



# IMMIGRATION UPDATE: SEPTEMBER 1, 2019

*Posted on September 9, 2019 by Cyrus Mehta*

## Immigration Update September 1, 2019

### Headlines:

[Continue to Use "Expiring" I-9 Form Until Further Notice, USCIS Says](#) – Until further notice, employers should continue using the Form I-9 (Employment Eligibility Verification) currently available on I-9 Central, even after the August 31, 2019, expiration date has passed

[USCIS Changes Direct Filing Addresses for Certain Nonimmigrant Worker Petitions](#) – USCIS has changed the direct filing addresses for certain petitioners filing Form I-129, Petition for a Nonimmigrant Worker, as of September 1, 2019.

[Ninth Circuit Dismisses Challenge to Denial of National Interest Waiver for Lack of Jurisdiction](#) – Affirming the district court's dismissal for lack of subject-matter jurisdiction of an Iranian engineer's suit challenging the denial of his petition for a national interest waiver (NIW) related to his application for a work visa, a panel of the U.S. Court of Appeals for the Ninth Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review NIW denials.

[USCIS Policy Guidance Changes Definition of "Residing in the United States" for Purposes of Acquiring Citizenship](#) – Effective October 29, 2019, USCIS is changing its policy regarding eligibility for U.S. citizenship of children born to U.S. government employees and U.S. armed forces members employed or stationed outside the United States.

[Guidance Updated on Adjudication of Cuban Adjustment Act Cases](#) – USCIS accepts certain documents as evidence that an applicant is a Cuban native or U.S. citizen, and has updated its guidance to provide examples of acceptable documents.

**ABIL Global: Belgium** – There have been several developments with respect to business immigration in Belgium this year, including the introduction of a single permit authorizing a foreign employee to work and reside in Belgium, and new legal frameworks for work authorizations/permits in Flanders, Brussels, and Wallonia.

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### **Continue to Use "Expiring" I-9 Form Until Further Notice, USCIS Says**

U.S. Citizenship and Immigration Service (USCIS) has announced that until further notice, employers should continue using the Form I-9 (Employment Eligibility Verification) currently available on I-9 Central, even after the August 31, 2019, expiration date has passed.

### **USCIS Changes Direct Filing Addresses for Certain Nonimmigrant Worker Petitions**

U.S. Citizenship and Immigration Services (USCIS) has changed the direct filing addresses for certain petitioners filing Form I-129, Petition for a Nonimmigrant Worker, as of September 1, 2019. USCIS said that starting October 1, 2019, "we may reject Forms I-129 that are filed at the wrong service center."

The changes apply to the following cap-exempt H-1B petitions:

- Continuing previously approved employment from the same employer
- Changing previously approved employment
- New concurrent employment
- Changing an employer
- Changing status to H-1B
- Notifying a U.S. consulate, port of entry, or pre-flight inspection
- Amending a petition

The announcement excludes petitions:

- Filed by cap-exempt petitioners or for cap-exempt entities
- That are cap-exempt based on a Conrad/Interested Government Agency waiver
- Where the employer is located in Guam or the beneficiary will be performing services in Guam. This also excludes all H-1B1, H-1B2, and H-1B3 petitions

## **Ninth Circuit Dismisses Challenge to Denial of National Interest Waiver for Lack of Jurisdiction**

Affirming the district court's dismissal for lack of subject-matter jurisdiction of an Iranian engineer's suit challenging the denial of his petition for a national interest waiver (NIW) related to his application for a work visa, a panel of the U.S. Court of Appeals for the Ninth Circuit held that 8 U.S.C. § 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review NIW denials. Among other things, the panel also noted that his due process claim that he did not receive a copy of a request for evidence for the denial of his second petition failed on the merits because notice sent to his home address "was reasonably calculated to reach him."

Details: Ninth Circuit's opinion,

<https://law.justia.com/cases/federal/appellate-courts/ca9/17-16579/17-16579-2019-08-28.html> (scroll down)

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## **USCIS Policy Guidance Changes Definition of "Residing in the United States" for Purposes of Acquiring Citizenship**

U.S. Citizenship and Immigration Service (USCIS) has issued policy guidance, effective October 29, 2019, and applicable prospectively to applications filed on or after that date, that defines "residence" and clarifies distinctions between U.S. residence and physical presence. USCIS is changing its policy regarding eligibility for U.S. citizenship of children born to U.S. government employees and U.S. armed forces members employed or stationed outside the United States.

Specifically, the guidance:

- Clarifies that temporary visits to the United States do not establish U.S. residence and explains the distinction between residence and physical presence in the United States
- Explains that USCIS no longer considers children of U.S. government employees and U.S. armed forces members residing outside the United States as "residing in the United States" for purposes of acquiring U.S. citizenship under INA 320.

USCIS said it is rescinding the prior USCIS policy permitting children of U.S.

government employees and U.S. armed forces members stationed outside of the United States to be considered "residing in" the United States. The changes also will affect the ability of U.S.-born citizens to transmit citizenship to children if they do not meet the more restrictive test for residing in the United States.

