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US IMMIGRATION & NATIONALITY LAW

DECEMBER 2017 IMMIGRATION UPDATE

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Headlines:

1. **Federal Court Vacates Delay of International Entrepreneur Rule** – On December 1, 2017, a federal court vacated the Trump administration's delay of an Obama-era rule that would have allowed certain foreign entrepreneurs to obtain immigration parole.
2. **USCIS Designates Adopted Decisions Defining Affected Parties, Function Managers** –USCIS has designated two Administrative Appeals Office decisions as Adopted Decisions.
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4. **Federal Court Blocks Trump Order To Strip 'Sanctuary Jurisdictions' of Federal Funding** – A federal court granted two California counties' motions for summary judgment and permanently enjoined the defunding and enforcement provisions of the Trump administration's executive order with respect to "sanctuary jurisdictions."
5. **USCIS Announces Caps for Final Three Fiscal Years of CNMI Transitional Worker Program** – USCIS encourages employers to file petitions for CW-1 workers as early as possible within six months of the requested employment start date. USCIS will reject a petition if it is filed more than six months in advance.
6. **ABIL Global: European Court Dismisses Challenge to Mandatory Relocation of Displaced Persons** – The European Court of Justice recently dismissed a challenge by Slovakia and Hungary to a mandatory allocation of 120,000 asylum seekers from Greece and Italy to other European Union Member States.
7. **Firm In The News...**

Details

1. **Federal Court Vacates Delay of International Entrepreneur Rule**

On December 1, 2017, federal district Judge James E. Boasberg vacated the Trump administration's delay of an Obama-era rule that would have allowed certain foreign entrepreneurs to obtain immigration parole (to temporarily enter the United States despite lacking a visa or permanent residence). At the outset of the opinion, the court said, "Elections have consequences. But when it comes to federal agencies, the Administrative Procedure Act shapes the contours of those consequences."

The "International Entrepreneur Rule" was set to take effect July 17, 2017, but shortly beforehand, the Department of Homeland Security (DHS) issued the "Delay Rule," delaying the effective date of the original rule until March 14, 2018. The court noted that the agency did so without providing notice or soliciting comment from the public, which is generally required by the APA. The plaintiffs alleged that the agency lacked good cause to dispense with the APA's strictures and that the Delay Rule was therefore invalid, and the court agreed.

The court noted that the Obama-era DHS promulgated the International Entrepreneur Rule to encourage international entrepreneurs to create and develop start-up entities with high growth potential in the United States. DHS believed that attracting foreign entrepreneurs would "benefit the U.S. economy through increased business activity, innovation, and dynamism." Before issuance of the regulation, the court observed, foreign entrepreneurs "lacked a clear-cut avenue for entry into this country. ...The United States had no dedicated visa category for foreign entrepreneurs, and other visa options were frequently unavailable to that group." The executive branch, however, cannot unilaterally create a new visa category, the court noted, so it turned to a more temporary solution for these entrepreneurs: parole. This allows a foreign national to be physically present in the United States for a specific, temporary period, ranging from days to years. Parole does not constitute formal "admission" to the United States and gives the recipient no formal immigration status.

To be considered for a discretionary grant of parole for up to 30 months (with reapplication for up to an additional 30 months based on certain conditions) under the International Entrepreneur Rule, an entrepreneur would generally

need to demonstrate the following:

1. The applicant must have formed a new start-up entity in the United States within 5 years of the application;
2. The applicant must (a) possess at least a 10% ownership interest in the business; and (b) "have an active and central role" in its operations and future growth; and
3. The applicant must validate the business's potential "for rapid growth and job creation" by showing (a) it has received at least $250,000 from established U.S. investors; or (b) it has received at least $100,000 in grants from government entities.

The rule also created "alternative criteria" for meeting the final prong: a person partially meeting one of the investment thresholds could provide "additional reliable and compelling evidence" of the company's potential for rapid growth and job creation. U.S. Citizenship and Immigration Services (USCIS) would also consider other relevant information in making its discretionary determination, such as any criminal history or other serious adverse factors.

The court noted that the agency "meaningfully" revised the final version in response to 763 comments received on the proposed rule. DHS changed the minimum investment amount, the definition of an entrepreneur, and the definition of a start-up entity.

