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US IMMIGRATION & NATIONALITY LAW

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Lawsuit Challenges New USCIS Policy on 'Unlawful Presence' for Foreign Students and Exchange Visitors – Several institutions of higher education have challenged a recently announced Trump administration policy, effective August 9, 2018, changing the calculation of the number of days of "unlawful presence" for nonimmigrant foreign students.

E-Verify Reminds Employers Not to Terminate Employees Based on Tentative SSA/DHS Nonconfirmations – Employers may not terminate, suspend, delay training, withhold or lower pay, or take any other adverse action against an employee because of a Tentative Nonconfirmation until it becomes a Final Nonconfirmation.

USCIS Moving Forward With Proposal to Require H-1B Lottery Pre-Registration – USCIS has sent a draft regulation to the Office of Management and Budget that would require employers, beginning in April 2019, to pre-register for the H-1B lottery.

USCIS Revises Validity Period for Report of Medical Exam and Vaccination Record – The updated policy requires applicants to submit a Form I-693 that is signed by a civil surgeon no more than 60 days before filing the underlying application for an immigration benefit.

Canada Legalizes Marijuana, CBP Issues Warning – U.S. Customs and Border Patrol has issued a warning that U.S. federal law on marijuana is unaffected and will be enforced at the border.

Canadian Ice Skating Champion Sues USCIS Over Visa Denial – USCIS said her medals won over the past two years in national and international competitions did not support classification as an "alien of extraordinary ability."

Agencies' Semiannual Regulatory Agenda Filings Include Multiple Immigration-Related Entries – With respect to immigration, there are potentially some very big changes ahead. On the other hand, although the items on the agenda reflect the Trump administration's intentions for the next 12 months, historically, many items on the agenda never make it into the regulations.

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Lawsuit Challenges New USCIS Policy on 'Unlawful Presence' for Foreign Students and Exchange Visitors

In a new lawsuit filed in the U.S. District Court for the Middle District of North Carolina, several institutions of higher education have challenged a recently announced Trump administration policy, effective August 9, 2018, changing the calculation of the number of days of "unlawful presence" for nonimmigrant foreign students from the date U.S. Citizenship and Immigration Services (USCIS) or an immigration judge finds a violation or orders the student removed to the date the status lapsed.

The complaint states that in 1997, the United States adopted a clear policy governing the implementation of the immigration statute. Recognizing that the determination of whether an individual is “unlawfully present” in the United States is complex and will often turn on administrative discretion, the United States established objective rules that provided visa holders notice. If the authorized period of stay ended on a date certain on which the individual was required to leave the country, unlawful presence began following that date. And for all individuals, unlawful presence began the day after either a government official or immigration judge made a determination that the individual was out-of-status. This provided well-intentioned individuals an opportunity to cure their circumstances and remain in the country—or to depart the country within 180 days. Either way, individuals acting in good faith had an opportunity to avoid imposition of a three- or ten-year reentry bar.

Most international students enter the United States on F or M visas, while some enter on J visas, the complaint notes. Many international researchers, scholars, and professors at higher education and research institutions enter the country

on J visas for exchange visitors. In general, when F, J, or M visa holders enter the country, they are not supplied with a date certain on which they must depart. Rather, their visas are valid for the "duration of status," or "D/S." For more than two decades, the United States has held that the unlawful presence clock for these individuals begins on the day after a government official or immigration judge adjudicates the individual as out-of-status. That is, unlawful presence begins at the point that an F, J, or M visa holder is provided unequivocal notice that the government believes that the individual is out-of-status.

Now, based on the August 9, 2018, USCIS memorandum, when a government official or immigration judge determines that an F, J, or M visa holder is out-of-status, the unlawful-presence clock will be backdated to the day on which the agency concludes that the visa holder first fell out-of-status. The complaint states that the immigration system "is beset with processing delays, and many of these status determinations are made when an individual is applying for new immigration benefits."

Thus, the new policy's use of a backdated unlawful-presence clock "will render tens of thousands of F, J, and M visa holders subject to three- and ten-year reentry bars without any opportunity to cure," the complaint states. "This policy, accordingly, will result in the three- or ten-year banishment of untold numbers of international students and exchange visitors acting in good faith."

Moreover, the complaint notes, by disrupting the ability of these individuals to continue studying at their schools—or continuing their research, teaching, or other scholarly pursuits—the August 2018 policy memorandum fundamentally upsets student-school and employee-school relationships. This results in concrete, significant harms to colleges and universities, including through the loss of irreplaceable community members, loss of tuition dollars, and loss of trained employees.

The complaint asserts that the new policy is unlawful for several reasons, including, among other things, that the defendants "failed to undertake the notice and comment required in these circumstances," such as by not publishing advance notice in the Federal Register and responding to public comments, and by not complying with the Administrative Procedure Act.

Guilford College, Guilford College International Club, The New School, Foothill-De Anza Community College District, and Haverford College joined the lawsuit.

1. Ronald Klasko of Klasko Immigration Law Partners LLP is co-counsel for the plaintiffs.

A copy of the complaint, *Guilford College et al. v. Nielsen et al.,* is at https://dlbjbjzgnk95t.cloudfront.net/1094000/1094960/https-ecf-ncmd-uscourts-gov-doc1-13312981437.pdf.

