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

IMMIGRATION UPDATE- JANUARY 27, 2020

Posted on January 28, 2020 by Cyrus Mehta

Headlines:

State Department Issues Final Rule Ordering Denials of B Visas to Combat 'Birth Tourism' – The final rule establishes that travel to the United States with the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States is an impermissible basis for the issuance of a B nonimmigrant visa.

USCIS Announces Termination of Iranian Eligibility for E-1 and E-2 Nonimmigrant Classification Based on Treaty – Those who are currently in valid E–1 or E–2 status on the basis of the Treaty of Amity must depart the United States upon expiration of their authorized period of stay in the United States, unless otherwise authorized to remain.

USCIS Reopens, Extends Comment Period for Fee Increases – USCIS has reopened and extended the comment period on its proposed rule raising certain fees for immigration services and benefits to February 10, 2020.

OFLC to Decommission iCERT Labor Certification Registry – The iCERT System Labor Certification Registry, which provides public access to labor certification decisions in the PERM, LCA, H-2A, and H-2B visa programs, will be decommissioned.

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State Department Issues Final Rule Ordering Denials of B Visas to Combat 'Birth Tourism'

The Department of State's Bureau of Consular Affairs has amended its regulation governing the issuance of visas in the “B” nonimmigrant

classification for temporary visitors for pleasure, effective January 24, 2020. The final rule establishes that travel to the United States with the primary purpose of obtaining U.S. citizenship for a child by giving birth in the United States is an impermissible basis for the issuance of a B nonimmigrant visa. Consequently, a consular officer "shall deny a B nonimmigrant visa to an alien who he or she has reason to believe intends to travel for this primary purpose," the rule states, noting that this rule is an effort to combat the "birth tourism industry" as a matter of national security.

The final rule also codifies a requirement that a B nonimmigrant visa applicant who seeks medical treatment in the United States must demonstrate, to the satisfaction of the consular officer, the arrangements for such treatment and establish the ability to pay all costs associated with such treatment. The rule establishes a "rebuttable presumption that a B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is traveling for the primary purpose of obtaining U.S. citizenship for the child."

Although the regulation amends the part pertaining to visitors for pleasure, the language is broad enough to subject B-1 business visitor applicants to the rebuttable presumption. The rule would thus also adversely affect women who seek to come to the United States to engage in legitimate business activities, which includes business meetings and entrepreneurial activities. The rule only applies to visa applicants at U.S. consular posts and not to visa waiver applicants whose first opportunity to establish their eligibility as visitors is at a U.S. port of entry. As of January 23, 2020, no guidance has been issued by U.S. Customs and Border Protection HQ to ports of entry concerning the final rule.

The Department said the rule is exempt from notice and comment under the foreign affairs exemption of the Administrative Procedure Act: "Opening this pronouncement of foreign policy to public comment, including comment from foreign government entities themselves, and requiring the Department to respond publicly to pointed questions regarding foreign policy decisions would have definitely undesirable international consequences."

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USCIS Announces Termination of Iranian Eligibility for E-1 and E-2 Nonimmigrant Classification Based on Treaty

U.S. Citizenship and Immigration Services (USCIS) announced on January 23, 2020, that nationals of Iran and their dependents are no longer eligible to change to or extend their stays in E-1 or E-2 nonimmigrant status on the basis of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran due to the treaty's termination.

USCIS said that those who are currently in valid E–1 or E–2 status on the basis of the Treaty of Amity, including their family members who are also in valid E status, must depart the United States upon expiration of their authorized period of stay in the United States, unless otherwise authorized to remain in the United States (e.g., pursuant to a change of status to another nonimmigrant status or adjustment of status to lawful permanent residence). The changes described in the notice do not prevent Iranian nationals and their dependents from seeking admission in, or applying for a grant of, another nonimmigrant visa classification for which they believe they can establish eligibility under U.S. immigration law, the agency noted.

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USCIS Reopens, Extends Comment Period for Fee Increases

U.S. Citizenship and Immigration Services (USCIS) has reopened and extended the comment period on its proposed rule raising certain fees for immigration services and benefits to February 10, 2020.

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OFLC to Decommission iCERT Labor Certification Registry

The Department of Labor's Office of Foreign Labor Certification (OFLC) is alerting employers and other interested stakeholders that the iCERT System Labor Certification Registry, which provides public access to labor certification decisions in the PERM, LCA, H-2A, and H-2B visa programs, will be decommissioned. As part of the Department's technology modernization initiative, the Foreign Labor Application Gateway (FLAG) System was developed "to replace the legacy iCERT System, improve customer service, and modernize the administration of foreign labor certification programs," OFLC said.

Effective February 28, 2020, iCERT System account users will no longer be able to take any actions on their applications (e.g., delete initiated applications, request redeterminations, request center director reviews, withdraw

applications, and upload supporting documents) within the respective Prevailing Wage, LCA, H-2A, or H-2B program areas of the legacy iCERT System. However, iCERT System account users will retain the ability to access their accounts and view, download, or copy information related to their applications after the iCERT System is placed in a read-only mode.

Also effective February 28, 2020, data on labor certification decisions will be available within the Disclosure Data section of the OFLC Performance data page. Those interested in obtaining copies of labor certification records or other information maintained by OFLC may also request access under the Freedom of Information Act.

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Firm in the News:

Cyrus Mehta was invited to conduct a webinar on Ethical Issues for Lawyers Representing Detained Noncitizens for attorneys at the Southern Poverty Law Center on January 27, 2020.

Mr. Mehta was extensively quoted in a Times of India article dated January 24, 2020 on a court challenge to the USCIS February 2018 Memo relating to third party placements under the H-1B visa, and the impact it will have on employers who place their H-1B workers at third party client sites, https://timesofindia.indiatimes.com/business/india-business/us-court-sets-aside-plea-it-service-companies-will-need-to-file-more-evidence-when-hiring-h-1bs/articleshow/73549070.cms

Mr. Mehta's blog was cited in an amicus brief of immigrant representation organizations to the Supreme Court, including AILA, which advocates for declaring the Encouragement Provision unconstitutional as it criminalizes ethical advice that an immigration lawyer must give to clients who are present in the US and thus violates the First Amendment. Mr. Mehta's video commentary on the case, USA v. Evelyn Sineneng-Smith, and the amicus brief is available at https://www.aila.org/publications/videos/quicktakes/aila-quicktake-278-decriminalize-ethical-advice.