Details: USCIS Policy Alert,

<https://www.uscis.gov/sites/default/files/policymanual/updates/20190828-ResidenceForCitizenship.pdf>; USCIS announcement,

<https://www.uscis.gov/news/fact-sheets/uscis-policy-manual-update>; statement from Acting USCIS Director Ken Cuccinelli,

<https://www.uscis.gov/news/alerts/statement-regarding-a-policy-update-defining-residence-statutory-provisions-related-citizenship>

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## Guidance Updated on Adjudication of Cuban Adjustment Act Cases

U.S. Citizenship and Immigration Services has updated policy guidance relating to adjustment of status under the Cuban Adjustment Act (CAA), enacted in 1966 as a special avenue for Cuban refugees to adjust to lawful permanent resident status in the United States. USCIS accepts certain documents as evidence that an applicant is a Cuban native or U.S. citizen, and has updated its guidance to provide examples of acceptable documents.

The guidance, dated August 13, 2019, states that an expired or unexpired Cuban passport can be evidence of being a Cuban native, and an unexpired Cuban passport can be evidence of Cuban citizenship. USCIS is also clarifying that a Cuban Citizenship Letter (*Carta de Ciudadanía*) or a Nationality Certificate (*Certificado de Nacionalidad*) may be evidence of Cuban citizenship. Previously, acceptable evidence of Cuban citizenship generally included "a Cuban Civil Registry document issued in Havana." However, a birth certificate issued by the Civil Registry or a Cuban consular certificate documenting an individual's birth outside of Cuba to at least one Cuban parent is not sufficient to establish Cuban citizenship, the guidance states. This remains true even if the birth or consular certificate states the individual to whom the certificate was issued is a Cuban citizen.

Details: USCIS policy guidance,

<https://www.uscis.gov/sites/default/files/policymanual/updates/20190813-CAA.pdf>

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## ABIL Global: Belgium

*There have been several developments with respect to business immigration in Belgium this year, including the introduction of a single permit authorizing a foreign employee to work and reside in Belgium, and new legal frameworks for work authorizations/permits in Flanders, Brussels, and Wallonia.*

### Introduction of Single Permit

Before 2019, the process for employees was always a "dual permit" system: an employment authorization/work permit authorized a foreign employee to work, and a Belgian residence permit authorized legal residence in Belgium.

As of 2019, the single permit has been implemented, in principle, for any (with a

few exceptions) employment for more than 90 days. This means that the applicant will receive one Belgian permit authorizing him or her to work and reside in Belgium. For employment up to 90 days and some situations of employment for more than 90 days (e.g., frontier workers, au pairs), the "dual permit" system remains in place.

The single permit application must be filed by the employer and the employee with the regional Ministry (Flanders, Brussels, or Wallonia) with jurisdiction (in general this will be determined by the place of work in Belgium). The process includes the following phases:

- The first phase is the admissibility check. The regional Ministry will check whether the file is complete, and will, in principle, confirm this within 10 days. If the file is not complete, the applicant(s) will be informed and will have 15 days to complete the file. If the file is timely completed, it is considered admissible. If the file is not timely completed, the application will not be processed further.
- The second phase is the processing of the single permit application. The maximum processing time is 4 months/120 days (in exceptional circumstances, the processing time can theoretically even be extended) after notification by the regional Ministry that the application is complete. The regional Ministry will first make a decision on the work aspect: in the event of an approval, a work authorization will be issued. Afterwards, the federal immigration office will make a decision regarding residence. At present, the average processing time is approximately 3 months.
- If the application is approved by the federal immigration office (this can be an explicit or implicit approval), the employer and the employee will be informed, and instructions to issue a residence authorization will be sent to the relevant authorities, either the Belgian embassy in the employee's home country, for an employee residing abroad (the employee will receive a visa D), or the Belgian municipality where the employee legally resides, for an employee who is already legally residing in Belgium. The employee residing abroad can travel to Belgium with the visa D; he or she must register with the local municipality and will receive a temporary document before the single permit will be issued. The employee can start working as soon as the temporary document is issued.

## **New Legal Framework for Flanders for Work Authorizations/Permits**

In general (for all single and dual permit applications), Flanders adopted a Decree, dated December 7, 2018, with new corporate immigration rules as of January 1, 2019. A portion of these new rules relates to the implementation of European Union (EU) directives (e.g., ICT (Intra-Corporate Transfers), researchers, trainees, volunteers). These new rules have not yet taken effect, however. This is expected to happen in the next few months.

There are several important changes:

- Eligibility as a "highly skilled" or executive employee

"Highly skilled" implies having a higher education degree, issued by an education establishment accredited as a higher education establishment by its country of location. Degrees issued by private schools will not be taken into account. The studies must have taken at least 3 years, or have resulted in education qualification level 5 as defined by ISCED (International Standard Classification of Education).

Executives are defined as employees who (i) are entrusted with daily management of the company and authorized to represent and bind the company, and (ii) lead the company and supervise the activities of "lower" employees.

