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

IMMIGRATION UPDATE - DECEMBER 07, 2020

Posted on December 7, 2020 by Cyrus Mehta

Headlines:

U.S. District Court Orders DHS to Reopen DACA for New Applications, Vacates Wolf Memo – a U.S. district court vacated a memorandum issued by Chad Wolf, which made certain changes to the DACA program, and ordered DHS to reopen the program to new applications.

U.S. District Court Vacates H-1B Interim Final Rules – A U.S. district court vacated two interim final rules promulgated by DOL and DHS that made important changes to the H-1B program.

Senate-Passed Bill Would Remove Per-Country Limits on All Employment-Based Immigrant Visa Categories; Includes Controversial Provisions – The bill now returns to the U.S. House of Representatives.

State Dept. Imposes New Restrictions on Chinese Communist Party Members – A DOS spokesperson said that no current visas would be revoked as a result of the policy changes.

USCIS Updates Guidance for Schedule A Occupations – USCIS announced updated guidance for adjudicating EB-2 and EB-3 Schedule A petitions for registered nurses, physical therapists, and immigrants who have exceptional ability.

Justice Dept. Sues Facebook for Discriminating Against U.S. Workers – The lawsuit alleges that Facebook refused to recruit, consider, or hire qualified and available U.S. workers for more than 2,600 positions. Instead, the lawsuit alleges, Facebook reserved those positions for foreign national employees.

EOIR Proposes to Implement Electronic Filing for All Cases Before Immigration Courts and the BIA – EOIR issued a proposed rule to implement electronic filing and records applications for all cases before the immigration courts and the

Board of Immigration Appeals.

ABIL Global: France – This article provides updates on what the Brexit transition means for British nationals residing in France.

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U.S. District Court Orders DHS to Reopen DACA for New Applications, Vacates Wolf Memo

On December 4, 2020, a U.S. district court vacated a memorandum issued by Chad Wolf on July 28, 2020, which made certain changes to the Deferred Action for Childhood Arrivals (DACA) program, and ordered DHS to reopen the program to new applications.

The court found that Chad Wolf was without lawful authority to serve as Acting Secretary of the Department of Homeland Security (DHS) when he issued the memorandum, and that therefore the DACA program must be governed by the terms in existence before the attempted rescission of September 2017, when the Trump administration began its efforts to dismantle DACA. The court said that attempts by Administrator Peter Gaynor and Mr. Wolf to ratify Wolf's prior actions were "dead letter" and had no legal significance because the order of succession was not followed as designated under the Homeland Security Act.

Among other things, the court ordered DHS to post a notice on its website and on the websites of "all other relevant agencies," within three calendar days of the order, stating that:

- DHS is accepting first-time requests for consideration of deferred action under DACA, renewal requests, and advance parole requests, based on the terms of the DACA program before September 5, 2017, and in accordance with the court's memorandum and order of November 14, 2020; and
- Deferred action and employment authorization documents granted for only one year are extended to two years, in line with pre-Wolf memorandum policy.

The court also ordered the government to provide individual mailed notices to

all class members by December 31, 2020, and to produce a status report on the DACA program by January 4, 2021.

Details:

- December 4, 2020, order, http://cdn.cnn.com/cnn/2020/images/12/04/batalla_vidal_et_al_v_nielsen_et_al__nyedce-16-04756__0354.0.pdf
- "Judge Orders Trump Administration To Restore DACA As It Existed Under Obama," NPR, https://www.npr.org/2020/12/04/943355234/judge-orders-trump-administration-to-restore-daca-as-it-existed-under-obama

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U.S. District Court Vacates H-1B Interim Final Rules

On December 1, 2020, a U.S. district court vacated two interim final rules promulgated by the Departments of Labor (DOL) and Homeland Security (DHS) that made important changes to the H-1B program, including to prevailing wage calculations and the definition of "specialty occupation," among other things. The order prevents the interim final rules from taking effect and prevents the agencies from implementing the rules. The DHS rule was scheduled to take effect December 7, 2020; the DOL rule took effect in October.

The court said the question was whether the agencies demonstrated that the impact of the COVID-19 pandemic on domestic unemployment justified dispensing with the "due deliberation" that normally accompanies rulemaking to make significant changes to the H-1B program. The court concluded that the agencies had not done so.

