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

IMMIGRATION UPDATE - MAY 13, 2024

Posted on May 13, 2024 by Cyrus Mehta

Headlines:

Retrogression Likely in EB-2 and EB-3 Categories, Visa Bulletin for June 2024 States – High demand in the employment-based second (EB-2) and third (EB-3) categories will most likely necessitate retrogression of the worldwide final action date (including Mexico and Philippines) next month. Also, a new law may affect certain current and former employees of the U.S. government abroad applying for Special Immigrant Visas or adjustment of status.

USCIS Clarifies Policy on Location of H-3 Training – U.S. Citizenship and Immigration Services issued policy guidance clarifying when H-3 nonimmigrants may participate in training provided on the property of an academic or vocational institution.

OFLC Seeks Comments on Proposed Three-Year Extension of Labor Condition Application and WH-4 Forms for H-1B, H-1B1, and E-3 Temporary Programs – Comments are due by July 5, 2024.

DOL Ratifies Final H-2A Rule's AEWR Methodology – The Department of Labor published a notice stating that the Assistant Secretary for Employment and Training ratified a final rule on Adverse Effect Wage Rate methodology for H-2A agricultural workers "out of an abundance of caution."

DOJ Secures Agreement With Climate Nonprofit to Resolve Immigration-Related Employment Discrimination Claims – The agreement resolves the Department of Justice's determination that Second Nature violated the Immigration and Nationality Act by posting discriminatory job advertisements that deterred non-U.S. citizens from applying for open positions.

Firm in the News

Details:

Retrogression Likely in EB-2 and EB-3 Categories, Visa Bulletin for June 2024 States

The Department of State's (DOS) Visa Bulletin for June 2024 notes that high demand in the employment-based second (EB-2) and third (EB-3) categories will most likely necessitate retrogression of the worldwide final action date (including Mexico and Philippines) next month to hold number use within the maximum allowed under the fiscal year 2024 annual limit. The bulletin states that DOS will monitor this situation and make any necessary adjustments.

The bulletin also notes that the National Defense Authorization Act (NDAA) for Fiscal Year 2024, signed into law on December 22, 2023, may affect certain current and former employees of the U.S. government abroad applying for Special Immigrant Visas (SIVs) abroad or adjustment of status in the United States. This does not affect certain Iraqis and Afghans, the bulletin notes, adding that applicants "should contact the consular section at which they filed their Form DS-1884 for further information on the impact of that law on their case."

Details:

- DOS Visa Bulletin for June 2024.

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USCIS Clarifies Policy on Location of H-3 Training

On May 8, 2024, U.S. Citizenship and Immigration Services (USCIS) issued policy guidance clarifying when H-3 nonimmigrants may participate in training provided on the property of an academic or vocational institution. USCIS noted that this was a clarification rather than a change in policy.

USCIS explained that generally, H-3 trainees "cannot participate in training provided primarily at or by an academic or vocational institution." The updated policy guidance clarifies that "if other H-3 requirements are met, training that happens to take place on the physical property of an academic or vocational institution may qualify if the training program is primarily created, offered, and sponsored by a government agency or other nonacademic or nonvocational entity."

Details:

- USCIS alert (May 8, 2024).

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OFLC Seeks Comments on Proposed Three-Year Extension of Labor Condition Application and WH-4 Forms for H-1B, H-1B1, and E-3 Temporary Programs

The Department of Labor's (DOL) Employment and Training Administration (ETA) announced its intent to extend the Office of Foreign Labor Certification's Labor Condition Application (LCA) forms and the Wage and Hour Division's WH-4 complaint form for three years and invited public comments until July 5, 2024. DOL proposes the extensions without changes.

The information collection request includes LCA Forms ETA-9035, ETA-9035E (electronic), ETA-9035 and 9035E Appendix A, ETA-9035CP Instructions, and the WH-4 complaint form.

Written comments must be submitted in accordance with the notice's instructions.

Details:

- OFLC notice (scroll to May 6, 2024).
- Federal Register notice (with a link to submit comments) (May 6, 2024).

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DOL Ratifies Final H-2A Rule's AEWR Methodology

The Department of Labor (DOL) published a notice stating that the Assistant Secretary for Employment and Training (ETA) ratified a final H-2A rule published February 28, 2023, Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in the Non-Range Occupations in the United States. The ratification was signed on May 3, 2024.

The notice explains that the final rule has become the subject of litigation asserting that the final rule was improperly issued. Specifically, a question concerns whether the final rule was approved by the Attorney General in consultation with the Secretaries of Labor and Agriculture. The notice states that on April 29, 2024, the Secretary of Homeland Security, in consultation with

the Secretaries of Labor and Agriculture, approved the final rule. Before its issuance in February 2023, the final rule was provided to the Departments of Homeland Security and Agriculture through an interagency review process, the notice says. To "resolve any possible uncertainty," the DOL, through its Assistant Secretary for Employment and Training, is ratifying the final rule "out of an abundance of caution."

The ratification certifies, among other things, that "the employment of H-2A workers will not adversely affect the wages and working conditions of workers in the United States similarly employed, and that the changes adopted in the Final Rule best strike the balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages of workers in the United States similarly employed."

Details:

- DOL ratification notice, 89 Fed. Reg. 38838 (May 8, 2024).

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DOJ Secures Agreement With Climate Nonprofit to Resolve Immigration-Related Employment Discrimination Claims

The Department of Justice (DOJ) announced that it secured a settlement agreement with Second Nature, a nonprofit organization based in Massachusetts, on May 9, 2024. The agreement resolves DOJ's determination that Second Nature violated the Immigration and Nationality Act (INA) by posting discriminatory job advertisements that deterred non-U.S. citizens from applying for open positions.

DOJ explained that after opening an investigation based on a worker's complaint, its Civil Rights Division's Immigrant and Employee Rights Section (IER) concluded that "Second Nature posted a job advertisement inviting applications only from U.S. citizens. In doing so, the company deterred non-U.S. citizens with permission to work (such as people granted asylum or refugee status, and lawful permanent residents) from applying to the job advertisements and being fairly considered for the employment opportunities." The investigation also determined that "the lawful permanent resident who filed the complaint was deterred from applying for the job because of the discriminatory language in the posting."

Under the settlement, Second Nature will pay a $4,610 civil penalty to the United States and pay the affected worker $904 in lost wages. The agreement also requires the company to train those employees who recruit on the INA's requirements, revise its employment policies, and be subject to monitoring and reporting requirements.

Details:

- DOJ press release (May 9, 2024).
- Settlement agreement (May 9, 2024).

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Firm in the News

Cyrus Mehta was an invited speaker at the 2024 Immigration Law Conference of the Federal Bar Association in Salt Lake City, Utah on May 11, 2024 where he spoke on Ethical Representation in Your Humanitarian Case. The co-panelists were Joanna Mexicano Furmanska and Lauren Anselowitz.

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