Six days before the effective date of the rule, USCIS issued the superseding Delay Rule postponing the effective date by eight months, to March 14, 2018, but without offering the public advance notice or an opportunity to comment. Instead, it provided a short window for comments only after the Delay Rule took effect. Further, DHS indicated that it was "highly likely" to rescind the International Entrepreneur Rule. Its Delay Rule, therefore, appeared designed to ensure that the Obama-era rule would never take effect, the court noted.

The plaintiffs included two foreign nationals, two U.S. businesses, and the National Venture Capital Association, an organization of individuals who invest in businesses founded by foreign entrepreneurs. The plaintiffs all claimed that the Delay Rule seriously injured their businesses or investments. The Trump administration argued that the APA's "good cause" exception applied, which allows an agency to dispense with notice-and-comment when it "for good cause finds...that notice and public procedure thereon are impracticable,

unnecessary, or contrary to the public interest." The court noted that because notice-and-comment is "the default," the onus is on the agency to establish that a notice-and-comment opportunity should not be given, and an agency "faces an uphill battle to meet that burden."

Among other things, the plaintiffs argued that through its own delay, the agency forfeited any "good cause" defense. Citing related decisions, the court noted that good cause cannot arise as a result of an agency's own delay; otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the even of a statutory, judicial, or administrative deadline, then raise up the "good cause" banner and promulgate rules without following APA procedures. In this case, the court said, the government's briefing never explained the time lag and "struggled" to explain what the agency did between learning of the executive order and issuing the Delay Rule. DHS primarily justified the Delay Rule by citing the expense of implementing the new parole system, among other arguments. The court said that the agency's proffered reasons for bypassing notice-and-comment were unpersuasive and "easily short of good cause." The court noted that the agency estimated it would process roughly 2,900 applications this year and receive $1,285 each in filing fees, generating more than $3.5 million, and that the asserted expense to the government without evidence was not sufficient to overcome the notice-and-comment requirement.

The court concluded, " If Defendants have additional reasons why a stay might be appropriate pending any appeal, they can so move. Until then, the Court believes that vacatur is the appropriate remedy."

The full text of the opinion, *National Venture Capital Association, et al., v. Elaine Duke, et al.*, Civil Action No. 17-1912 (JEB), is at http://bit.ly/2BGcN2T.

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2. **USCIS Designates Adopted Decisions Defining Affected Parties, Function Managers**

U.S. Citizenship and Immigration Services (USCIS) has designated two Administrative Appeals Office (AAO) decisions as Adopted Decisions.

Matter of V-S-G Inc. (AAO Nov. 11, 2017), Adopted Decision 2017-06. This decision clarifies that beneficiaries of valid employment-based immigrant visa petitions who are eligible to change jobs or employers ("port") and who have

properly requested to do so under INA § 204(j) are "affected parties" under Department of Homeland Security regulations for purposes of revocation proceedings of their visa petitions and must be afforded an opportunity to participate in those proceedings.

The USCIS memorandum notes that other kinds of visa petition beneficiaries, and the subsequent employers of beneficiaries who have ported or sought to port, are not affected parties under DHS regulations and may not participate in visa revocation proceedings.

The AAO decision states that it "settles a tension between longstanding agency regulations and subsequent developments in the law regarding who is a cognizable party to a Form I-140, Immigrant Petition for Alien Worker." The decision notes that traditionally, the applicant or petitioner is the only recognized party to a proceeding; that is, the beneficiary of a petition generally does not have the ability to participate in the immigration proceeding initiated by the petitioner. The decision sets forth a scenario in which an I-140 beneficiary may become a recognized party in certain limited circumstances in light of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) and one of its amendments. In so doing, the decision explains the current USCIS interpretation of applicable regulations to allow such a beneficiary to participate in relevant administrative proceedings.

The decision concludes:

> Because we find that beneficiaries who are eligible to port and properly request to port under AC21 are within the statute's zone of interests, USCIS interprets that statute as requiring a change in the agency's historical interpretation of the applicable DHS regulations. Our new interpretation is to treat these beneficiaries as affected parties who may participate in revocation proceedings related to their underlying immigrant visa petitions. Because the Beneficiary in this case, who is eligible to port and properly requested to port in compliance with the requirements under AC21, did not have an opportunity to so participate, we will reopen these proceedings and reinstate the Form I-140 immigrant visa petition relating to the Beneficiary and remand these proceedings to the Director, who must afford the Beneficiary an opportunity to respond to any future related to this I-140 petition. Should the Director thereafter revoke the immigrant petition's approval, the Beneficiary may appeal or file a motion to reopen

> or reconsider from the revocation or he may participate in proceedings arising from an appeal or motion filed by the Petitioner relating to this petition.

