



MARCH 2019 IMMIGRATION UPDATE

Posted on March 8, 2019 by Cyrus Mehta

Headlines:

Trump Administration Moves Ahead on Reversing H-4 EADs – On February 20, 2019, the Trump administration sent a proposed rule to the Office of Management and Budget (OMB) for review that would halt work authorization for H-4 spouses of H-1B visa holders in the United States.

Premium Processing Resumes for H-1B Petitions Filed by December 21 – USCIS has resumed premium processing for all H-1B petitions filed on or before December 21, 2018.

Trump Administration Increases Scrutiny, RFEs for H-1B Petitions – According to statistics released by USCIS, the percentage of H-1B cases with requests for evidence has greatly increased.

USCIS to Issue New Version of Form I-539 and New I-539A on March 8 – USCIS has announced that the revised Form I-539, Application to Extend/Change Nonimmigrant Status, and new Form I-539A, will be published on March 8, 2019, not March 11 as previously reported. USCIS will accept the old form through March 21.

House Representatives Send USCIS Inquiry re "Alarming Growth in Processing Delays" – Eighty-six Democratic members of the House of Representatives sent a letter to the USCIS Director expressing their "grave concerns about the alarming growth in processing delays" and requesting "prompt and detailed" responses to a series of related questions.

March Visa Bulletin Shows Progress – The Department of State's Visa Bulletin for March 2019 shows modest progress for EB-1 for all chargeability areas as well as EB-2 for China and India; EB-3 and Other Workers China, India, and the Philippines; and EB-5 China and Vietnam, with the remainder of the priority

dates remaining Current.

H-2B Cap Reached for FY 2019 – February 19, 2019, was the final receipt date for new cap-subject H-2B temporary nonagricultural worker petitions requesting an employment start date before October 1, 2019.

USCIS Closing Moscow Field Office; U.S. Embassy in Moscow Moves Visa Unit – Due to "a significant decrease in workload," USCIS will permanently close its field office in Moscow, Russia, on March 29, 2019. The last day the office was open to the public and accepting applications was February 28, 2019. Also, the Visa Unit of the U.S. Embassy in Moscow has moved to a new location.

Global: Peru – This article provides an update on eased requirements for approval of employment contracts of foreign workers in Peru.

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Trump Administration Moves Ahead on Reversing H-4 EADs

On February 20, 2019, the Trump administration sent a proposed rule to the Office of Management and Budget (OMB) for review that would halt work authorization for H-4 spouses of H-1B visa holders in the United States. If OMB approves, the administration is expected to move forward with the regulatory process, including publication of the proposed rule in the Federal Register and requesting public comments. Publication of a final rule could take months, and new legislation or lawsuits could have an impact. It is also unclear whether the more than 90,000 current H-4 spouses with work authorization, mostly women from India, will be exempted from the final rule. Historically, in similar situations, the Department of Homeland Security (DHS) has allowed current EADs to expire. As of now, H-4 visa holders can still apply for and work under H-4 EADs.

According to information DHS filed with OMB, "DHS anticipates that there would be two primary impacts that DHS can estimate and quantify: the cost-savings accruing to forgone future filings by certain H-4 dependent spouses, and labor turnover costs that employers of H-4 workers could incur when their employees' EADs are terminated. Some U.S. workers would benefit from this proposed rule by having a better chance at obtaining jobs that some of the

population of the H-4 workers currently hold, as the proposed rule would no longer allow H-4 workers to enter the labor market early."

The Trump administration has long vowed to rescind the H-4 work authorization program, which has allowed certain H-4 spouses to apply for EADs since 2015. It is unclear what prompted the sudden move forward with the rule, after a long delay. In December, the D.C. Circuit Court of Appeals allowed a lawsuit against the H-4 program to proceed. That case was filed by "Save Jobs USA," a group of technology workers who say the H-4 program takes away jobs from U.S. workers. Natalie Tynan, a former DHS employee, said, "In general from an agency's perspective, the agency prefers to issue its regulations rather than have the courts opine on what the regulations should say. So any opportunity to moot out litigation is a positive one for the agency."