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E-Verify Reminds Employers Not to Terminate Employees Based on Tentative SSA/DHS Nonconfirmations

E-Verify has issued a reminder that employers may not terminate employees because of a Tentative Nonconfirmation (TNC) until the Social Security Administration (SSA) and/or Department of Homeland Security (DHS) has reviewed the case and the TNC becomes a Final Nonconfirmation.

A DHS or SSA TNC means that the information the employer entered in E-Verify from a Form
I-9, Employment Eligibility Verification, did not match records available to DHS or SSA. A DHS or SSA TNC case result does not necessarily mean that a person is not authorized to work in the United States. The employer must give the employee an opportunity to take action to resolve the mismatch. If E-Verify cannot instantly confirm employment eligibility, it must manually review government records. E-Verify will try to do this within 48 hours to let the employer know whether or not the employee is authorized to work.

It is possible for E-Verify to issue a dual TNC, which means the case received a TNC result from both agencies at the same time because information entered into E-Verify does not match records available to both SSA and DHS. E Verify identifies the agency or agencies associated with the mismatch in the TNC Further Action Notice.

E-Verify noted that a TNC for an information mismatch against SSA records may result because:

- The employee has not updated his or her citizenship or immigration status with SSA
- The employee did not report a name change to SSA
- The employee's name, Social Security number, or date of birth is incorrect in SSA records

- SSA records contain another type of mismatch
- The employer entered the employee's information incorrectly in E-Verify

A case can result in a TNC with DHS because the employee's:

- Name, Alien Number, Form I-94 number. and/or foreign passport number are incorrect in DHS records
- U.S. passport, passport card, driver's license, state ID, or foreign passport information could not be verified
- Information was not updated in the employee's DHS records
- Citizenship or immigration status changed
- Record contains another type of error
- Information was entered incorrectly in E-Verify by the employer

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any other adverse action against an employee because of a TNC until it becomes a Final Nonconfirmation.

If the employee chooses not to take action on the TNC, the employer may terminate employment with no civil or criminal liability, E-Verify said. The case can be treated as a Final Nonconfirmation and the employer should close the case in E Verify.

For information on this process, see https://www.e-verify.gov/employers/verification-process/tentative-nonconfirmations.

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USCIS Moving Forward With Proposal to Require H-1B Lottery Pre-Registration

U.S. Citizenship and Immigration Services (USCIS) has sent a draft regulation to the Office of Management and Budget that would require employers, beginning in April 2019, to pre-register for the H-1B lottery. Other changes being considered include prioritizing H-1B visa number allocations based on criteria in a 2017 Trump executive order directing prioritization based on "the most skilled or highest-paid petition beneficiaries"; and changing the order of the H-1B visa lotteries so the chances for applicants with a master's degree are increased. It is unclear when the draft regulation will appear in the Federal Register.

USCIS first proposed a pre-registration system in 2011. See https://www.uscis.gov/news/fact-sheets/uscis-seeks-public-comment-proposed-h-1b-registration-system-fact-sheet.

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USCIS Revises Validity Period for Report of Medical Exam and Vaccination Record

U.S. Citizenship and Immigration Services (USCIS) announced that effective November 1, 2018, it has revised policy guidance for the validity period of Form I-693, Report of Medical Examination and Vaccination Record.

The updated policy requires applicants to submit a Form I-693 that is signed by a civil surgeon no more than 60 days before filing the underlying application for an immigration benefit. The Form I-693 would remain valid for a two-year period following the date the civil surgeon signed it. As such, USCIS is retaining the current maximum two-year validity period of Form I-693 but "calculating it in a different manner to both enhance operational efficiencies and reduce the number of requests to applicants for an updated Form I-693."

USCIS officers use the form to determine whether an applicant for an immigration benefit in the United States is inadmissible under the health-related grounds of inadmissibility. By specifying that the I-693 must be signed no more than 60 days before the applicant files the underlying application for which the I-693 is required, the validity of the form "is more closely tied to the timing of the underlying application," USCIS said.

Additionally, requiring submission of an I-693 that was signed no more than 60 days before the date the underlying application was filed may, in some cases, maximize the period of time the
I-693 will be valid while the underlying application is under USCIS review, the agency said. "Officers will still have the discretion, as they have always had, to request a new Form I-693 if they have reason to believe an applicant may be inadmissible on the health-related grounds. Delays in adjudicating the underlying application will also be reduced if fewer requests for updated Forms I-693 are necessary," USCIS noted.

The USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-policy-manual-update. Additional details are in a related USCIS policy alert at https://www.uscis.gov/policymanual/Updates/20181016-I-693Validity.pdf.

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Canada Legalizes Marijuana, CBP Issues Warning

Canada legalized recreational marijuana on October 17, 2018. U.S. Customs and Border Patrol (CBP) has issued a warning that U.S. federal law is unaffected and will be enforced at the border. CBP noted that although medical and recreational marijuana may be legal in some U.S. states and Canada, the sale, possession, production, facilitation, or distribution of marijuana remain illegal under U.S. federal law. Consequently, CBP said, "crossing the border or arriving at a U.S. port of entry in violation of this law may result in denied admission, seizure, fines, and apprehension." Determinations about admissibility and whether any regulatory or criminal enforcement is appropriate are made by a CBP officer based on the facts and circumstances known to the officer at the time.

Generally, CBP said, "any arriving alien who is determined to be a drug abuser or addict, or who is convicted of, admits having committed, or admits committing, acts which constitute the essential elements of a violation of (or an attempt or conspiracy to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance, is inadmissible to the United States."

