



US IMMIGRATION LAWS: Emerging Trends in Policies and Procedures

By

Cyrus D. Mehta, Esq.

Cyrus D. Mehta & Associates, PLLC

67 Wall Street, Suite 1801, New York, NY 10005

Ph: 212-425-0555

E-mail: info@cyrusmehta.com

Website: www.cyrusmehta.com

New York, March 22, 2004

Copyright ©2004 Cyrus D. Mehta & Associates. All rights reserved.

CERTAIN REALITIES ABOUT IMMIGRATION TO US

- Immigration is inextricably linked to America's identity. Albert Einstein, and Henry Kissinger, among many others, came to the US as immigrants.
- Employment projections for 2010 forecast another 22 million jobs. With the baby boomer population retiring, only immigrants will be able to fill these jobs.

CERTAIN REALTIES ABOUT IMMIGRATION TO THE US

- Immigrants contribute to the economy in times of boom and bust. They pay taxes and contribute to social security.
- Immigrants ultimately vote. Both the Republicans and Democrats are courting the votes of new Americans through new legislative incentives.

CERTAIN REALITIES ABOUT IMMIGRATION TO THE US

- Immigrants revitalize cities. New York would not be such a world center without 40% of its population being foreign born.

- Immigrants are not terrorists!

STRUCTURAL CHANGES TO THE IMMIGRATION SYSTEM

- In 2003, a new Department of Homeland Security was established.
- The former Immigration & Naturalization Service was dismantled and absorbed into the DHS.

NEW IMMIGRATION AGENCIES

- There are three agencies within DHS primarily in charge of immigration functions:
- United States Citizenship and Immigration Services
- Immigration and Customs Enforcement

NEW IMMIGRATION AGENCIES

- ❑ Border and Customs Patrol.
- ❑ The Department of State continues to administer the issuance of visas at US consulates abroad under the oversight of the DHS.
- ❑ The Department of Justice administers the Immigration Courts.

OTHER POST 9/11 CHANGES

- ❑ Greater enforcement and crackdowns against non-citizens.
- ❑ Greater sharing of intelligence between different agencies.
- ❑ Likely delays in visa issuance due to security clearance delays.
- ❑ Students are heavily monitored through SEVIS.
- ❑ Registration at Ports of Entry and US Visit Program.

TRENDS IN IMMIGRATION POLICY

- ❑ There is still an obsession for security in a Post 9/11 World
- ❑ The recent economic downturn has led to inaction on the H-1B visa cap, and proposals to restrict the L visa program.
- ❑ A need to do something about the 8 million + undocumented immigrants.

NEW VISA APPLICATIONS

- ❑ DS-156 is the new visa application that replaces old Form OF-156. It asks detailed questions about previous stays, violations or criminal arrests and convictions.
- ❑ Overstaying one's visa for more than a day results in the automatic voidance of the multiple entry visa on the passport under Section 222(g).
- ❑ Overstaying the visa for more than 6 months leads to a 3 year bar against re-entry.
- ❑ Overstaying the visa for more than one year leads to a 10 year bar against re-entry.

NEW VISA APPLICATIONS

- ❑ DS-157 must be completed by all male nonimmigrant visa applicants between the ages of 16 and 45 years. It requests specific information about the applicant's skills, education, training and movement over the past 10 years.
- ❑ DS-158 must be completed by all applicants for the student F visa, the exchange visitor J visa and the vocational student M visa.
- ❑ All forms may be downloaded from www.travel.state.gov or www.USCIS.gov

NONIMMIGRANT VISAS

- ❑ Nonimmigrant visas are issued to persons who wish to enter the US for a specific purpose and for temporary periods of time.
- ❑ The most common nonimmigrant visas are the B-2 tourist visa or the B-1 business visa.
- ❑ Other commonly utilized visas are the student F visa, the J visa for exchange visitors and foreign medical graduates and the H-1B visa for persons who are employed by companies in the US for professional jobs.

NONIMMIGRANT VISAS

- ❑ Section 214(b) allows a consular officer to determine that every applicant for a nonimmigrant visa is presumed to be an immigrant unless he or she can establish otherwise.
- ❑ Most nonimmigrants must show that they have no intention of abandoning their foreign residence during their stay in the US.

NONIMMIGRANT VISAS

- Thus, it is important to show ties to the home country such as employment, history of past travel, and realistic/credible plans of travel.
- Some visas such as the H-1B allow for “dual intent” and do not require a showing of ties to the home country.