DOL's Office of Foreign Labor Certification (OFLC) issued a related announcement on December 3, 2020, stating that the agency is "taking necessary steps to comply" with the order, including making required changes to the Foreign Labor Application Gateway (FLAG) system, such as replacing wage data. Beginning "around" 8:30 a.m. ET on December 9, 2020, "employers and their authorized attorneys or agents will be able to submit new LCAs , Form ETA-9035/9035E, using the OES survey data that was in effect on October 7, 2020," the Office of Foreign Labor Certification said. Employers desiring review of a prevailing wage determination issued using the interim final rule's

calculations can request review from the National Prevailing Wage Center before January 4, 2021.

Details:

- Court order, https://www.courtlistener.com/recap/gov.uscourts.cand.367484/gov.uscourts.cand.367484.73.0.pdf
- OFLC announcement, https://www.dol.gov/agencies/eta/foreign-labor
- Foreign Labor Certification Data Center, https://www.flcdatacenter.com/
- USCIS news release, https://www.uscis.gov/news/alerts/us-district-court-for-the-northern-district-of-california-vacates-the-strengthening-the-h-1b-program
- "Court Strikes Down Trump Admin's H-1B Restrictions," Times of India, https://bit.ly/3ghomSt
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Senate-Passed Bill Would Remove Per-Country Limits on All Employment-Based Immigrant Visa Categories; Includes Controversial Provisions

On December 2, 2020, the U.S. Senate passed its version of H.R. 1044, the "Fairness for High-Skilled Immigrants Act of 2020." The Senate version of the bill now returns to the U.S. House of Representatives. If the Senate version passes in the House and is signed into law by the President, it would remove the per-country limits on all employment-based immigrant visa categories, among other things. Since Congress is scheduled to end its session shortly, chances for passage in the House are unclear.

The bill includes several controversial provisions, such as an annual limit on the number of immigrants who could adjust from H-1B status to that of permanent resident and a bar on those affiliated with the military forces of the People's Republic of China or the Chinese Communist Party or the Chinese military.

Details:

- R. 1044, https://www.congress.gov/bill/116th-congress/house-bill/1044
- Section-by-section summary of Senate bill, https://www.visalaw.com/siskind-summary-s-386-fairness-high-skilled-immigrants-act-2020-852020/

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State Dept. Imposes New Restrictions on Chinese Communist Party Members

As part of a continued chilling of relations between the United States and China under the Trump administration, on December 4, 2020, the Department of State announced several new restrictions on Chinese Communist Party members, including:

- New rules limiting the validity of B1/B2 visas to one month and single-entry for Chinese Communist Party members and their families. B1/B2 visas for Chinese nationals are normally valid for 10 years and allow multiple entries.
- Termination of five exchange programs, including the Policymakers Educational China Trip Program, the U.S.-China Friendship Program, the U.S.-China Leadership Exchange Program, the U.S.-China Transpacific Exchange Program, and the Hong Kong Educational and Cultural Program.

A Department of State spokesperson told the *New York Times* that no current visas would be revoked as a result of the policy changes.

Details:

- "U.S. Imposes Sanctions on People's Republic of China Officials Engaged in Coercive Influence Activities," Department of State, https://www.state.gov/u-s-imposes-sanctions-on-peoples-republic-of-china-officials-engaged-in-coercive-influence-activities/
- "Termination of PRC-Funded Propaganda Programs," Department of State, https://www.state.gov/termination-of-prc-funded-propaganda-programs/
- S. Tightens Visa Rules for Chinese Communist Party Members," New York Times, https://www.nytimes.com/2020/12/03/world/asia/us-visa-china-communist-party.html
- "Trump Restricts U.S. Visas for Chinese Communist Party Members and Families," Washington Post, https://www.washingtonpost.com/world/asia_pacific/us-visas-china-communist-trump/2020/12/03/bf6694ea-3551-11eb-9699-00d311f13d2d_story.html

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USCIS Updates Guidance for Schedule A Occupations

On December 2, 2020, U.S. Citizenship and Immigration Services (USCIS) announced updated guidance for adjudicating EB-2 and EB-3 Schedule A petitions for registered nurses, physical therapists, and immigrants who have exceptional ability.

USCIS said the update does not change policy but clarifies how agency adjudicators should apply Department of Homeland Security and Department of Labor (DOL) regulations when deciding Schedule A petitions. Generally, USCIS noted, EB-2 and EB-3 petitioners must obtain a labor certification from DOL verifying that there are no qualified U.S. workers available. However, DOL has pre-certified certain occupations, known as Schedule A, so those petitioners do not need to obtain a labor certification. Instead, EB-2 and EB-3 Schedule A petitioners file Form I-140, Immigrant Petition for Alien Workers, directly with USCIS.