Matter of G- Inc. (AAO Nov. 8, 2017), Adopted Decision 2017-05. This decision provides important guidance to U.S. employers who transfer "function managers" (those who primarily manage essential functions rather than people) under the L-1 intracompany visa. A USCIS memorandum explaining the adoption of this decision notes:

> *Matter of G- Inc*. clarifies that, to establish that a beneficiary will be employed in a managerial capacity as a "function manager," the petitioner must demonstrate that: (1) the function is a clearly defined activity; (2) the function is "essential," i.e., core to the organization; (3) the beneficiary will primarily *manage*, as opposed to *perform*, the function; (4) the beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and (5) the beneficiary will exercise discretion over the function's day-to-day operations.

The *Matter of V-S-G-* memorandum and decision are at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf. The *Matter of G-* memorandum and decision are at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/APPROVED_PM-602-0148_Matter_of_G-_Inc._Adopted_AAO_Decision.pdf. Commentary on *Matter of G-* is at http://bit.ly/2Bgl3p3.

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3. **DHS To Terminate TPS Designation for Haiti in July 2019**

Acting Secretary of Homeland Security Elaine Duke recently announced the termination of the temporary protected status (TPS) designation for Haiti with a delayed effective date of 18 months "to allow for an orderly transition before the designation terminates on July 22, 2019."

The DHS statement said, "Since the 2010 earthquake, the number of displaced people in Haiti has decreased by 97 percent. Significant steps have been taken to improve the stability and quality of life for Haitian citizens, and Haiti is able to safely receive traditional levels of returned citizens. Haiti has also demonstrated a commitment to adequately prepare for when the country's TPS

designation is terminated."

In May 2017, then-DHS Secretary John Kelly announced a limited extension for Haiti's TPS designation, stating that he believed there were indications that Haiti may not warrant further TPS extension past January 2018. At the time, then-Secretary Kelly stated that his six-month extension should give Haitian TPS recipients living in the United States time to attain travel documents and make other necessary arrangements for their ultimate departure from the United States, and should also provide the Haitian government with the time it needed to prepare for the future repatriation of all current TPS recipients.

DHS said the effective date of July 22, 2019, would "provide time for individuals with TPS to arrange for their departure or to seek an alternative lawful immigration status in the United States, if eligible. It will also provide time for Haiti to prepare for the return and reintegration of their citizens. During this timeframe, USCIS will work with the State Department, other DHS components and the Government of Haiti to help educate relevant stakeholders and facilitate an orderly transition."

Haitians with TPS must reapply for employment authorization documents to continue working legally in the United States until the end of the extension period.

The DHS announcement is at https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti.

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4. **Federal Court Blocks Trump Order To Strip 'Sanctuary Jurisdictions' of Federal Funding**

Following lawsuits by the counties of San Francisco and Santa Clara, California, federal district Judge William H. Orrick ruled against a provision of the Trump administration's executive order issued in January 2017 to block federal funds from "sanctuary jurisdictions."

The January executive order stated, "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic." The executive

order said, among other things, that the policy of the executive branch is to "nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." The order further said that the Secretary of Homeland Security has the authority to designate a jurisdiction as a sanctuary jurisdiction, and that the Attorney General can take "appropriate enforcement action" against any entity that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."

The counties challenging the executive order argued that the relevant provision of the Trump executive order violated the separation of powers doctrine in the Constitution because it improperly sought to wield congressional spending powers. The counties said it was so overbroad and coercive that even if the President had spending powers, the executive order would clearly exceed them and violate the Tenth Amendment's prohibition against commandeering local jurisdictions. Further, the counties argued that the provision was so vague that it violated the Fifth Amendment's Due Process Clause and was void for vagueness. And because it sought to deprive local jurisdictions of congressionally allocated funds without any notice or opportunity to be heard, it violated the procedural due process requirements of the Fifth Amendment.

The federal government responded that the counties could not demonstrate that the executive order's sanctuary provision was invalid under all circumstances. It also claimed, among other things, that the provision was consistent with the Constitution's separation of powers and did not apply to funding in which the county might have a constitutionally protectable interest.

