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Immigration Update: USCIS “Cure” For Security Name Check Delays

By Nancy-Jo Merritt and Matthew J. Martinez

While USCIS has dramatically reduced its processing times for family-based and employment-based visa petitions, the same has not been uniformly true for individual applications for adjustment of status to permanent resident. The security check procedures imposed by USCIS has, in some cases, created extremely lengthy waits for approval, even when the individual has lived in the U.S. without incident for many years.

On February 4, USCIS issued “revised guidance” which would result in aligning its background and security check policies with those of U.S. Immigration and Customs Enforcement (“ICE”). The following procedures, now used by ICE in removal proceedings, will allow adjustment of status applications to be timely adjudicated, although subject to rescission should later-received information from the FBI indicate the individual was not eligible.

The process will work as follows: subject to receipt of a definitive FBI fingerprint check and a clear Interagency Border Inspection Services check, after the FBI name check request, usually the cause of extensive delay, has been pending for more than 180 days, a pending adjustment of status application “shall be approved” and the permanent resident card issued. If at a later date, the completed FBI name check indicates that approval was not warranted, the USCIS will determine if rescission or removal proceedings are appropriate.

This is very happy news to those individuals whose otherwise approvable applications have been caught in “name check hell” for lengthy periods of time. The USCIS is also no doubt pleased that it may no longer have to respond to the thousands of Federal Court lawsuits requesting relief from the unreasonably long adjudication delays. We have received no further information from USCIS regarding when to expect approval notices, although it is likely pending petitions will be resolved in order of the filing dates.

Please note that USCIS specifically states that there will be no change in the requirement to complete all security procedures with respect to applications for naturalization.

Proposed Changes in the H-2A Agricultural Worker Program

The Department of Homeland Security (“DHS”) and the Department of Labor (“DOL”) have agreed upon changes to streamline the hiring process procedures for agriculture workers in the H-2A Program. The proposed modifications are similar to those planned several years ago and according to DHS, “will provide farm employers with a more orderly and timely flow of legal workers, while continuing to protect the rights of laborers and promoting legal and secure methods for determining who is coming into the country.”

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The key change in the proposed rule is that the H-2A temporary labor certification process would change to an employer attestation procedure. DHS will establish a land-border exit system pilot program for H-2A workers, and the Department of Labor will institute an auditing program to ensure compliance with H-2A requirements.

In addition to those changes, DHS says that the housing inspection program will be improved, the methodology for determining the adverse affect wage rate will collect wage information from more than 500 localities, as opposed to the current 18 regions, application fees will be increased and state work force agencies will be required to use the E-Verify Program to ensure that all referred workers have work authorization.

The proposed rule would also increase the fines for willful failure to meet a condition of the work contract, for discrimination against U.S. or H-2A workers, and for violations of housing or transportation, safety and health standards. Finally, the proposed rule clarifies that logging is an agricultural activity included in the H-2A program.

The proposed rule is available at www.dhs.gov for public comment and can be reviewed at www.regulations.gov under docket no. USCIS-2007-0055 until 60 days after publication in the Federal Register. The DHS Fact Sheet on the rule is available at www.USCIS.gov.

Nancy-Jo Merritt focuses her practice in immigration law and has nearly three decades of experience representing domestic and international companies with issues concerning foreign national employees and business immigration matters. She provides strategic counseling to clients and assists employers in developing compliance programs. She earned her B.A. (1964), M.A. (1974) and J.D. (1978) from Arizona State University.

Matthew J. Martinez focuses his practice in the area of immigration and nationality law, with an emphasis on corporate transfers, professionals, entrepreneurs, investors, entertainers and athletes. Mr. Martinez has extensive experience representing employers and athletes in the equine industry, and in obtaining visas for temporary and seasonal workers. He earned his B.S. (1995) and his J.D. (1999) from Brigham Young University.



Nancy-Jo Merritt
Director
602.916.5411
nmerritt@fclaw.com



Matthew J. Martinez
Associate
602.916.5446
mmartinez@fclaw.com