Details on the proposed rule are at

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1615-AC15>. The OMB notice is at

<https://www.reginfo.gov/public/do/eoDetails?rrid=128839&fbclid=IwAR1nF2IWL CcbRTDXfoOHITfv7jfkIrGd6owzhKH2bUAiWgwra6R5hzNQOwk>.

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Premium Processing Resumes for H-1B Petitions Filed by December 21

U.S. Citizenship and Immigration Services (USCIS) announced that it has resumed premium processing for all H-1B petitions filed on or before December 21, 2018.

Those who received a transfer notice for a pending H-1B petition and are requesting premium processing service must submit the premium processing request to the USCIS service center now handling the petition. They should also include a copy of the transfer notice with the premium processing request to avoid possible delays, USCIS said. Additionally, those who received a request for evidence (RFE) for a pending petition should also include the RFE response with the premium processing request. If the petition was transferred and the premium processing request is sent to the wrong center, USCIS said it will forward it to the petition's current location. However, the premium processing clock will not start until the premium processing request has been received at the correct center.

USCIS noted that when an H-1B petitioner properly requests the agency's premium processing service, the agency guarantees a 15-day processing time. "If we do not take certain adjudicative action within the 15-calendar day processing time, USCIS refunds the petitioner's premium processing service fee and continues with expedited processing of the petition," USCIS said.

A previously announced temporary suspension of premium processing remains in effect for H-1B petitions to which it applied that were filed on or after December 22, 2018. On January 28, 2019, USCIS resumed premium processing for FY 2019 cap-subject petitions, including those eligible for the advanced degree exemption. USCIS said it plans to resume premium processing for the remaining categories of H-1B petitions "as agency workloads permit."

The USCIS announcement, which includes instructions on where to send a premium processing request if USCIS has transferred the petition, is at <https://www.uscis.gov/news/news-releases/uscis-resumes-premium-processing-h-1b-petitions-filed-or-dec-21-2018>.

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Trump Administration Increases Scrutiny, RFEs for H-1B Petitions

According to statistics released by U.S. Citizenship and Immigration Services, the percentage of H-1B cases with requests for evidence (RFEs) has greatly increased. In the first quarter of fiscal year (FY) 2017, the rate of H-1B RFEs was less than 30%. In the first quarter of FY 2019, that rate skyrocketed to 60%. At the same time, the percentage of H-1B completions with an RFE that were approved has fallen, from almost 80% in the first quarter of FY 2017 to about 60% in the first quarter of FY 2019.

Approval rates were much higher for certain large companies; Apple, Facebook, Google, Intel, and Microsoft reportedly all had 99% approval rates; Amazon and Cisco had a 98% approval rate.

According to reports, a frequent reason for the RFEs was asking companies to prove that the offered job was in a "specialty occupation." Other questions related to valid employer-employee relationships and specific assignments. Numerous lawsuits have been filed in federal court challenging recent H-1B denials.

The USCIS statistics are at <https://bit.ly/2GJ6AJb>. An article about several

lawsuits is available at

<https://news.bloomberglaw.com/daily-labor-report/it-consulting-firms-trying-to-force-litigation-of-h-1b-denials>.

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USCIS to Issue New Version of Form I-539 and New I-539A on March 8

U.S. Citizenship and Immigration Services (USCIS) has announced that the revised Form I-539, Application to Extend/Change Nonimmigrant Status, and new Form I-539A, will be published on March 8, 2019, not March 11 as previously reported. USCIS will accept the old form through March 21.

Form I-539 is used for a variety of application types, including:

- Certain nonimmigrant applications for an extension of stay
- Certain nonimmigrant applications for a change of status
- Reinstatement for F-1 and M-1 students

USCIS has expanded the scope of information to be gathered and will change the filing and adjudication requirements. The revised Form I-539 includes the following significant changes:

- Every co-applicant included on the primary applicant's Form I-539 must submit and sign a separate Form I-539A. Parents or guardians may sign on behalf of children under 14 or any co-applicant who is not mentally competent to sign.
- Every applicant and co-applicant must pay an \$85 biometric services fee, except certain A, G, and NATO nonimmigrants as noted in the new Form I-539 instructions.
- Every applicant and co-applicant will receive a biometric services appointment notice, regardless of age, containing their individual receipt number. The biometric services appointments will be scheduled at the Application Support Center (ASC) closest to the primary applicant's address. Co-applicants who wish to be scheduled at a different ASC location should file a separate Form I-539.

