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

IMMIGRATION UPDATE- JULY 30, 2019

Posted on July 30, 2019 by Cyrus Mehta

Headlines:

Expedited Removal Expands to Interior of United States – With immediate effect, DHS issued a notice to dramatically expand the process of expedited removal. The ACLU has promised to file a suit challenging the action.

USCIS Amends EB-5 Regulations, Raising Minimum Investment Amounts and Modifying TEA Designations – A long-anticipated final rule provides priority date retention for certain EB-5 investors, increases the required minimum investment amounts, changes the targeted employment area (TEA) designation process, and clarifies USCIS procedures for the removal of conditions on permanent residence.

Judges Rule on Third-Country Asylum Ban – Following a joint interim rule issued by DOJ and DHS that restricted asylum, with some exceptions, for migrants traveling through third countries to reach the United States (most notably for many Central Americans passing through Mexico), two judges issued rulings in separate cases.

H-2B Petitioners Must Include Temporary Labor Certification Final Determination With Form I-129 – USCIS said it will consider a printed copy of the final determination as the original and approved temporary labor certification.

USCIS Ombudsman Says EAD Help Requests Constituted Single Largest Source of Work in 2018, Recommends Changes to H-1B Program Implementation Under BAHA – The lengthy, detailed H-1B section includes 290 footnotes and several recommendations for changing implementation of the H-1B program by USCIS and DOL to align with

President Trump's "Buy American and Hire American" executive order.

Expedited Removal Expands to Interior of United States

With immediate effect, the Department of Homeland Security (DHS) issued a notice on July 23, 2019, to place certain persons determined to be inadmissible in expedited removal, with limited exceptions. Affected individuals include those who have not been admitted or paroled into the United States and who have not "affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility."

The notice makes the following points, among others:

- Currently, immigration officers can apply expedited removal "to aliens encountered anywhere in the United States for up to two years after the alien arrived in the United States, provided that the alien arrived by sea and the other conditions for expedited removal are satisfied."
- For those who entered the United States by crossing a land border, DHS permits the use of expedited removal "if the aliens were encountered by an immigration officer within 100 air miles of the U.S. international land border and were continuously present in the United States for less than 14 days immediately prior to that encounter."
- The DHS Secretary has the "sole and unreviewable discretion" under the Immigration and Nationality Act "to modify at any time the discretionary limits on the scope of the expedited removal designation."
- The Acting DHS Secretary is exercising his statutory authority to designate several categories of aliens not previously designated for expedited removal:

1. Aliens who did not arrive by sea who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; and
2. Aliens who did not arrive by sea who are encountered within 100 air miles from a U.S. international and border and who have been continuously presenting the United States for at least 14 days but for less than two

years.

- Aliens otherwise subject to expedited removal who indicate either an intention to apply for asylum or a fear of persecution or torture will be given further review by an asylum officer, including an opportunity to establish "credible fear" and thus potential eligibility for asylum.
- An alien otherwise subject to expedited removal is given a "reasonable opportunity to establish to the satisfaction of the examining immigration officer that he or she was admitted or paroled into the United States." Aliens determined by immigration officers to be subject to expedited removal nonetheless "will receive prompt review of that determination if they claim under oath, after being warned of the penalties for perjury, that they have been admitted for permanent residence, admitted as a refugee, granted asylum, or are a U.S. citizen."

This is a major expansion of expedited removal. An estimate of at least 20,000 additional immigrants per year may be subject to expedited removal under the new policy. The American Civil Liberties Union (ACLU) quickly put out a statement calling the policy "unlawful," noting that under the plan, "immigrants who have lived here for years would be deported with less due process than people get in traffic court," and vowing to "sue to end this policy quickly." In the meantime, immigration lawyers are counseling clients of the need to be able to quickly document that they have been in the United States for at least two years, including carrying such documentation with them at all times.

Written comments may be submitted by September 23, 2019, via the method set forth in the DHS notice.

Details: DHS Federal Register notice, https://www.govinfo.gov/content/pkg/FR-2019-07-23/pdf/2019-15710.pdf; ACLU statement, https://www.aclu.org/press-releases/aclu-comment-new-trump-expedited-removal-action

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USCIS Amends EB-5 Regulations, Raising Minimum Investment Amounts and Modifying TEA Designations

U.S. Citizenship and Immigration Services (USCIS) has published a final rule, effective November 21, 2019, amending the regulations governing the

employment-based fifth preference (EB-5) immigrant investor classification and associated regional centers to reflect statutory changes and "modernize" the EB-5 program. The final rule provides priority date retention for certain EB-5 investors, increases the required minimum investment amounts, changes the targeted employment area (TEA) designation process, and clarifies USCIS procedures for the removal of conditions on permanent residence.