TOURIST AND BUSINESS VISAS

- ❑ Most of the 20 million visitors who come to the US enter as tourists on a B-2 visa. This visa covers tourism, visits to relatives and friends, visits for health reasons and participation in conferences.
- ❑ No one can sponsor you for a tourist visa. It is important to show your ties to the home country. If you cannot pay for your trip, the person you are visiting can submit INS Form I-134, which is an affidavit of support.

TOURIST AND BUSINESS VISAS

- Business visitors enter on a B-1 visa holders to conduct business, marketing, negotiating purchases and contracts. They must not be engaged in productive employment in the US either for a US employer or on an independent basis. Any work done in the US must be performed on behalf of a foreign employer and paid for by the foreign employer. The work should also be related to international commerce or trade.

APPROPRIATE ACTIVITIES ON A B-1 VISA

- ❑ employees of a US company's foreign office coming to the US to consult with the US company
- ❑ an employee of a foreign company coming to the US to handle sales transactions and purchases and to negotiate and service contracts
- ❑ coming to the US to conduct business or market research
- ❑ coming to the US to interview for a professional position in order to gain experience to help in finding a position in one's home country
- ❑ attending business conferences, seminars, or conventions
- ❑ an investor coming to set up an investment in the US or to open a US office

OTHER PERMISSIBLE ACTIVITIES ON B-1 VISA

- ❑ personal or domestic servants who can show they are not abandoning a residence abroad, have worked for the employer for a year and the employer is not residing in the US permanently
- ❑ airline employees who are paid in the US but an E visa is not available because no treaty exists between the US and the airline's country
- ❑ professional athletes who are not paid a salary in the US and are coming to participate in a tournament
- ❑ a member of a board of a US company coming to a board meeting
- ❑ coming to the US to handle preliminary activities in creating a business (opening bank accounts, leasing space, incorporating, etc.)

STUDENT VISAS

- ❑ A student may apply for an F-1 visa to study full time in a US educational institution. Certain programs may require the applicant to apply for an M or J visa too.
- ❑ The student must get admission to the university and receive the Form I-20. The student then applies for the visa at the US consulate.
- ❑ It is important for the student to establish ties with the home country and that he or she will not abandon residence in the home country.

POST 9/11 CHANGES TO STUDENT VISAS

- An internet system, Student and Exchange Visitor Information System (SEVIS) became operational on January 30, 2003.
- The database tracks all information, from the issuance of the initial I-20 to visa issuance, date of enrollment, degree program, date of graduation, departure or change of status.

EMPLOYMENT OPPORTUNITIES FOR STUDENTS

- ❑ A student can work on campus at any point of time. S/he can also obtain employment authorization for practical training after one academic year. The practical training is for a maximum of one year. It can be obtained during school or after graduation.
- ❑ J-1 students can get academic training for 18 months. The practical training for M-1 vocational students is shorter.
- ❑ After the practical training is completed, the student must return to the home country. An F-1 student gets a 60 day grace period upon the completion of the school program or practical training to leave the US. A J-1 student has a grace period of 30 days.

CHANGING VISA STATUS

- Although the law allows a person to change from one visa status to another, such as B-2 to F visa, or F visa to H-1B, there is always a danger of being found to have “preconceived intent.” One cannot use a visa to enter the US with an ulterior motive.
- The State Department and DHS have adopted a policy for determining whether to charge a person with “preconceived intent.” If the individual conducted an activity contrary to the visa within 30 days of entry, it would lead to a presumption of fraud.

CONSULAR PROCESSING

- Consular processing is an alternative to changing status in the US and may be a preferable option than changing status. Thus if a B-2 tourist obtains a job after entry into the US, it would be better for this person to return to India and apply for the new H-1B visa at the US Consulate.
- It is also required if one has changed status in the US to another nonimmigrant visa, and has to leave the US to a country other than a trip to Mexico or Canada for less than 30 days. The exemption of 30 days to Mexico/Canada does not apply to all persons.

DUAL INTENT FOR H-1Bs

- ❑ Most holders of nonimmigrant visas must at all times establish that they have not abandoned residence in their country of origin
- ❑ This is problematic when applying for a visa overseas, especially if an F-1 student has been in the US for a long period of time.
- ❑ The H-1B visa, along with the L, E and O visas, allow for DUAL INTENT. One can have an intent to live temporarily and permanently in the US at the same time.

H-1B VISA NUMBERS

- ❑ The H-1B Visa Quota was 195,000 from 2000-2003.
- ❑ On October 1, 2003, the quota reverted to the pre-existing cap of 65,000. The cap was reached on February 17, 2004.
- ❑ During the economic downturn, the H-1B visa program became controversial.