A Canadian citizen who is working in or facilitating the proliferation of the legal marijuana industry in Canada and is coming to the United States for reasons unrelated to the marijuana industry will generally be admissible, CBP said. However, if a traveler is found to be coming to the United States for a reason related to the marijuana industry, he or she may be deemed inadmissible. CBP noted that the burden of proof is on the Canadian citizen.

The CBP notice is at https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border. Additional information is at https://help.cbp.gov/app/answers/detail/a_id/3684/kw/marijuana.

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Canadian Ice Skating Champion Sues USCIS Over Visa Denial

Canadian figure-skating champion Christina Carreira has filed a complaint against U.S. Citizenship and Immigration Services (USCIS) over the agency's

denial of her EB-1 "extraordinary ability" visa petition to enable her to compete for the United States in international events. Reportedly, she wishes to obtain permanent residence and eventual U.S. citizenship and to join the U.S. team for the 2022 Winter Olympics. USCIS said her medals won over the past two years in national and international competitions did not support classification as an "alien of extraordinary ability."

The complaint notes that Ms. Carreira is a citizen and national of Canada currently lawfully present in the United States as an athlete performing at an internationally recognized level of performance. She is half of the two-member team of Carreira/Pomomarenko, "the highest ranked competitive junior ice dance team in the world as ranked by the governing body of the sport, the International Skating Union," the complaint states. The team has won multiple national and international gold and silver medals in various competitions.

The complaint argues that the "nonsensical" denial was "arbitrary and capricious" and "absurd" in its conclusion that "silver and gold awards at national and international...ice skating competitions" are not "nationally or internationally recognized prizes or awards for excellence in the field of endeavor, because limited to members of that association and participants of those competitions." By this standard, the complaint notes, even an Olympic gold medal would not qualify.

Michael Piston, counsel for Ms. Carreira, said the "incomprehensible" decision "is part and parcel of the decline in administrative decision-making we've seen with the Trump administration."

The complaint is at https://assets.documentcloud.org/documents/5014667/10-21-18-Carreira-v-USCIS-Complaint.pdf.

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Agencies' Semiannual Regulatory Agenda Filings Include Multiple Immigration-Related Entries

The Office of Management and Budget has released the semiannual regulatory agenda list for various agencies in fall 2018. There are potentially some very big immigration changes ahead, some of which may not be obvious initially. On the other hand, although the items on the agenda reflect the Trump administration's intentions for the next 12 months, historically, many items on the agenda never make it into the regulations. The process is slow and even a

final rule could be subject to a court challenge.

Among other things, the Trump administration intends to propose a new rule in fall 2019 establishing a maximum period of authorized stay for international students and certain other nonimmigrants. The administration is proposing to eliminate concurrent filings of visa petitions, I-485s, and adjustments of status.

"Amendments to Foreign Labor Certification Regulations to Conform to Amendments to Nonprocurement Common Rule" would allow the Department of Labor, working with the Department of Justice, to impose fines and bar employers from participation in the employment-based immigration system if labor certification violations are found. "Nonimmigrant Classes: Temporary Visitors to the United States for Business or Pleasure" would tighten eligibility for admission under the B-1, B-2, WT, and WB classifications. "Establishing a Maximum Period of Authorized Stay for F-1 and Other Nonimmigrants" would formalize the ability of the federal immigration authorities to enforce the visa voidance penalty and unlawful presence grounds of inadmissibility by eliminating D/S classification upon entry.

Below is a summary of the immigration-related highlights from several agencies.

Department of Homeland Security

- Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure (prerule stage): DHS established the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT) in accordance with a series of legislative mandates requiring that DHS create an integrated automated entry-exit system that records the arrival and departure of aliens, verifies aliens' identities, and authenticates travel documents. Upon Presidential approval of the 2013 continuing resolution, the Office of Biometric Identity Management (OBIM) was created in March 2013, and replaced the US-VISIT program. The Notice of Proposed Rulemaking proposed that all aliens provide biometric identifiers at entry and upon departure at any air and sea port of entry at which facilities exist to collect such information.
- EB-5 Immigrant Investor Program Realignment (prerule stage): DHS plans to publish an advanced notice of proposed rulemaking to solicit public input on proposals that would increase monitoring and oversight of the EB-5 program as well as encourage investment in rural areas. DHS would

solicit feedback on proposals associated with redefining components of the job creation requirement, and defining conditions for regional center designations and operations.

- Inadmissibility on Public Charge Grounds (proposed rule stage): DHS will propose regulatory provisions guiding the inadmissibility determination on whether an alien is likely at any time to become a public charge. DHS proposes to add a regulatory provision that would define the term public charge and would outline DHS's public charge considerations.
- Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap Subject Aliens (proposed rule stage): DHS proposes to amend its regulations governing petitions filed on behalf of H-1B beneficiaries who may be counted under the H-1B regular cap or under the H-1B master's cap. This rule proposes to establish an electronic registration program for petitions subject to numerical limitations for the H-1B nonimmigrant classification. This action is being considered because the demand for H-1B specialty occupation workers by U.S. employers has often exceeded the numerical limitation. This rule "is intended to allow USCIS to more efficiently manage the intake and selection process for these H-1B petitions." The Department published a proposed rule on this topic in 2011. The Department intends to publish an additional proposed rule in 2018. The proposal may include a modified selection process, as outlined in Executive Order 13788, Buy American and Hire American.
- Requirements for Filing Motions and Administrative Appeals (proposed rule stage): This rule proposes to revise the requirements and procedures for the filing of motions and appeals before DHS, USCIS, and its Administrative Appeals Office (AAO). The proposed changes "are intended to streamline the existing processes for filing motions and appeals and will reduce delays in the review and appellate process. This rule also proposes additional changes necessitated by the establishment of DHS and its components. The proposed changes are intended to promote simplicity, accessibility, and efficiency in the administration of USCIS appeals and motions." The Department also solicits public comment on proposed changes to the AAO's appellate jurisdiction.
- EB-5 Immigrant Investor Regional Center Program (proposed rule stage): DHS is considering making regulatory changes to the EB-5 Immigrant Investor Regional Center Program. DHS issued an Advance Notice of Proposed Rulemaking (ANPRM) to seek comment from all interested