Details:

- USCIS news release, https://www.uscis.gov/news/alerts/uscis-updates-guidance-for-schedule-a-occupations
- USCIS policy alert, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201202-ScheduleA.pdf

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Justice Dept. Sues Facebook for Discriminating Against U.S. Workers

The Department of Justice announced on December 3, 2020, that it filed a lawsuit against Facebook for discriminating against U.S. workers. The lawsuit alleges that Facebook refused to recruit, consider, or hire qualified and available U.S. workers for more than 2,600 positions. Instead, the lawsuit alleges, Facebook reserved those positions for "temporary visa holders it sponsored for permanent work authorization (or 'green cards') in connection with the permanent labor certification process (PERM)."

Facebook told National Public Radio that it is "cooperating with in its review of this issue and while we dispute the allegations in the complaint, we cannot comment further on pending litigation."

Details:

- Department of Justice news release, https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-facebook-discriminating-against-us-workers
- Department of Justice complaint, https://www.justice.gov/opa/press-release/file/1342786/download
- "Facebook Sued by Justice Dept. for Allegedly Discriminating Against U.S. Workers," NPR, https://www.npr.org/2020/12/03/942335472/facebook-sued-by-justice-dept-for-allegedly-discriminating-against-u-s-workers

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EOIR Proposes to Implement Electronic Filing for All Cases Before Immigration Courts and the BIA

The Department of Justice's Executive Office for Immigration Review (EOIR) issued a proposed rule on December 4, 2020, to implement electronic filing and records applications for all cases before the immigration courts and the Board of Immigration Appeals.

Under the proposed rule, electronic filing would become mandatory for the Department of Homeland Security and for attorneys and accredited representatives who represent respondents, applicants, and petitioners before the EOIR. Among other things, EOIR proposes "to allow for an extended filing deadline when the electronic filing system is unavailable due to an unplanned outage and to provide immigration judges with the authority to accept paper filings in open court in limited circumstances."

Comments on the proposed rule are due by January 4, 2021.

Details:

- EOIR proposed rule, https://bit.ly/2LbgAhM

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ABIL Global: France

This article provides updates on what the Brexit transition means for British nationals residing in France.

On December 31, 2020, at midnight, the Brexit transition period will end. The United Kingdom (UK) will become a third country to the European Union (EU).

British nationals already residing in France can submit "Withdrawal Agreement" residence permit applications now. The request can be made on the internet. All British nationals already residing in France before December 31, 2020, are eligible to apply for a residence permit, in accordance with the provisions of the Brexit agreement signed between the UK and the EU. By June 30, 2021, all British nationals wishing to benefit from the provisions of the Brexit agreement to retain their rights to stay and work in France must have a French residence permit.

Applicants must upload documentation, including passport identity pages; proof establishing the date the applicant moved to France, such as a property certificate issued by a notary, a home insurance contract, a home insurance certificate or an employment contract; and documents relating to the specific situation of each applicant. For example, an employee must provide a copy of their most recent pay slip, while a student must provide proof of enrollment in a school or university. After completing these steps, the applicant will receive an application confirmation by email, with a reference number confirming the filing.

Once the file has been processed, an email will be sent to the candidate to make an appointment at the prefecture to finalize the file (fingerprinting, photo, and proof of payment of fees).

It is not yet clear how the applicant will receive the residence permit when it becomes available, whether by post to his or her home in France or by going to the Prefecture a second time.

Permit Types

Presence of less than five years

British nationals who have resided in France for less than five years as of December 31, 2020, must apply for a residence permit, depending on their status (e.g., student, employee, temporary worker, posted worker, self-employed professional, unemployed person, family member, long-term visitor). They will be issued a residence permit in accordance with the agreement bearing the specific category, such as "Withdrawal agreement—employee."

Although the list of required documents is not yet available, applicants are advised to prepare:

- Passport or identity card
- Proof of address in France
- Identity photographs
- Proof of resources: employment contract, payslips, bank statements
- Proof of professional activity: work certificate signed by the employer confirming the date of the start of employment in France
- Proof of the purpose of the stay in France over the past five years (e.g., employment contract)

British nationals who have resided in France for less than five years as of December 31, 2020, can also apply for a resident card when they can prove that they have lived in France for five years. For example, a British national residing in France as of December 31, 2017, can apply for a resident card as of December 31, 2022.