Among other things, the final rule:

- Clarifies that the priority date of a petition for classification as an investor is the date the petition is properly filed
- Clarifies that a petitioner with multiple approved immigrant petitions for classification as an investor is entitled to the earliest qualifying priority date
- Retains the 50 percent minimum investment differential between a TEA and a non-TEA instead of changing the differential to 25 percent as proposed, thereby increasing the minimum investment amount in a TEA from $500,000 to $900,000 rather than $1.35 million, as DHS initially proposed (the minimum non-TEA investment will be $1.8 million)
- Bases future inflation adjustments on the initial investment amount set by Congress in 1990 rather than on the most recent inflation adjustment
- Modifies the original proposal that any city or town with a population of 20,000 or more may qualify as a TEA, to provide that only cities and towns with a population of 20,000 or more *outside* of metropolitan statistical areas may qualify as a TEA, eliminates a state's ability to designate certain geographic and political subdivisions as high unemployment areas, and gives the Department of Homeland Security responsibility for directly making TEA designations "based on revised requirements in the regulation limiting the composition of census tract-based TEAs"

Practitioners are expecting a rush on EB-5 investments in the months before the effective date of November 21, 2019, which could increase the already long waits for EB-5 visas for those from high-volume countries by years, assuming Congress does not allocate additional visa numbers or eliminate per-country caps.

Details: USCIS announcement, https://www.uscis.gov/news/news-releases/new-rulemaking-brings-significant-changes-eb-5-program; Final rule,

https://www.federalregister.gov/documents/2019/07/24/2019-15000/eb-5-immigrant-investor-program-modernization

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Judges Rule on Third-Country Asylum Ban

Following a joint interim rule issued by the Departments of Justice and Homeland Security on July 16, 2019, that restricted asylum, with some exceptions, for migrants traveling through third countries to reach the United States (most notably for many Central Americans passing through Mexico), two judges issued rulings in separate cases:

- Judge Timothy Kelly, of the U.S. District Court in Washington, DC, declined to issue a temporary order to block the asylum ban.
- Judge Jon Tigar, of the U.S. District Court in San Francisco, California, issued a preliminary injunction to block the ban until the arguments can be considered and a final decision can be issued.

Details: News reports, https://www.cbsnews.com/news/judge-allows-trump-administrations-most-restrictive-asylum-ban-to-continue-today-2019-07-24/, http://immigrationimpact.com/2019/07/25/judge-blocks-trumps-new-asylum-rule/#.XT3s325Fy70; DHS announcement of joint interim rule, https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule; ; interim final rule, https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications; ACLU complaint, https://www.dropbox.com/s/4wckd0ol9hhusb8/1-main.pdf?dl=0

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H-2B Petitioners Must Include Temporary Labor Certification Final Determination with Form I-129

U.S. Citizenship and Immigration Services (USCIS) announced on July 26, 2019, that employers who file an H-2B application for temporary labor certification in FLAG will only receive a temporary labor certification electronically, as of July 3, when the Department of Labor implemented its new Foreign Labor Certification Application Gateway (FLAG) system for the H-2B temporary nonagricultural worker program. Those whose applications for a temporary

labor certification were processed in FLAG must include a printed copy of the electronic one-page "final determination" of their H-2B temporary labor certification approval when submitting the Form I-129, Petition for a Nonimmigrant Worker.

USCIS said it will consider a printed copy of the final determination as the original and approved temporary labor certification. Applicants must also ensure that the DOL Case Number identified on the final determination matches the ETA Case Number provided in Part 5, Item 2 of the I-129.

Details: USCIS announcement, https://www.uscis.gov/news/alerts/h-2b-petitioners-must-include-temporary-labor-certification-final-determination-form-i-129

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USCIS Ombudsman Says EAD Help Requests Constituted Single Largest Source of Work in 2018, Recommends Changes to H-1B Program Implementation Under BAHA

The U.S. Citizenship and Immigration Services (USCIS) Ombudsman recently released its 2019 Annual Report.

The report notes that requests for help related to employment authorization documents (EADs) constituted the single largest source of work for the Ombudsman's Case Team in calendar year 2018—over a third of its total case load. During a four-month period between December 2017 and March 2018, the number of incoming EAD cases spiked 400 percent, most related to processing delays.

The Ombudsman also noted that it explored in depth the H-1B visa program. The lengthy, detailed H-1B section includes 290 footnotes and several recommendations for changing implementation of the H-1B program by USCIS and the Department of Labor to align with President Trump's "Buy American and Hire American" (BAHA) executive order.

Details: USCIS Ombudsman's Annual Report for 2019, https://www.dhs.gov/sites/default/files/publications/19_0712_cisomb_2019_ombudsman_annualreport.pdf; BAHA order, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/

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The Firm and the News:

Cyrus Mehta was quoted by the Times of India on July 25, 2019. Mr. Mehta noted that many of the attractive projects that are designated in targeted employment areas in metropolitan areas may no longer receive such a designation after November 21, so the investment will go from $500,000 currently for such a project to $1.8 million. "Under the current RBI guideline of only allowing $250,000 to be remitted out of India per financial year, the higher investment amounts will serve as a further disincentive. I predict that there will be a rush to file EB-5 applications before the rule change on November 21."

https://timesofindia.indiatimes.com/business/india-business/as-us-eb-5-visas-become-expensive-indian-applications-expected-to-slump/articleshow/70377010.cms

On July 25, 2019, Cyrus Mehta took part in an ethics panel at the Practising Law Institute's Defending Immigration Removal Proceedings 2019. Mr. Mehta discussed a wide range of topics on the ethical issues that may arise when lawyers represent clients in removal proceedings.