stakeholders on several topics, including: (1) the process for initially designating entities as regional centers, (2) a potential requirement for regional centers to utilize an exemplar filing process, (3) continued participation requirements for maintaining regional center designation, and (4) the process for terminating a regional center designation. While DHS has gathered some information related to these topics, the ANPRM "sought additional information that can help the Department make operational and security updates to the Regional Center Program while minimizing the impact of such changes on regional center operations and EB-5 investors."

- Strengthening the H-1B Nonimmigrant Visa Classification Program (proposed rule stage): DHS will propose to revise the definition of "specialty occupation" to "increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages." DHS also will propose "additional requirements designed to ensure employers pay appropriate wages to H-1B visa holders."
- USCIS Biometrics Collection for Consistent, Efficient, and Effective Operations: DHS will propose to update its regulations to eliminate multiple references to specific biometric types, and to allow for the expansion of the types of biometrics required to establish and verify an identity. DHS will also propose to modify age restrictions where they exist to detect, deter, or prevent human trafficking of children; establish consistent identity enrollment and verification policies and processes; and align USCIS biometric collection with other immigration operations. The DHS proposal will provide a definition to the public on the term "biometric" and how biometrics will be used in the immigration process.
- Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization (proposed rule stage): On February 25, 2015, DHS published a final rule extending eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status. DHS is publishing this notice of proposed rulemaking to amend that 2015 final rule. DHS is proposing to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as a class of aliens eligible for employment authorization.

- USCIS Fee Schedule (proposed rule stage): USCIS is currently engaging in a fee review. The results of that fee review may result in a need to adjust the fee schedule for requesting immigration benefits from USCIS.
- Removal of 30-Day Processing Provision for Certain Employment Authorization Applications (proposed rule stage): DHS proposes to withdraw its regulatory provision stating that USCIS has 30 days from the date an asylum applicant files the initial Application for Employment Authorization (Form I-765 or EAD application) to grant or deny that application. By eliminating the 30-day provision, DHS "will be able to maintain customer service, respond to national security and fraud concerns, maintain technological advances in document production, and address identity verification considerations." DHS also proposes to make a technical amendment by deleting the provision requiring pending asylum applicants to submit Form I-765 renewal applications 90 days before their employment authorization expires.
- Electronic Processing of Immigration Benefit Requests (proposed rule stage): DHS will propose to: (1) mandate electronic submission for all immigration benefit requests and explain the requirements associated with electronic processing; and (2) make changes to existing regulations to allow end-to-end digital processing.
- Updating Adjustment of Status Procedures for More Efficient Processing and Immigrant Visa Usage (proposed rule stage): DHS will propose regulatory provisions "designed to improve the efficiency in the processing of Application to Register Permanent Residence or Adjust Status (Form I-485), reduce processing times, improve the quality of inventory data provided to partner agencies, reduce the potential for visa retrogression, promote efficient usage of available immigrant visas, and discourage fraudulent or frivolous filings." DHS proposes to eliminate the concurrent filing of visa petitions and Form I-485 for all applicants seeking an immigrant visa in a preference category, and proposes to make further changes to the appropriate dates when applicants can file Form I-485 and for ancillary benefits.
- Improvements to the Medical Certification for Disability Exceptions Processing (proposed rule stage): DHS will propose updates to regulatory provisions "designed to improve the efficiency of processing of Medical Certification for Disability Exceptions (Form N-648) by improving customer service and responding to concerns of possible fraud and abuse."

- Credible Fear Reform (proposed rule stage): DHS will propose to amend regulatory provisions to "streamline credible fear screening determinations in response to the Southwest Border crisis." DHS plans to establish various measures, such as applying the mandatory bars to asylum eligibility to certain credible fear screening determinations, and removing provisions related to novel or unique issues that merit consideration in a full hearing before an immigration judge.
- Employment Authorization Documents for Asylum Applicants (proposed rule stage): DHS plans to propose regulatory amendments "intended to promote greater accountability in the application process for requesting employment authorization and to deter the fraudulent filing of asylum applications for the purpose of obtaining Employment Authorization Documents (EADs)."
- Modernizing Recruitment Requirements Under the H-2B Program (proposed rule stage): DOL's Employment and Training Administration and USCIS are jointly amending regulations governing temporary employment of H-2B nonimmigrants in the United States. The Notice of Proposed Rulemaking (NPRM) "will include necessary improvements to modernize regulatory requirements for employer recruitment of U.S. workers, including proposing to eliminate print newspaper advertisements."
- Classification for Victims of Severe Forms of Trafficking in Persons, Eligibility for T Nonimmigrant Status (final rule stage): The T nonimmigrant classification was designed for eligible victims of a severe form of trafficking in persons who aid law enforcement with their investigation or prosecution of the traffickers, and who can establish that they would suffer extreme hardship involving unusual and severe harm if they were removed from the United States. This rule finalizes the interim final rule published in December 2016, which streamlined application procedures and responsibilities for DHS, provided guidance to the public on how to meet the requirements to obtain T nonimmigrant status, and implemented legislative amendments to the T nonimmigrant status provisions in the INA.
- Removal of International Entrepreneur Parole Program (final rule stage): On January 17, 2017, DHS published the International Entrepreneur Final Rule in the Federal Register, with an original effective date of July 17, 2017. On May 29, 2018, DHS published a notice of proposed rulemaking (NPRM)