The court noted that the provision in question, by its plain language, attempted to reach all federal grants. The rest of the executive order was broader still, the court noted, addressing all federal funding. And if there was any doubt about the scope of the executive order, the court observed, the President and Attorney General "erased it with their public comments." The court noted that the President has called the order "a weapon" to use against jurisdictions that disagree with his preferred policies of immigration enforcement, and his press secretary reiterated that the President intends to ensure that "counties and other institutions that remain sanctuary cites don't get federal government funding in compliance with the executive order." The Attorney General has warned that jurisdictions that do not comply would suffer "withholding grants, termination of grants, and disbarment or ineligibility for future grants," and the "claw back" of any funds previously awarded, the court noted.

The court said that the Constitution vests spending powers in Congress, not the President, so the executive order "cannot constitutionally place new conditions on federal funds." Further, the court noted, the Tenth Amendment "requires that conditions on federal funds be unambiguous and timely made; that they bear some relation to the funds at issue; and that they not be unduly coercive." Federal funding that bears no meaningful relationship to immigration enforcement "cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves," the court said. Because the executive order violates the separation of powers doctrine and deprives the counties of their Tenth and Fifth Amendment rights, the court granted the counties' motions for summary judgment and permanently enjoined the defunding and enforcement provisions of the executive order.

The January executive order is at https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united. Additional details on sanctuary jurisdiction cases, including links to this decision and other related decisions, are at http://www.cand.uscourts.gov/who/sanctuary-litigation.

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5. **USCIS Announces Caps for Final Three Fiscal Years of CNMI Transitional Worker Program**

U.S. Citizenship and Immigration Services (USCIS) has announced the number of visas the agency will grant for the last three fiscal years of the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) program. The caps until the end of the program are 9,998 (FY 2018); 4,999 (FY 2019); and 4,999 (FY 2020, until December 31, 2019).

Congress previously mandated that USCIS end the program by reducing the number of workers in the program to zero by December 31, 2019. Under the CW-1 program, employers in the CNMI can apply for permission to employ foreign workers who are ineligible to work in the territory under other nonimmigrant worker categories. The intent of phasing out this foreign worker program is "to encourage the territory's transition into the U.S. immigration system, as well as to bolster recruitment of U.S. workers in the CNMI," the USCIS announcement states.

USCIS announced in May 2017 that the agency had received a sufficient number of petitions to reach the maximum possible CW-1 cap for FY 2018. April 11, 2017, was the last day on which USCIS accepted FY 2018 CW-1 petitions requesting an employment start date before October 1, 2018. USCIS "encourages employers to file petitions for CW-1 workers as early as possible within 6 months of the requested employment start date. Please note, however, that USCIS will reject a petition if it is filed more than six months in advance," the announcement states.

The USCIS announcement is at https://www.uscis.gov/news/news-releases/cnmi-transitional-worker-program-draws-down-uscis-announces-cap-final-three-fiscal-years.

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6. **ABIL Global: European Court Dismisses Challenge to Mandatory Relocation of Displaced Persons**

The European Court of Justice (ECJ) recently dismissed a challenge by Slovakia and Hungary to a mandatory allocation of 120,000 asylum seekers from Greece and Italy to other European Union (EU) Member States.

ECJ judges said the European Council had acted lawfully. The court said that EU institutions were on firm legal ground when they adopted measures to respond to "an emergency situation characterized by a sudden inflow of displaced persons." The ECJ also concluded that the legality of the decision was not affected by retrospective conclusions about the policy's effectiveness.

Budapest condemned the court ruling as "appalling and irresponsible." The foreign minister, Péter Szijjártó, said, "This decision jeopardizes the security and future of all of Europe. Politics has raped European law and values." Hungary and Poland have not relocated anyone yet, and the Czech Republic has not made any such offers for more than a year. All three countries risk being taken to court by the commission.

Karl Waheed offered the following answers in response to questions about the ECJ's decision, in his capacity as Vice Chair of the International Bar Association's (IBA) Immigration and Nationality Law Committee:

1. What is the view of the Immigration and Nationality Law Committee on the ECJ decision?

The IBA promotes the rule of law, and this decision upholds the rule of law and backs the European Council's authority to apply it uniformly, despite resistance from some Member States. This is good news for the governance of the EU.

2. Why did Slovakia and Hungary object in the first place?

Slovakia considers itself to be ethnically homogeneous. It has presently taken in 16 refugees out of the 902 it has pledged to take. However, Slovakia has avoided provoking any "infringement procedures," which is the financial penalty imposed by the ECJ for refusing to follow their ruling, and it has avoided this by promising to take in more refugees.