USCIS said it will reject any Form I-539 that is missing any of the required signatures or biometrics fees, including those required for Form I-539A.

The USCIS announcement is at

<https://www.uscis.gov/news/alerts/uscis-publish-revised-form-i-539-and-new-form-i-539a>.

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House Representatives Send USCIS Inquiry re "Alarming Growth in Processing Delays"

Eighty-six Democratic members of the House of Representatives sent a letter on February 12, 2019, to U.S. Citizenship and Immigration Services (USCIS) Director Lee Francis Cissna, expressing their "grave concerns about the alarming growth in processing delays" at USCIS and requesting "prompt and detailed" responses to a series of related questions. "Clearly, policy changes implemented by the current administration in 2017 and 2018 have increasingly shifted the agency away from its service-oriented mission," the letter states. "Rather than continuing to seek ways to simplify and streamline its benefit-delivery systems, USCIS now appears more focused on erecting barriers to the benefits it administers, including by significantly delaying adjudications."

The letter notes that as of the end of fiscal year (FY) 2017, the Department of Homeland Security reported a net backlog of more than 2.3 million USCIS cases, which was more than double the backlog reported after FY 2016.

The letter asks for responses to questions about, among other things, the causes of the backlog; the use of "extreme vetting"; USCIS's reversal of longstanding guidance on deference toward prior determinations regarding nonimmigrant employment extension petitions; and USCIS's proposed FY 2019 budget, which requested the transfer of over \$200 million from USCIS to U.S. Immigration and Customs Enforcement.

The letter, which notes that USCIS was created by congressional mandate, asks USCIS how it intends to reduce and eliminate processing delays while ensuring fairness and quality and not passing costs for "the agency's inefficiencies" on to the applicants and petitioners "experiencing hardship due to USCIS's crisis-level delays."

The letter is available at <http://src.bna.com/Fy0>.

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March Visa Bulletin Shows Progress

The Department of State (DOS) has released the Visa Bulletin for March 2019, showing modest progress for EB-1 for all chargeability areas as well as EB-2 for China and India; EB-3 and Other Workers China, India, and the Philippines; and EB-5 China and Vietnam, with the remainder of the priority dates remaining Current.

The specific changes in the Final Action Cut-Off Dates, or priority dates, from the February to the March Visa Bulletin are:

1. EB-1: China and India—forward progress of two weeks for China and India to February 22, 2017; Mexico—forward progress of three weeks to February 22, 2017; All Other Chargeability Areas—forward progress of one month to January 1, 2018.
2. EB-2: China—forward progress of three months to January 1, 2016; India—forward progress of three days to April 9, 2009.
3. EB-3: China—forward progress of one week to July 8, 2015; India—forward progress of one month to May 22, 2009; Philippines—forward progress of four months to December 1, 2017.
4. Other Workers: China—forward progress of two weeks to August 15, 2007; India—forward progress of one month to May 22, 2009; Philippines—forward progress of four months to December 1, 2017.
5. EB-5: China (Non-Regional Center)—forward progress of one week to September 8, 2014; Vietnam—forward progress of one month to July 15, 2016.

Applicants whose priority dates are currently backlogged are recommended to review the dates to determine if they may be eligible to file during the month of March. U.S. Citizenship and Immigration Services (USCIS) noted that beneficiaries of approved employment-based immigrant petitions whose priority dates become current in March 2019 should use the "Final Action Cut-Off Dates" when filing during the month of March 2019. USCIS in the recent past had accepted applications filed during certain months based on the typically earlier "Dates for Filing."

The March 2019 Visa Bulletin is at

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-march-2019.html>.

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H-2B Cap Reached for FY 2019

U.S. Citizenship and Immigration Services (USCIS) announced that it has received enough petitions to meet the congressionally mandated H-2B cap for the second half of fiscal year (FY) 2019. February 19, 2019, was the final receipt date for new cap-subject H-2B temporary nonagricultural worker petitions requesting an employment start date before October 1, 2019. USCIS will reject new cap-subject H-2B petitions received after February 19 that request an employment start date before October 1, 2019.