proposing to rescind the IE final rule and soliciting public comments on the proposal to rescind the IE final rule.

- EB-5 Immigrant Investor Program Modernization (final rule stage): In January 2017, DHS proposed to amend its regulations governing the employment-based fifth preference (EB-5) immigrant investor classification. In general, under the EB-5 program, individuals are eligible to apply for lawful permanent residence in the United States if they make the necessary investment in a commercial enterprise in the United States and create or, in certain circumstances, preserve 10 permanent full-time jobs for qualified U.S. workers. This rule sought public comment on a number of proposed changes to the EB-5 program regulations. Such proposed changes included raising the minimum investment amount; allowing certain EB-5 petitioners to retain their original priority date; changing the designation process for targeted employment areas; and other miscellaneous changes to filing and interview processes.
- Implementation of the Northern Mariana Islands U.S. Workforce Act of 2018 (final rule stage): DHS plans to issue an interim final rule to implement the amendments of the Northern Mariana Islands U.S. Workforce Act of 2018, which President Trump signed on July 24, 2018. The stated purpose of the act is to increase the percentage of U.S. workers in the total workforce of the CNMI, while maintaining the minimum number of non-U.S. workers to meet the demands of the CNMI economy; to encourage the hiring of U.S. workers into the CNMI workforce; and to ensure that no U.S. worker is at a competitive disadvantage compared to a non-U.S. worker or is displaced by a non-U.S. worker. The act extends the transition period until December 31, 2029, including the Guam and CNMI H cap exemptions and the bar related to filing asylum applications in the CNMI. It also provides additional criteria for CW beneficiaries and their employers.
- Privacy Act of 1974: Implementation of Exemptions; DHS/USCIS-018 Immigration Biometric and Background Check (IBBC) System of Records (final rule stage): On July 31, 2018, DHS proposed an exemption to a system of records notice in a rulemaking published at 83 FR 36792. The system of records notice, Immigration Biometric and Background Check System of Records, was published on July 31, 2018. The purpose of this system of records is to verify identity and conduct criminal and national security background checks in order to establish an individual's eligibility

for an immigration benefit or other request, and support domestic and international data-sharing efforts. In the proposed rulemaking, DHS sought public comment on its proposal to exempt the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

- Nonimmigrant Classes: Temporary Visitors to the United States for Business or Pleasure (proposed rule stage): This is a proposal to amend DHS regulations pertaining to nonimmigrants admitted to the United States as temporary visitors for business (B-1) or pleasure (B-2). The proposed amendments will clarify the criteria for according B-1 or B-2 nonimmigrant classification to applicants for admission to the United States. Such clarification "is necessary to ensure fair and consistent adjudication and enforcement, as well as to make the criteria more transparent."
- Western Hemisphere Travel Initiative (WHTI)—Noncompliant Traveler Fee (proposed rule stage): This rule proposes amendments to DHS regulations to establish a user fee to cover the inspection costs of processing U.S. citizens seeking entry at U.S. land border ports-of-entry without documents that comply with the WHTI. Additionally, this rule proposes to update the regulation regarding the establishment of projects for the charging of a land border fee for inspection services.
- Collection of Biometric Data from U.S. Citizens Upon Entry to and Departure from the United States (proposed rule stage): To "facilitate the implementation of a seamless biometric entry-exit system that uses facial recognition and to help prevent persons attempting to fraudulently use U.S. travel documents and identify criminals and known or suspected terrorists," DHS is proposing to amend the regulations to provide that all travelers, including U.S. citizens, may be required to be photographed upon entry and/or departure.
- Collection of Biometric Data from U.S. Citizens Upon Entry to and Departure from the United States (final rule stage): DHS is required by statute to develop and implement an integrated, automated entry and exit data system to match records, including biographic data and biometrics of aliens entering and departing the United States. In addition, Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, states that DHS is to expedite the completion and implementation of a biometric entry-exit tracking system. Although the

current regulations provide that DHS may require certain aliens to provide biometrics when entering and departing the United States, they only authorize DHS to collect biometrics from certain aliens upon departure under pilot programs at land ports and at up to 15 airports and seaports. To provide the legal framework for CBP to begin a comprehensive biometric entry-exit system, DHS is amending the regulations to remove the references to pilot programs and the port limitation. In addition, to enable CBP to make the process for verifying the identity of aliens more efficient, accurate, and secure by using facial recognition technology, DHS is amending the regulations to provide that all aliens may be required to be photographed upon entry and/or departure.