Presence of five years or more

British nationals who have resided for five years or more in France as of December 31, 2020, are eligible to obtain a resident card valid for 10 years.

Although the list of required documents is not yet available, applicants are advised to prepare:

- Passport or identity card
- Proof of address in France
- Three identity photographs
- Proof of presence in France over the past five years: one document per half-year (e.g., rent receipts, energy bills)
- Proof of resources: employment contract, payslips, bank statements

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Firm in the News

Cyrus Mehta was quoted by *Forbes* in "Facebook Lawsuit Raises Troubling Immigration Issues for Companies." Among other things, Mr. Mehta said, "A U.S. employer is not required to hire the U.S. worker when conducting recruitment in conjunction with labor certification, and is required to conduct a good faith recruitment pursuant to recruitment rules, which DOL has

acknowledged deviate from an employer's normal recruitment practice." https://bit.ly/37EOJhp

Mr. Mehta's views on the Department of Justice's lawsuit against Facebook being extremely problematic are reflected in a *Times of India* article, "U.S. Justice Dept. Files Lawsuit Against Facebook for Bias Towards Hiring H-1B Visa Holders." He said that "it is rather odd that when Facebook followed the Department of Labor (DOL) rules regarding recruitment for a labor certification, another agency of the federal government accuses it of discriminatory practices." He noted that Facebook "was not accused of violating the DOL rules," and said that an employer "is not required to hire the U.S. worker and terminate the foreign worker who already holds the job often on an H-1B visa." If the government "is not happy about the way Facebook conducted recruitment under the DOL rules, then the labor certification system must be reformed and Facebook should not be penalized with whopping penalties," he said. https://bit.ly/2IjOY8Z

Mr. Mehta spoke at the 53nd Annual Immigration & Naturalization Institute on December 3, 2020. The program was sponsored by the Practising Law Institute. Mr. Mehta's panel was "Trends in Processing and Policy at USCIS—Practical Tips." https://www.pli.edu/programs/immigration-and-naturalization-institute

Mr. Mehta was quoted by the *Times of India* in "U.S. Senate Passes S. 386 Bill, Eliminates Country Cap for Employment-Based Green Cards." He tweeted, "While S386 removes country of birth discrimination, the 50-50 provision will badly impact IT companies though they can still file H-1B extension and change of employer requests." https://bit.ly/36JyMan

Mr. Mehta was quoted by *Scroll India* in "Will Joe Biden and Kamala Harris Actually Undo the Anti-Immigrant Policies of the Trump Years?" He said, "Because India has so many more applicants, and because it's such a large country, people born there have far worse backlogs than anyone else." Mr. Mehta said this was a "fundamental problem in the immigration law that has not been reformed. But what Trump did was to kind of make it far harder to obtain and renew an H-1B visa, making the lives of thousands of Indians more difficult." He also noted that there is much uncertainty each time an H-1B visa holder files for renewal, and now "the terrain has become even more difficult to negotiate. Life is just going to be more uncertain and more stressful for an Indian there—because a lot of Indians are in IT." https://bit.ly/33ONZ8h

Mr. Mehta was quoted by the *Times of India* in "Court Strikes Down Trump Admin's H-1B Restrictions." Mr. Mehta said, "The court found no justification for the government to issue these rules without going through the required notice and comment under the Administrative Procedure Act. Judge White also remained unconvinced regarding the government's justification to bypass notice and comment due to unemployment caused by the Covid-19 pandemic as the Trump administration had been planning to issue these rules much before the pandemic. This ruling is another victory against a rule of the Trump administration that had no economic basis, and which would have harmed U.S. businesses as well as skilled foreign nationals employed in the U.S. on H-1B visas." https://bit.ly/3ghomSt

Mr. Mehta's views were extensively reflected in a *Times of India* article, "Bid to Halt OPT Program for International Students Stemmed by U.S. District Court." He said the decision is "great news for international students as they can look forward to getting permission to engage in practical training in the U.S. after they complete their studies. It is also good for American universities as they can continue to compete with universities in other countries to attract the best students. Obtaining practical training after successfully graduating from a U.S. university can nicely round off a stellar education, and provide the student a foray into a career, which in turn can benefit the U.S. or the home country or both." https://bit.ly/3ot9Fid

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