On February 19, the number of beneficiaries USCIS received petitions for surpassed the total number of remaining H-2B visas available for the H-2B cap for the second half of FY 2019. In accordance with regulations, USCIS said it determined that it was necessary to use a computer-generated process, commonly known as a lottery, to ensure the fair and orderly allocation of H-2B visa numbers to meet, but not exceed, the remainder of the FY 2019 cap. On February 21, USCIS conducted a lottery to randomly select petitions from those received on February 19. As a result, USCIS assigned all petitions selected in the lottery the receipt date of February 22. Premium processing service for petitions selected in the lottery also began on that date.

USCIS continues to accept H-2B petitions that are exempt from the congressionally mandated cap. This includes petitions for:

- Current H-2B workers in the United States petitioning to extend their stay and, if applicable, change the terms of their employment or change their employers;
- Fish roe processors, fish roe technicians, and/or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of the Northern Mariana Islands and/or Guam from November 28, 2009, until December 31, 2029.

Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year and 33,000 for workers who begin employment in the second half of the fiscal year plus any unused numbers from the first half of the fiscal year, if any. However, unused H-2B numbers from one fiscal year do not carry over into the next, USCIS explained.

Also, a new letter sent on February 22, 2019, from the H-2B Workforce Coalition urges the Department of Homeland Security to add H-2B numbers as authorized by the Fiscal 2019 Consolidated Appropriations Act. The 40-page letter, endorsed by hundreds of employers and organizations, notes:

Without immediate action, many employers across the country will be without the critical workforce they need to operate this spring and summer. These businesses will not be able to fulfill contracts. They will be forced to turn away customers and may need to lay off American workers whose jobs are supported by H-2B workers. In some cases, they will be compelled to shut down their operations entirely. ... The H-2B program is essential to employers who cannot find local temporary workers to fill jobs in seafood processing, horse training, hospitality and amusement parks, forestry, landscaping, circuses, carnivals, food concessionaires, swimming pool maintenance, golf courses, stone quarries and other seasonal industries. These seasonal businesses need H-2B workers to supplement their American workforce. The H-2B program relies on well-vetted returning workers who come to the U.S. for seasonal employment and then go home. These workers are not immigrants. They provide an opportunity for U.S. businesses to operate at a greater capacity, retain their full-time workers and contribute to their local economy.

The USCIS notice is at

<https://www.uscis.gov/news/alerts/h-2b-cap-reached-fy-2019>. The letter from the H-2B Workforce Coalition is at <https://goo.gl/4JTyT7>.

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USCIS Closing Moscow Field Office; U.S. Embassy in Moscow Moves Visa Unit

Due to "a significant decrease in workload," U.S. Citizenship and Immigration Services (USCIS) will permanently close its field office in Moscow, Russia, on March 29, 2019. The last day the office was open to the public and accepting applications was February 28, 2019. Also, the Visa Unit of the U.S. Embassy in Moscow has moved to a new location.

The USCIS field office in Athens, Greece, will assume jurisdiction over immigration matters in the Russian Federation, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The U.S. Embassy in Moscow will assume responsibility for certain limited services previously provided by USCIS

to individuals residing in Russia. The USCIS Refugee Affairs Division will assume primary responsibility for adjudicating refugee cases presented for interview in the region.

The new location for the Visa Unit of the U.S. Embassy in Moscow is 8 Bolshoy Deviatinsky Pereulok, 121099, Moscow, Russia.

The USCIS notice, which includes details on filing instructions, is at <https://www.uscis.gov/news/alerts/uscis-close-moscow-field-office>. Information on the USCIS Athens office is at <https://www.uscis.gov/about-us/find-uscis-office/international-offices/greece-uscis-athens-field-office>. The website for the U.S. Embassy in Moscow is at <https://ru.usembassy.gov/>. The U.S. Embassy announcement about the Visa Unit move is at <https://ru.usembassy.gov/attention-visa-applicants-u-s-embassy-moscow-visa-unit-moved-new-location/>.

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Global: Peru

This article provides an update on eased requirements for approval of employment contracts of foreign workers in Peru.

On September 13, 2018, Peru's Official Gazette, "El Peruano," published Supreme Decree No. 008-2018-TR, which amends the regulations of the Law of Hiring of Foreign Workers, approved by Supreme Decree No. 014-92-TR. It has been in force since October 13, 2018.