- Return to Territory (final rule stage): Executive Order 13767, section 7, Border Security and Immigration Enforcement Improvements, requires the DHS Secretary to take appropriate action to ensure that aliens described in section 235(b)(2)(C) of the INA are returned to the territory from which they came pending a formal removal proceeding. This rulemaking proposes to amend 8 CFR 235.3(d) so that it is consistent with this requirement.
- Implementation of the Electronic System for Travel Authorization (ESTA) at U.S. Land Borders—Automation of CBP Form I-94W (final rule stage): This rule amends DHS regulations to implement ESTA requirements under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, for aliens who intend to enter the United States under the Visa Waiver Program (VWP) at land ports of entry. Currently, aliens from VWP countries must provide certain biographic information to U.S. Customs and Border Protection (CBP) officers at land ports of entry on a paper I-94W Nonimmigrant Visa Waiver Arrival/Departure Record (Form I-94W). Under this rule, these VWP travelers will instead provide this information to CBP electronically through ESTA prior to application for admission to the United States. DHS has already implemented the ESTA requirements for aliens who intend to enter the United States under the VWP at air or sea ports of entry.
- Conforming Amendments Regarding the Asia-Pacific Economic Cooperation Business Travel Card Program (final rule stage): This rule amends the DHS regulations pertaining to the Asia-Pacific Economic Cooperation Business Travel Card Program to bring the regulations into conformity with the Asia-Pacific Economic Cooperation Business Travel

Cards Act of 2017 by removing the expiration date of the program.

- Privacy Act of 1974: System of Records; DHS/TSA-024 Use of Department of State Passport and Visa Records (proposed rule stage): TSA is establishing this new system of records notice (SORN) to inform the public of the collection, maintenance, dissemination, and use of Department of State (DOS) records on individuals who have applied for a U.S. passport, immigrant visa, nonimmigrant visa, or other travel document issued by DOS. TSA will maintain a synchronized copy of the DOS records to automate and simplify the transmission of information in DOS databases to TSA. DHS proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.
- Eligibility Checks of Nominated and Current Designated School Officials of Schools That Enroll F and M Nonimmigrant Students and of Exchange Visitor Program-Designated Sponsors of J Nonimmigrants (proposed rule stage): ICE proposes to vet all designated school officials (DSOs) and responsible officers (ROs) who ensure that ICE has access to accurate data on covered individuals via the Student and Exchange Visitor Information System (SEVIS). By requiring DSOs and ROs to undergo an eligibility check, the rule would help DHS prevent potential criminal activities or threats to national security that may result from noncompliance by DSOs and SEVP-certified schools, or ROs and Exchange Visitor Program (EVP) sponsors. The rule would also ensure that SEVP has the necessary enforcement and accountability mechanisms built into the SEVIS to safeguard U.S. security interests.
- Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children (proposed rule stage): Since 1997, statutory changes, including passage of the Homeland Security Act (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), have significantly changed the applicability of certain provisions of the Flores Settlement Agreement (FSA). This rule would codify the relevant and substantive terms of the FSA and "enable the U.S. Government to seek termination of the FSA and litigation concerning its enforcement." Through this rule, DHS, HHS, and DOJ "will create a pathway to ensure the humane detention of family units while satisfying the goals of the FSA." The rule will also implement related provisions of the TVPRA.

- Visa Security Program Fee (proposed rule stage): ICE seeks to enable the expansion of the Visa Security Program (VSP) by proposing the VSP be moved to a user-fee-funded model (as opposed to relying on appropriations). The VSP uses resources in the National Capital Region and at U.S. diplomatic posts overseas to vet and screen visa applicants; identifies and prevents the travel of those who constitute potential national security and/or public safety threats; and launches investigations into criminal and/or terrorist-affiliated networks operating in the United States and abroad. The fees collected as a result of this rule would fund an expansion of the VSP, enabling ICE to extend visa security screening and vetting operations and investigative efforts to more visa-issuing posts overseas, and "enhance the U.S. government's ability to prevent travel to the United States by those who pose a threat to the national security interests of the U.S."
- Establishing a Maximum Period of Authorized Stay for F-1 and Other Nonimmigrants (proposed rule stage): ICE will propose to modify the period of authorized stay for certain categories of nonimmigrants traveling to the United States from "duration of status" (D/S) and to replace such with a maximum period of authorized stay, and options for extensions, for each applicable visa category.
- Adjusting Program Fees for the Student and Exchange Visitor Program (final rule stage): ICE will publish a final rule to adjust fees that the Student and Exchange Visitor Program (SEVP) charges individuals and organizations. In 2017, SEVP conducted a comprehensive fee study and determined that current fees do not recover the full costs of the services provided. ICE has determined that adjusting fees is necessary to fully recover the increased costs of SEVP operations and program requirements, and to provide the necessary funding to sustain initiatives critical to supporting national security. The final rule will adjust fees for individuals and organizations. The SEVP fee schedule was last adjusted in a rule published on September 26, 2008.

Department of Labor

- Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers) (proposed rule stage): DOL's Employment and Training Administration (ETA) and Wage and Hour Division (WHD) are amending regulations regarding the H-2A non-immigrant visa program.

The Notice of Proposed Rulemaking (NPRM) will include technical changes to the existing H-2A regulations "which will modernize and streamline the overall function of the program." The NPRM will also "make necessary legal changes to modernize the regulation that have arisen since the current H-2A regulation was published in 2010."

