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

IMMIGRATION UPDATE - DECEMBER 21, 2020

Posted on December 21, 2020 by Cyrus Mehta

Headlines:

Ninth Circuit Rejects USCIS Reasoning on H-1B Computer Programmer as 'Specialty Occupation' – The Ninth Circuit ruled that USCIS's denial of a visa for a computer programmer on the basis that it was not a "specialty occupation" was arbitrary and capricious, and remanded the case.

DOJ Finalizes Rule Hiking Fees for EOIR Applications, Appeals, and Motions – DOJ issued a final rule effective January 19, 2021, adopting proposed fee amounts without change.

DOJ's Asylum Final Rules Adopt Most Provisions of Interim and Proposed Rules – DOJ issued two final rules on asylum and withholding of removal-related standards and procedures.

USCIS Updates Discretionary Criteria for Case-by-Case Interview Determinations of Adjustment Applications Based on Refugee or Asylee Status – USCIS expanded the discretionary criteria USCIS officers use to determine whether to interview applicants filing Form I-485, Application to Register Permanent Residence or Adjust Status, based on refugee or asylee status. The guidance removes asylee and refugee adjustment cases from the list of categories in which USCIS may waive the required interview.

USCIS Issues Lockbox Updates re Recent Delays – The agency announced significant delays in issuing receipt notices and provided tips for decreasing processing time.

DOJ Finalizes EOIR Rule on BIA Appeals Processing – **DOJ is making multiple changes to the processing of appeals to the BIA and clarifying "that there is no freestanding authority of line immigration judges or BIA members to administratively close cases."**

Cato Institute Proposes 30 Deregulatory Actions for Biden Administration – The Cato Institute recommended 30 deregulatory actions for the Biden administration to consider, to "lessen the costs of America's outdated immigration laws." The proposals focus on agency measures to improve the process for legal immigrants.

In Response to Litigation, USCIS Pauses 'Blank Space' Rejection Policy – USCIS has agreed to pause implementation of the rejection policy starting December 24, 2020.

Firm in the News

Details:

Back to Top

Ninth Circuit Rejects USCIS Reasoning on H-1B Computer Programmer as 'Specialty Occupation'

In a decision issued December 16, 2020, the Ninth Circuit ruled that U.S. Citizenship and Immigration Services' (USCIS) denial of a visa for a computer programmer on the basis that it was not a "specialty occupation" was arbitrary and capricious, and remanded the case.

The court was unpersuaded by USCIS' reasoning, noting among other things that whether or not computer programmers normally possess a bachelor's degree was central to USCIS's decision. The court noted that USCIS relied heavily on the Department of Labor's Occupational Outlook Handbook (OOH), which states that "most" computer programmers have a bachelor's degree. The court pointed out that the regulatory language similarly states that a bachelor's degree is "normally" required for a computer programmer, and found no appreciable difference between those two descriptions: "There is no daylight between typically needed, per the OOH, and normally required, per the regulatory criteria." Indeed, the court found USCIS's reasoning "beyond saving."

Details:

- *Innova Solutions v. Baran*, https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/16/19-16849.pdf
- "*Innova Solutions v. Baran*: Computer Programmer is a Specialty Occupation Under the H-1B Visa," https://bit.ly/3nDu1VV

Back to Top

DOJ Finalizes Rule Hiking Fees for EOIR Applications, Appeals, and Motions

The Department of Justice issued a final rule effective January 19, 2021, adopting fee amounts proposed in February 2020 without change. The rule increases the fees for Executive Office for Immigration Review (EOIR) applications, appeals, and motions subject to an EOIR-determined fee. The rule does not affect fees established by the Department of Homeland Security (DHS) for DHS forms for applications filed or submitted in EOIR proceedings. It does not affect the ability of applicants to submit fee waiver requests and does not add new fees. The final rule responds to comments received in response to the notice of proposed rulemaking.Some practitioners noted that it could be difficult for the incoming Biden administration to quickly come up with a remedy for the higher fees given competing urgent priorities.

Details:

- Final rule, https://bit.ly/2KdUcEs

Back to Top

DOJ's Asylum Final Rules Adopt Most Provisions of Interim and Proposed Rules

The Department of Justice issued two final rules on asylum and withholding of removal-related standards and procedures.

- **Final rule on asylum eligibility and procedural modifications.** This final rule, effective January 19, 2021, responds to comments received on an interim final rule issued in July 2019 and "makes minor changes to regulations implemented or affected by the for clarity and correction of typographical errors."

Among other things, the rule adds a new mandatory bar to eligibility for asylum for those who enter or attempt to enter the United States "across the southern land border after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States." Some exceptions apply. The rule also adds new limits on asylum eligibility for people who are subject to expedited removal.