Hungary sees itself as defending European and Christian civilization. Prime Minister Orban has pledged to fight the quota. Orban is facing a re-election this fall, which may be encouraging him to double down on his refusal. To date, Hungary has not taken a single person, and in June the ECJ initiated Infringement procedures against it, Poland, and the Czech Republic.

3. Will this ruling make any difference? Will these two countries now accept refugees?

Yes, this ruling makes the European Council stronger. It reinforces their decision-making authority, even in the face of a lack of unanimity. It shows that the Council can enforce solidarity upon the reluctant EU members to provide relief for the more exposed countries like Italy and Greece.

If the rule of law still has any currency in Europe at all, then Slovakia and Hungary are bound to follow the ruling of the ECJ. If they do not follow the ruling, we have a deeper political crisis of the EU on our hands.

If Slovakia and Hungary refuse to follow the ruling, the ECJ can implement infringement procedures that financially penalize the countries for not abiding with their ruling, which the ECJ already started initiating in June 2017.

4. Why was there so much refugee migration in 2015 in particular? Are there still refugees trying to get into Greece/Italy?

Numerous factors contributed. An escalation of the civil war in Syria made it such that more than one out of every two Syrians became a displaced

person, either internally within Syria or outside it. Furthermore, German Chancellor Angela Merkel's offer in September 2015 to accept 1 million refugees had the inverse effect of encouraging more people to emigrate. Concerning the Mediterranean crossings, the civil war in Libya destabilized that country such that there was no authority to prevent the traffickers from shipping out of Libya.

At present, there are still tens of thousands of people on boats arriving monthly in Italy and Greece. According to the International Organization for Migration, in the first five months of 2017, there were 60,000 arrivals in Italy compared to 47,000 in the first five months of 2016. So, the problem is far from being episodic, or from having resolved itself.

Italy and EU are seemingly doing whatever they can, both legally and illegally, to keep boats from arriving in Italy. Take, for example, the EU-Turkey agreement from 2015. The EU is "*refouling*," or relocating, thousands of asylum-seekers to Turkey, and yet Turkey is not considered a safe country because it has signed the outdated 1951 Convention relating to the Status of Refugees but not the modern 1968 Protocol.

5. Where does this ruling leave the relocation "policy" of the EU?

This ruling reinforces the legitimacy of relocating within the EU. The ECJ described the relocation as fair and proportionate, so as to be in solidarity with Greece and Italy receiving so many arrivals. It reinforces the Dublin regulation, which took a hit to its legitimacy during 2015 when both Greece and Germany decided not to abide by it.

6. Is this problem unique to the EU or are there other places where relocation is used?

It is not unique to the EU. Australia, for example, has similar agreements with Christmas Island and Papua New Guinea, where the latter two countries are paid to "warehouse" the asylum seekers. The problem with this is that these are not humane conditions. The asylum seekers are stuck on tiny islands for years while they wait for Australia to refuse them asylum. And what happens to them when they are refused asylum? Thus, relocation exists in other places, but it is not a model solution. At least within the EU, it can be done ethically among advanced countries, providing humane conditions during the asylum application process.

7. Do we have any facts relating to the number of refugees affected? How many are there in Greece/Italy waiting relocation or who have been relocated?

   According to the United Nations High Commissioner for Refugees, in 2015 approximately 1 million refugees arrived by sea in Europe. For 2016, it was 362,000 sea arrivals. In 2017, as of September, there have been 132,000 sea arrivals. Of those 132,000, Italy has received 103,000 and Greece 18,000.

   Regarding relocation, 8,500 of the 39,600 targeted relocations from Italy have occurred, which is just 22 percent for Italian relocations. For Greece, 20,000 out of the 63,000 have been relocated, which is 31 percent.

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7. **Firm In The News**

Cyrus D. Mehta was a Speaker, *US immigration and visa policy in the Trump era – what has changed and what has not?* 8th Biennial IBA Global Immigration Conference, London, UK, November 17, 2017**.**

Cyrus D. Mehta was a Speaker, *Ethical Issues In I-140/I-485 Scenarios*, Advanced Corporate Immigration: Don't Cross that Line! Ethics for Immigration Practitioners, New Jersey Institute for Continuing Legal Education, Newark, NJ, November 15, 2017.

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