen Nielsen of a new "Migration Protection Protocols (MPP)," which will apply to individuals arriving in or entering the United States via Mexico without documentation. " 'Catch and release' will be replaced with 'catch and return,' " the announcement states.

The Department of Homeland Security (DHS) released information on the MPP on January 24, 2019. Among other things, the information notes that:

With certain exceptions, MPP applies to aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly admissible and who are placed in removal proceedings under INA § 240. This includes aliens who claim a fear of return to Mexico at any point during apprehension, processing, or such proceedings, but who have been assessed not to be more likely than not to face persecution or torture in Mexico. Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP. Other individuals from vulnerable populations may be excluded on a case-by-case basis.

The December announcement outlines the following process:

- "Aliens trying to enter the U.S. to claim asylum will no longer be released into our country, where they often disappear before a court can determine their claim's merits.
- Instead, those aliens will be processed by DHS and given a 'Notice to Appear' for their immigration court hearing.
- While they wait in Mexico, the Mexican government has made its own determination to provide such individuals humanitarian visas, work authorization, and other protections. Aliens will have access to immigration attorneys and to the U.S. for their court hearings.
- Aliens whose claims are upheld by U.S. judges will be allowed in. Those without valid claims will be deported to their home countries."

It is unclear how many are expected to follow this process or whether Tijuana has sufficient capacity to keep asylum seekers safe while they await their proceedings in the United States. Litigation is considered likely. The American Immigration Lawyers Association called the new policy a "due process disaster for asylum seekers" and said that asylum seekers waiting in Mexico "would encounter substantial barriers to accessing U.S. attorneys."

Secretary Nielsen's December announcement is at https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration. A related Department of Homeland Security announcement is at https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols. DHS released U.S. Customs and Border Protection data about apprehensions along the southwest border with the United States and related demographics, at https://www.dhs.gov/news/2019/01/24/cbp-releases-apprehension-data#.

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Firm in the News

Mr. Mehta was quoted by the *Times of India* in "Reversal in H-1B Lottery Order, First Priority to U.S. Degree Holders," about his views on the change in the way H-1Bs will be counted so that they will be skewed toward U.S. advanced degree holders: "The skewing of H-1B visas toward those with master's degrees from U.S. institutions under the new selection methodology is in some senses counter to the H-1B law, which was to permit those with foreign degrees, and equivalent work experience, to qualify for H-1B classification. Hence, a foreign

physician with a master's degree in medicine from a foreign university who intends to provide critical medical services in a shortage area in the United States may have less chances of nabbing an H-1B visa under the new proposal." He added that "ven a highly skilled IT worker with a bachelor's degree in computer science from a reputed Indian institution such as the Indian Institute of Technology will have less chance of getting an H-1B in the new proposal. Both the physician and the IT worker with foreign degrees have the potential of making contributions to the U.S. in the same way, or even greater, as one who has recently graduated with an MBA from a U.S. university." The article is at https://timesofindia.indiatimes.com/world/us/reversal-in-h-1b-lottery-order-first-priority-to-us-degree-holders/articleshow/67764048.cms.

Mr. Mehta was a Program Chair of "Basic Immigration Law 2018" at the Practising Law Institute, in New York, NY and via Webcast, on February 7, 2019. He participated on the Immigration Overview and Update panel.

Mr. Mehta chaired a panel entitled "Asylum, Special Immigrant Juvenile Status, Crime Victim, and Other Related Relief" at the Practising Law Institute, in New York, NY and via Webcast, on February 8, 2019.

Cyrus Mehta was quoted by the *India-West* in an article entitled "DHS Finalizes New Rule Favoring H-1B Applicants With Advanced U.S. Degrees". The article is at https://www.indiawest.com/news/global_indian/dhs-finalizes-new-rule-favoring-h--b-applicants-with/article_749800ea-2520-11e9-8b20-ab9ebb650aeb.html

Cyrus Mehta was quoted by the *India-West* in an article entitled "Trump States Support for Immigrants, Slams Undocumented Migrants in State of the Union Address". The article is at https://www.indiawest.com/news/global_indian/trump-states-support-for-immigrants-slams-undocumented-migrants-in-state/article_9dd0d828-2a6c-11e9-928f-1fa1b005cfa6.html

Cyrus Mehta was quoted by the *India-West* in an article entitled "In Tweet, Trump Assures Path to Citizenship for H-1B Visa-Holders; Republican Hindu Coalition Claims 'Promises Made, Promised Kept". The article is at https://www.indiawest.com/news/global_indian/in-tweet-trump-assures-path-to-citizenship-for-h-/article_fee0a024-19c5-11e9-afa4-13c68c778b08.html

Cyrus Mehta was quoted by the *Firstpost* in an article entitled "ICE fake

university fallout: Students who have overstayed US visa by 180 days face grim prospect of 3 year bar". The article is at https://www.firstpost.com/world/ice-fake-university-fallout-students-who-have-overstayed-us-visa-by-180-days-face-grim-prospect-of-3-year-bar-6025501.html

Cyrus Mehta was quoted by the *Qrius* in an article entitled "The US revamps its H-1B visa process. Here's why it matters". The article is at https://qrius.com/the-us-revamps-its-h-1b-visa-process-heres-why-it-should-matter/

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