- Modernizing Recruitment Requirements Under the H-2A Program (proposed rule stage): ETA is amending regulations regarding the H-2A non-immigrant visa program. The Notice of Proposed Rulemaking (NPRM) will include technical changes to eliminate print newspaper advertisements and will "modernize the requirements employers must meet for advertising job opportunities to U.S. workers."
- Modernizing Recruitment Requirements Under the H-2B Program (proposed rule stage): ETA and USCIS are jointly amending regulations regarding the H-2B nonimmigrant visa program. The Notice of Proposed Rulemaking (NPRM) will include technical changes to "eliminate print newspaper advertisements and modernize the requirements employers must meet for advertising job opportunities to U.S. workers."
- Temporary Employment of H-2B Foreign Workers in Certain Itinerant Occupations in the United States (proposed rule stage): ETA/WHD and USCIS are jointly amending regulations regarding the H-2B nonimmigrant visa program. The Notice of Proposed Rulemaking (NPRM) will establish standards and procedures for employers seeking to hire foreign temporary nonagricultural workers for certain itinerant job opportunities, including entertainers and carnivals and utility vegetation management.
- Amendments to Foreign Labor Certification Regulations to Conform to Amendments to Nonprocurement Common Rule (proposed rule stage): DOL/ETA proposes to issue a Notice of Proposed Rulemaking to amend 2 CFR Part 2998 to expressly add foreign labor certifications as covered nonprocurement transactions, and to make other conforming amendments, as appropriate. In connection with that rulemaking, DOL/ETA also proposes to issue a Notice of Proposed Rulemaking to amend the foreign labor certification regulations to cross-reference to and implement the applicable provisions of 2 CFR Part 2998, and to make other conforming amendments, as appropriate.
- Northern Mariana Islands U.S. Workforce Act of 2018 (final rule stage): H.R. 5956 modifies the CW-1 visa program, which allows for the temporary employment of foreign workers in the Commonwealth of the

Northern Mariana Islands. The bill was signed into law on July 24, 2018. The law requires employers to obtain a temporary labor certification from DOL prior to requesting a visa from DHS and requires DOL to establish statistical standards for prevailing wage rates. The bill requires DOL to publish an Interim Final Rule that establishes the regulatory framework for issuing a temporary labor certification for the CW-1 program within 180 days of the bill being enacted into law.

Department of State

- Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Documentary Services Fee (proposed rule stage): DOS proposes an adjustment to the Schedule of Fees for Consular Services for authentication of a document in the United States. DOS is incorporating the domestic authentications fee into the Schedule of Fees and increasing it from $8 to $15.
- Schedule of Fees for Consular Services (proposed rule stage): This rule amends the fees for passport books and cards. The rule also amends the security surcharge for immigrant visa services and the fees for certain immigrant visa services.
- Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates (final rule stage): This rule amends the Schedule of Fees for Consular Services to include an exemption from the fee for administrative processing of request for Certificate of Loss of Nationality (CLN) for individuals born in the United States to a foreign mission member parent, where immunities enjoyed by the individual at birth were less than diplomatic agent-level immunity (such that the individual acquired U.S. citizenship at birth under the 14th Amendment to the United States Constitution), but where the individual has never received any privilege or benefit of United States citizenship and/or has been denied such a privilege or benefit on the basis that he/she is not a U.S. national.
- Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Visa Services Fee Changes (final rule stage): This rule is promulgated to implement the Adoptive Family Relief Act (the Act), which allows for the waiver or refund of fees relating to the renewal or replacement of an immigrant visa for certain already adopted children, where the adopted child was unable to use his or her initially issued

immigrant visa as a direct result of extraordinary circumstances. DOS is also amending its regulations regarding immigrant visa application procedures to cover new technologies, application forms, and procedures that have been implemented in recent years.

- Visas: Documentation of Nonimmigrants Under the INA, as Amended (various, final rule stage):
- A rule to allow DOS to authorize an immediate family member of an alien properly classified as an A-1, A-2, G-1, G-2, G-3, or G-4 principal nonimmigrant to obtain a different nonimmigrant visa, maintain current nonimmigrant visa status, or change to a different nonimmigrant visa status without being restricted to the principal's A-1, A-2, G-1, G-2, G-3, or G-4 nonimmigrant visa category. Recent cases involving changes of status have led to increased interest in revising the A/G required rule to provide DOS discretion in its application, with the goal of "avoiding potential bilateral irritants."
- A rule to revise the definition of equivalent to a "diplomatic passport" for purposes of the eligibility of foreign nationals to receive a "diplomatic type" visa and to update the categories of nonimmigrants who may be eligible for a "diplomatic type" or "official type" visa.
- A rule to revise the definition of "substantial amount of capital" as used for E-2 nonimmigrant treaty investor visa eligibility.
- A rule to remove 22 CFR 41.86 governing V nonimmigrant visas for certain spouses and children of lawful permanent residents. All potential applications for this visa program have been adjudicated and the regulation is obsolete.
- A rule to eliminate 22 CFR 42.23(a), which applies to certain women who lost their U.S. citizenship due to marriage before 1922. The regulation is obsolete since it is unlikely that any living person would meet the regulatory criteria.
- A rule to eliminate obsolete regulations pertaining to the Irish Peace Process Cultural Exchange and Training Program. The Irish Peace Process Cultural and Training Program Act of 1998 created what is commonly referred to as the Walsh Visa Program. The program expired on September 30, 2008. The regulations for administering the program became obsolete upon the expiration of the program. DOS also intends to remove the obsolete classification codes for Q2 and Q3 visas.
- A rule to update the definition of prostitution contained in 22 CFR 40.24

"consistent with the modern understanding of prostitution." The definition currently in the regulation "was crafted in 1959 and is unduly narrow, as compared with current definitions of prostitution, such as the Model State Criminal Provisions promulgated pursuant to section 225 of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008)," which provides that "prostitution" means a sexual act or contact with another person in return for giving or receiving a fee or a thing of value.