H-1B VISA NUMBERS

- ❑ Allegations have been made that H-1B visas displace US workers and depress wages.
- ❑ US Congress has not yet moved to increase the quota.
- ❑ A crisis is looming ahead, as companies will not be able to have foreign workers with skills and talents.

H-1B VISA NUMBERS

- About 15,000 H-1Bs got carried forward from fiscal year 2003. Lobbying efforts are being made to release these numbers for FY 2004. Efforts are also being made to carve out exceptions from the cap, such as for foreign students who have graduated with US advanced degrees.
- 6,800 H-1Bs have been reserved for Singapore and Chile through Free Trade treaties.
- Thus, the cap is expected to be reached by Spring 2004. Last year, 79,100 H-1Bs were used up.

H-1B VISA NUMBERS

- ❑ The cap will not apply to H-1B extension requests, with the same employer or from one employer to another.
- ❑ The cap will not apply if the sponsor is an institution of higher education or an affiliate entity, or if the sponsor is a non-profit research organization or governmental research organization.

H-1B VISA PROGRAM

- ❑ The H-1B visa is issued to individuals employed in specialty occupations.
- ❑ A specialty occupation requires the minimum of a bachelor's degree for entry into that occupation.
- ❑ The individual entering into the specialty must possess a bachelor's degree or foreign equivalent.

H-1B VISA PROGRAM

- The occupation must generally require the bachelor's degree or equivalent.
- Work experience may substitute for a bachelor's degree.

LABOR CONDITION APPLICATION

- ❑ Filing a Labor Condition Application with the Dept. of Labor is the first step in the H-1B visa process.
- ❑ The employer must attest on the LCA that it is willing to pay the higher of the prevailing or actual wage.
- ❑ The employer must also attest that it will provide the same working conditions for H-1B workers, as well as attests that there is no strike or lock out.
- ❑ Finally, the employer must post notice of the job and wage for 10 days.

H-1B VISA PETITION

- Once the LCA is certified electronically, the employer files the H-1B petition with the USCIS.
- It usually takes about 60-90 days for the USCIS Service Center to approve the petition. The total filing fee is \$130 since September 30, 2003.

H-1B PETITION

- ❑ However, the petition could be speeded up through premium processing by paying a fee of \$1,000.
- ❑ Once you get an H-1B visa status, it is possible to exercise “portability” to the next job, ie. one can commence working for another employer when the new employer files the H-1B petition. There is no need to wait for the approval.

THE L-1 VISA

- ❑ The L visa facilitates the transfer of personnel from a foreign entity to a US subsidiary, parent or affiliate.
- ❑ Only top level managers, executives or employees with specialized knowledge can be transferred from the foreign to the US entity.

THE L-1 VISA

- ❑ The transferee must have been employed in the foreign entity for at least one year as an executive, manager, or in a specialized knowledge capacity.
- ❑ In Blanket L cases, the prior experience is reduced to 6 months instead of one year.

THE L-1 VISA

- The L visa program became controversial earlier in 2003 when there were allegations that it was being abused.

- At issue was whether an L employee could be “outsourced” to a client company in the IT field.

The L-1 Visa Program

- There are several proposals in the US Congress to restrict the L visa program.
- When Congress does act to increase the H-1B cap, it is likely that there will be changes in the L visa too.

OTHER NONIMMIGRANT VISA CATEGORIES

- The J-1 visa allows one to train with a company for a temporary duration. J-1 visa holders are often subject to a two-year home country requirement.
- The TN visa applies to Canadian and Mexican nationals who have job offers in certain occupations. Mexicans must first get LCA certification before applying for the TN visa.

OTHER NONIMMIGRANT VISA CATEGORIES

- The O visa is issued to people who have demonstrated extraordinary ability in artistic, scientific, business or athletic fields. A person with a J visa, subject to the two year home residency requirement, can apply for an O visa.
- The E visa is applicable to nationals of certain countries that have treaties with the US. It is issued to a person who makes a substantial investment in a US business or actively trades with the US.

OVERVIEW OF LEGAL IMMIGRATION

- ❑ **FAMILY-BASED IMMIGRATION –**
A US citizen or Green Card holder can sponsor his or her close family members for permanent residence.

- ❑ **EMPLOYMENT-BASED IMMIGRATION –**
A US employer can sponsor a foreign national employee for permanent residence.

OVERVIEW OF LEGAL IMMIGRATION

- ❑ REFUGEE OR POLITICAL ASYLUM – A person outside the US can seek protection as a refugee or within the US through political asylum. S/he must prove a well founded fear of persecution on one of the following grounds: race, religion, nationality, membership in a social group or political opinion.
- ❑ DIVERSITY PROGRAM - The US issues 50,000 green cards through a lottery program every year. Nationals of countries with high immigration rates, such as India, are excluded.