- **Final rule on procedures for asylum and withholding of removal.** This

> final rule, effective January 15, 2021, responds to comments received in response to a notice of proposed rulemaking issued in September 2020. The final rule adopts the proposed rule "with few changes." The rule outlines requirements for filing a complete application for relief and the consequences of filing an incomplete application, establishes a 15-day filing deadline for applicants in "asylum-and-withholding-only proceedings" (calculated from the date of the first hearing before an immigration judge (IJ), with "good cause" extensions possible) and clarifies evidentiary standards in deciding such applications. It also adopts changes related to the 180-day asylum adjudication clock.

In a change from the proposed rule, which required the applicant to submit a fee receipt together with the application by the deadline set by the IJ, the final rule allows applicants to meet the filing deadline when they "cannot meet all requirements due to no fault of their own." As an example, the final rule says an applicant can submit alternative proof of payment if the fee receipt has not yet been received, but in such instance, the fee receipt will be due by the deadline the IJ sets. If the IJ does not set a separate deadline for the fee receipt, the applicant must submit it within 45 days of the date of filing the associated application.

Details:

- Final rule on asylum eligibility and procedural modifications, https://bit.ly/34rRWjt
- Final rule on procedures for asylum and withholding of removal, https://bit.ly/3pgmVr3

Back to Top

USCIS Updates Discretionary Criteria for Case-by-Case Interview Determinations of Adjustment Applications Based on Refugee or Asylee Status

U.S. Citizenship and Immigration Services (USCIS) expanded the discretionary criteria USCIS officers use to determine whether to interview applicants filing Form I-485, Application to Register Permanent Residence or Adjust Status, based on refugee or asylee status. The guidance removes asylee and refugee adjustment cases from the list of categories in which USCIS may waive the required interview.

The updated criteria "are well within the parameters of USCIS' regulatory authority to determine, on a case-by-case basis, whether an interview is necessary to determine the admissibility of an alien applying for lawful permanent resident status under INA § 209," the agency said, noting that the updates do not change the eligibility requirements to adjust status. Although the updated criteria "may result in more applicants requested to appear for an interview, the changes are necessary to help ensure program integrity and support USCIS' efforts to detect and prevent fraud and risks of harm to the United States," the agency said.

Details:

- USCIS news alert, https://www.uscis.gov/news/alerts/uscis-updates-discretionary-criteria-for-case-by-case-interview-determinations-of-adjustment-of
- USCIS updated guidance, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201215-RefugeeAsyleeAOSInterviewGuidelines.pdf

Back to Top

USCIS Issues Lockbox Updates re Recent Delays

U.S. Citizenship and Immigration Services (USCIS) announced that its lockbox facilities "have received a significant increase in filings in recent weeks." The increase, along with COVID-19 pandemic-related restrictions, is causing "significant delays for processing receipt notices," the agency said.

The notice states that USCIS will send a receipt notice to the mailing address provided on a properly filed form "normally within 30 days." The agency provided several tips for decreasing the time it takes USCIS to process and send a receipt notice, including filing online, creating a USCIS online account and using the case status online tool to check status, and completing a Form G-1145, Notification of Application/Petition Acceptance, and clipping it to the front of the form to request a text message and/or email when USCIS accepts the form. The notice also includes additional tips for submitting evidence with application packages.

Details:

- USCIS Lockbox Updates, https://bit.ly/3rffYIs

Back to Top

DOJ Finalizes EOIR Rule on BIA Appeals Processing

The Department of Justice (DOJ) published a final rule, effective January 15, 2021, making multiple changes to processing appeals to the Board of Immigration Appeals (BIA) and to clarify "that there is no freestanding authority of line immigration judges or BIA members to administratively close cases." The final rule responds to comments made on a proposed rule issued in August 2020 and adopts the proposed rule "with minor changes."

Among other things, the final rule reduces the maximum allowable time for an extension of the briefing schedule for "good cause shown" from 90 days to 14 days. The rule limits the parties to one possible extension, consistent with BIA policy "not to grant second briefing extension requests." The rule also "adopts simultaneous briefing schedules instead of consecutive briefing schedules for all cases." In response to comments, DOJ also made adjustments to the biometrics timeline to allow for circumstances such as delays by the Department of Homeland Security or lack of sufficient notice.

Details:

- DOJ final rule, https://bit.ly/3arBsf5

Cato Institute Proposes 30 Deregulatory Actions for Biden Administration

The Cato Institute recommended 30 deregulatory actions for the Biden administration to consider, to "lessen the costs of America's outdated immigration laws." The proposals "focus entirely on agency measures to improve the process for legal immigrants."