- Salary threshold for highly skilled and executive employees

The gross salary threshold for highly skilled employees and executives will be determined on the basis of the average gross salary, published by federal authorities. The average annual gross salary is 12 times the average monthly gross salary. For 2019, the average annual gross salary is 41,868 € (12 x 3,489 €). For highly skilled employees, the salary threshold is 100% of the average annual gross salary (exception: locally employed highly skilled < 30 years and nurses: 80% of the average annual gross salary, or 33,494.40 € for 2019). For executives, the salary threshold is 160% of the average annual gross salary; for 2019 this is 66,989 €.

Salary includes all payments to the employee in consideration for work. The payments/amounts must be certain in advance/at the start of the employment in Belgium, which means that they must be mentioned in the assignment letter. The fact that the payment must be certain excludes discretionary bonuses. Allowances, directly linked and specific to the assignment, are considered part

of the salary, unless they are paid in reimbursement of expenditures actually incurred on account of the assignment, such as expenditures on travel, lodging, and board. Travel, lodging, and board allowances are thus not considered as salary.

- Duration of work authorizations for highly skilled and executive employees

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- Duration of work authorizations for highly skilled and executive employees

The maximum duration of work authorization for the highly skilled and executives is 3 years instead of 1 year. The maximum duration depends on the



duration of validity of the employment contract or assignment letter.

### **New Legal Framework for Brussels for Work Authorizations/Permits**

A Decree of the Brussels Region government dated May 16, 2019, introduced new rules regarding work authorizations/permits as of June 1, 2019. A portion of the new rules relates to the implementation of EU directives (e.g., researchers, trainees, volunteers). These new rules have not yet taken effect; this is expected to happen in the next few months.

Some key points:

- ICT (Intra-Corporate Transfer) permits

ICT permits can be applied for as of June 1, 2019, for managers (maximum 3 years), specialists (maximum 3 years), and trainee-employees (maximum 1 year), who have been employed for at least 6 months uninterrupted, immediately preceding the transfer. There is a degree requirement (3 years of higher education for managers and specialists; university, at least a bachelor's degree, for trainee-employees), as well as a salary threshold (for 2019: 53,970 € for managers, 43,176 € for specialists, and 26,985 € for trainee-employees). The rules regarding short-term and long-term mobility for ICT permit holders also took effect as of June 1, 2019.

- Duration of work authorizations for the highly skilled and executives

For applications filed as of June 1, 2019, highly skilled and executive work authorizations can be valid up to 3 years (instead of 1 year). The maximum duration depends on the duration of validity of the employment contract or assignment letter. Instead of filing an annual renewal application, the only obligation for the employer is to submit copies of salary documents and, for assignees, of the foreign social security confirmation document and of the Belgian *Limosa* (this is an online notification for assignees with the Belgian national social security office).

### **New Legal Framework for Wallonia for Work Authorizations/Permits**

A Decree of the Walloon Region government dated May 16, 2019, is the new legal framework for work authorizations/permits issued by the Walloon Region. The new rules apply as of June 1, 2019, without affecting the validity of already issued authorizations/permits. An important section of the Decree relates to the implementation of EU directives (e.g., ICT, researchers, trainees,

volunteers). These new rules have not yet taken effect; this is expected to happen in the next few months.

A few key points/novelties:

- Salary threshold for the highly skilled and executives

As of 2020, the annual gross salary threshold for highly skilled and executive-level permits will be defined on the basis of the average annual gross salary. For the highly skilled, the threshold is 100% of the average annual gross salary (41,868 €); for executives, 160% (66,989 €). In addition, the annual gross salary cannot be less favorable than the applicable salary for similar jobs (currently and pursuant to the law, collective bargaining agreements, or practices);

Effective immediately, the definition of salary is clarified. Salary includes all payments to the employee in consideration for work. The amounts must be known with certainty to the employer, employee, and Belgian authorities before the start of the employment in Belgium. The fact that the amount must be certain excludes discretionary bonuses; contributions paid for professional supplementary pension schemes are not taken into account either. In the event of assignment, allowances, directly linked and specific to the assignment, are considered part of the salary provided they are not paid in reimbursement of expenditures actually incurred on account of the assignment, such as expenditures on travel, lodging, and board. Travel, lodging, and board allowances are thus not considered salary.

- Duration of work authorizations for the highly skilled and executives

Highly skilled and executive work authorizations can be valid for the duration of the employment contract or assignment letter, up to a maximum of 3 years (instead of 1 year). Instead of filing an annual renewal application, the employer must submit copies of salary documents on/by the anniversary date of issuance of the work authorization.

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## **Firm in the News**

Cyrus D. Mehta participated in a Fox 5 Interview in which he discussed the legal issues surrounding a Palestinian student from Harvard who was deported.

Since the interview, the student has been allowed to return and start his classes at Harvard.

<http://www.fox5ny.com/news/us-turns-away-palestinian-harvard-freshman>