FAMILY-BASED IMMIGRATION

- IMMEDIATE RELATIVES are spouses of US citizens, unmarried children of US citizens and parents of US citizens. There is no quota.

- The FAMILY PREFERENCE (OR QUOTA) SYSTEM allows into the US:
 - Adult children and brothers and sisters of US citizens
 - Spouses and unmarried children of Green Card holders.

THE FAMILY PREFERENCE SYSTEM

- ❑ FIRST PREFERENCE. Unmarried adult children (21+) of US citizens.
- ❑ SECOND PREFERENCE (2A). Spouses and minor children of Green Card holders.
- ❑ SECOND PREFERENCE (2B). Unmarried adult children of Green Card holders.
- ❑ THIRD PREFERENCE. Married adult children of US citizens.
- ❑ FOURTH PREFERENCE. Siblings of US citizens.

OPTIONS FOR SPOUSES

- ❑ If not married, applying for K-1 fiancé visa could be the best option to quickly and legally bring spouse into the US to marry, and then apply for adjustment,
- ❑ If married, file I-130 Petition and K-3 Petition, and apply for adjustment,
- ❑ File I-130 Petition directly at foreign DHS office or consular post and apply directly for the Green Card, or
- ❑ Adjustment of status in the United States, if already in the country but beware of preconceived intent.

CHILD STATUS PROTECTION ACT OF 2002

- ❑ CSPA freezes the age of a child at earlier points in time.
- ❑ If a US citizen parent is the sponsor, the child's age is frozen at the time of filing the I-130 petition.
- ❑ Different rules apply if the child is sponsored by a Green Card holder parent under Family 2A or is a derivative on a parent's application who in turn is being sponsored by a relative or employer.

CHILD STATUS PROTECTION ACT (Continued)

- ❑ The age of the child is determined on the date on which an immigrant visa number becomes available, reduced by the number of days the petition was “pending.”
- ❑ Finally, the provision only triggers if the alien child has sought to acquire permanent residence within one year of such availability.

EMPLOYMENT-BASED IMMIGRATION

THE EMPLOYMENT PREFERENCE SYSTEM allows immigrants who have skills and talents in the US to be admitted to work. Currently, immigration law allots 140,000 employment-based visas to immigrants, as follows:

- FIRST PREFERENCE. Priority Worker Categories such as people who have *Extraordinary Ability*, who are *Outstanding Researchers* or who are certain *Multinational Executives or Managers*.

EMPLOYMENT-BASED IMMIGRATION (Cont.)

- ❑ SECOND PREFERENCE. Green Cards are issued to members of the *professions holding advanced degrees or aliens of exceptional ability*. This category requires labor certification unless the individual can establish that he or she is going to work in the national interest of the US.
- ❑ THIRD PREFERENCE. Green cards are issued to *professionals* (jobs requiring at least a bachelor's degree), *skilled workers* (jobs requiring at least 2 years experience) or *unskilled workers* (jobs requiring less than 2 years of experience). The employer must file and obtain labor certification before filing an immigrant visa petition under these categories.

EMPLOYMENT-BASED IMMIGRATION (Cont)

- ❑ **FOURTH PREFERENCE.** Green Cards may be issued to certain special immigrants such as UN employees and victims of the WTC, ministers of religion, religious workers and others.
- ❑ **FIFTH PREFERENCE.** Green Cards may be issued to persons who have invested between \$500,000 to \$3 million in a job-creating enterprise in the US. At least 10 workers must be employed by each investor. The amount of money can vary depending on the area of the country which will benefit from the investment.

LABOR CERTIFICATION

- ❑ Labor Certification is generally the first step toward the Green Card when an employer sponsors a US worker.
- ❑ The US employer establishes that it has unsuccessfully tested the US labor market in the local area of employment.
- ❑ The employer generally places advertisements for the job in a newspaper and also conducts other forms of recruitment, such as contacting headhunters or campus interviews.
- ❑ If the Department of Labor is satisfied of the unavailability, it grants labor certification, after which an employer can file applications with the DHS for the Green Card.
- ❑ If PERM is implemented, it will expedite Labor Certification processing but subject more employers to audits.

MAINTAINING THE GREEN CARD

- ❑ At the very minimum, must visit the US once a year, but that is not sufficient.
- ❑ Must also show that you have not abandoned permanent residency. DHS will see whether you have a residence, filed US tax returns, have family ties, etc.
- ❑ If you have stayed overseas beyond the year, or beyond two years if you are the holder of a re-entry permit, then must apply for special immigrant visa at US Consulate.