One of the main changes established by the modified regulations is automatic approval of the employment contracts of foreign employees/workers by the Ministry of Labor in Peru. In the past, the contracts were to be approved within five business days following their filing at the Ministry of Labor and Employment Promotion (MTPE). In practice, approvals took up to three weeks due to the MTPE's workload, taking into consideration a massive inflow of Venezuelans requesting approval of their employment contracts in Peru. Now, an employment contract of any foreign individual will be considered approved from its filing before the labor authority.

Other important changes that ease the process of submission of dossiers before the MTPE to obtain the approval of an employment contract include

administrative simplification provisions, by means of Legislative Decree No. 1246 (October 2016), which no longer require the presentation of professional/technical degree diplomas and apostille work experience certificates, and lower accompanying documentation requirements for applications for the approval of employment contracts for foreign personnel, by means of Supreme Decree No. 008-2018-TR, which now include:

- Employment contract in writing;
- Affidavit stating that the hiring of foreigners complies with the conditions established by law and includes the training or work experience required by it; and
- Payment receipt of the corresponding right issued by the National Peruvian Bank. The receipt does not have to be presented initially but will be subject to a subsequent audit by the Labor Inspection Authority.

Logically, the Administrative Labor Authority in charge of the approval process of the employment contracts will be in charge of the subsequent inspection, without prejudice to the inspective actions carried out by the competent Labor Inspection Authority in the local companies to verify if they are in compliance with the cited Law of Hiring of Foreign Workers under (1) compliance of limiting percentages, (2) exonerations of them, or (3) exemptions, if applicable. Therefore, diplomas of foreign employees showing their professional titles or degrees and specializations, and work certificates, must be kept in the local company in its files to be shown to the authorities in case of audits.

The issuance of complementary regulations for the presentation, approval, extension, or modification of the employment contracts of foreign personnel, through the "Virtual System of Contracts for Foreigners—SIVICE," has been established by Ministerial Resolution N° 291-2018-TR (November 14, 2018). It is in the process of implementation.

With this modifying regulatory labor standard, an administrative procedure regulated by labor norms that has been valid for 26 years in Peru has been updated and simplified, to ease the approval of employment contracts of foreign personnel, improving the right to labor migration, and taking into account that an employment contract duly approved and registered is the main document that supports the visa process to obtain a temporary or resident worker immigration status in Peru for foreign nationals working under a subordinated labor relationship with a local company.

With the implementation of the SIVICE virtual system, the Foreign Personnel Employment Contract approval procedure has been upgraded and simplified, as well as its consequent extensions and/or modifications, for foreign personnel both exempted and not exempt from the limiting percentages. These developments make the labor-immigration administrative process faster and more effective in support of labor migration to Peru.

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Firm in the News

Cyrus Mehta has been ranked in Chambers Global 2019 under Band 1.

For more information see

<https://chambers.com/guide/global?publicationTypeld=2&practiceAreald=132&subsectionTypeld=1&locationId=225>

Mr. Mehta spoke on a panel entitled "Perception and Realities of Immigrants Today" at the AJC NY, in New York, on March 5, 2019.

Mr. Mehta spoke on a panel entitled "Ethical Dilemmas in Business Immigration" at the 16th Annual AILA New England Chapter Conference, on March 1, 2019.

Cyrus Mehta was quoted by the *News India Times* in an article entitled "H-4 visa EAD to be eliminated by DHS". The article is at

<http://www.newsindiatimes.com/h-4-visa-ead-to-be-eliminated-by-dhs>

Mr. Mehta was quoted by the *ZD Net* in an article entitled "Upcoming H-1B lottery gives US-based advanced degree candidates an edge over foreign degree ones". The article is at

<https://www.zdnet.com/article/upcoming-h-1b-lottery-gives-us-based-advanced-degree-candidates-an-edge-over-foreign-degree-ones/>

Mr. Mehta was quoted by the *Times of India* in an article entitled

<https://timesofindia.indiatimes.com/city/mumbai/uscis-sought-addl-info-for-60-h-1b-applications-last-quarter/articleshow/68160379.cms> "USCIS sought addl info for 60% H-1B applications last quarter". The article is at http://timesofindia.indiatimes.com/articleshow/68160379.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

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