The report notes that President Trump has reduced immigrant visa approvals by more than 80 percent during his term. The agenda compiled by Cato would "permit more legal migration and legal employment within the confines of the restrictive laws that Congress has passed." Contributors include several members of the Alliance of Business Immigration Lawyers and other immigration law experts. Their proposals are organized into four sections: reforms affecting green card applicants on the path to permanent residence, reforms affecting nonimmigrants (visitors, students, and temporary workers), reforms affecting refugees, and big-picture reforms affecting more than one category.

Details:

- "Deregulating Legal Immigration: A Blueprint for Agency Action," Cato Institute, https://www.cato.org/publications/study/deregulating-legal-immigration-blueprint-agency-action
- "Leading Legal Experts Urge Aggressive Immigration Actions," The Hill, https://thehill.com/blogs/congress-blog/politics/530948-leading-legal-experts-urge-aggressive-immigration-actions

Back to Top

In Response to Litigation, USCIS Pauses 'Blank Space' Rejection Policy

As a result of litigation in *Vangala v. USCIS* challenging USCIS's blank-space rejection policy, where the agency rejected applications because of blank spaces, USCIS has agreed to pause implementation of the rejection policy starting December 24, 2020. According to counsel, the parties will enter into negotiations to resolve the claims, including a remedy for proposed class members who have had applications rejected.

Those who received a rejection notice dated after December 24, 2020, can contact plaintiffs' counsel at bspolicy@nwirp.org.

Details:

- National Immigration Litigation Alliance's "Affirmative Litigation Docket" (scroll down to *Vangala v. USCIS*), includes summary and legal documents, https://immigrationlitigation.org/impact-litigation/

Back to Top

Firm in the News

Cyrus Mehta contributed three recommendations to "Deregulating Legal Immigration: A Blueprint for Agency Action," published by the Cato Institute. The paper presents 30 deregulatory proposals by 15 authors for consideration by the Biden administration. The proposals focus on agency measures to improve the process for legal immigrants. The Cato article is at https://www.cato.org/publications/study/deregulating-legal-immigration-blueprint-agency-action. A related op-ed, "Leading Legal Experts Urge Aggressive Immigration Actions," published by The Hill, is at

https://thehill.com/blogs/congress-blog/politics/530948-leading-legal-experts-urge-aggressive-immigration-actions.

Mr. Mehta's views on the court victory in favor of computer programmers under the H-1B visa are reflected in "Big Win! U.S. Appeals Court Rules in Favour of Grant of H-1B Visas to Computer Programmers," Times of India, https://bit.ly/34v7rr8

Mr. Mehta's weekly articles, along with the articles of other lawyers in his firm, were noted in this ILW editorial, https://discuss.ilw.com/articles/recent-issues/396807-dec-1-cyrus-mehta-articles. "We are grateful to the hundreds of immigration attorneys who have published articles in Immigration Daily on ILW. We want to particularly recognize the contributions to the immigration bar of those who have been producing high quality materials for the immigration professional on a regular weekly basis. One such person is Cyrus Mehta, who has been doing this for well over a decade. In his articles he brings incisive analysis to timely issues."... "This high-quality timely content on immigration law while balancing family and professional obligations is worthy of praise. While Cyrus is not alone in achieving this feat, it is relatively rare in the field, especially considering the consistency, quality and longevity of his contributions. We are proud of bringing Cyrus's (and his firm's) well thought out, well written, and topical material to Immigration Daily readers."

Mr. Mehta and Kaitlyn Box co-authored several new blog postings: "Innova Solutions v. Baran: Computer Programmer is a Specialty Occupation Under the H-1B Visa," https://bit.ly/3h4Cor7; and "Two New York Ethics Opinions Instruct When Lawyers Can Withdraw from Representing a Client in Court During COVID-19," https://bit.ly/3aoIXDH

Mr. Mehta was interviewed by Nikhila Natarajan of Indo Asian News Services (IANS) on wide-ranging issues regarding immigration under the Trump administration, especially during the transition, and what the future bodes for immigration under the Biden-Harris administration. https://www.youtube.com/watch?v=fRzHjtyW2r4&feature=youtu.be (video)

Mr. Mehta's views on the Department of Justice complaint accusing Facebook of citizenship discrimination are reflected in a Bloomberg Law article at https://news.bloomberglaw.com/daily-labor-report/dojs-facebook-allegations-risk-chilling-green-card-sponsorship?context=search&index=0."This lawsuit could

create a chilling effect on the labor certification program that employers use to sponsor skilled foreign worker nationals," he said. "If an employer scrupulously follows the Labor Department's complex rules governing the labor certification process, the employer could still be penalized by another branch of the federal government, based on this complaint. You can't just have them as guest workers and then throw them out after a few years."

Back to Top