- Intercountry Adoptions (proposed rule stage): DOS would amend requirements for accreditation of agencies and approval of persons to provide adoption services in intercountry adoption cases pursuant to the Hague Convention. The rule includes a new subpart establishing parameters for U.S. accrediting entities to authorize adoption service providers who have received accreditation or approval to provide adoption services in countries designated by the Secretary. The rule would also strengthen certain standards for accreditation and approval, including those related to fees and the use of foreign providers. In addition, the rule would enhance standards related to preparation of prospective adoptive parents so that they receive more training related to the most common challenges faced by adoptive families, and are better prepared for the needs of the specific child they are adopting. These changes are intended to align the preparation of prospective adoptive parents with the current demographics of children immigrating to the United States through intercountry adoption. Finally, the rule would make the mechanism to submit complaints about adoption service providers available to complainants even if they have not first addressed their complaint directly with the adoption service provider.
- Visas: Supporting Documents for Nonimmigrants (proposed rule stage): DOS proposes to clarify that a consular officer may request from a nonimmigrant visa applicant documents related to the applicant's previous employment in the United States.
- Exchange Visitor Program—Au Pairs (proposed rule stage): DOS is proposing to amend existing Exchange Visitor Program regulations to provide more flexibility for au pairs to meet the required educational component of their exchange programs. This proposed rule also increases the limit on the amount of the contribution that host families must provide au pairs toward the cost of completing the required educational

component, while significantly expanding the options available to au pairs to meet this requirement. In addition to the proposed changes in the educational component, DOL is proposing language that clarifies the intent of some existing regulatory requirements and requires the development of organizational specific statements of policy.

- Visas: Nonimmigrant Visa Medical Exam (final rule stage): DOS is revising 22 CFR 41.108 to reflect that all K visa applicants undergo medical examinations. Further amendments would allow DOS and CDC to identify groups of nonimmigrant visa applicants that require medical examinations via separate public notice.
- Visas: Two-Year Home-Country Physical Presence Requirement (final rule stage): DOS intends to change the standard and procedures for the Waiver Review Division's consideration of requests for a recommendation on waiver of the "two year home-country physical presence requirement" for certain exchange visitors.
- Visas: Refusal Procedures for Visas (final rule stage): This rule revises DOS's adjudication procedures to allow for suspension of visa issuance when a country has been sanctioned for denying or delaying accepting an alien subject to a final order of removal from the United States. This rule also updates DOS regulations requiring consular officers to issue or refuse a visa, once the application is fully executed. This change clarifies consular officer authority to suspend issuance and "promotes consistency in the Department's immigrant and nonimmigrant refusal regulations and procedures." This rule also removes an obsolete provision from nonimmigrant visa procedures regarding assessment of an alien's ineligibility before an application has been made.
- Visas: Children Born in the U.S. to A, G, or NATO Visa Holders (final rule stage): This rule pertains to children born in the United States (but not subject to the jurisdiction of the United States) to qualified aliens who are maintaining status and are properly classified as A, G, or NATO nonimmigrants. The amendment will add such children to the scope of individuals who may be issued a visa in the United States.
- Visas: Waivers of Grounds of Ineligibility (final rule stage): This rule limits the circumstances in which consular officers submit reports to the Department on waiver requests under INA 212(d)(3)(A)(i).
- Exchange Visitor Program—General Provisions (final rule stage): DOS is amending the general provisions (subpart A) of the existing Exchange

Visitor Program regulations. This section of the regulations establishes the procedures for designated program sponsors and addresses overall program administration. The regulations encompass technical changes to the General Provisions and address public diplomacy and foreign policy concerns, including the Department's ability to monitor program sponsors and to ensure the safety and well-being of foreign nationals who come to the United States as program participants. The final rule was effective on January 5, 2015, and this rulemaking incorporates any changes based on the Interim Final Rule's public comments.

- Exchange Visitor Program—Summer Work Travel (final rule stage): This rule aims to further protect the health, safety, and welfare of exchange visitors on the Summer Work Travel (SWT) Program, amends eligibility requirements for participation in the SWT Program, and places additional restrictions and requirements on sponsors implementing the SWT Program. DOS received 98 comment letters in response to the NPRM; it has analyzed all comments that were submitted. It is completing final rule provisions of the NPRM in response to comments received.

For the full DHS list, see https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1600.

DOL list: https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1200.

DOS list: https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1400.

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Firm in the News

Cyrus Mehta will serve on the Board of Editors for a new biannual law journal to be published by the American Immigration Lawyers Association in partnership with Fastcase. For more information, see

https://www.fastcase.com/blog/fastcase-partners-with-the-american-immigration-lawyers-association-to-publish-new-journal/.

Mr. Mehta was quoted by *Firstpost* in "Unconstitutional: Lawyers Weigh in on Bizarre Scenarios of Donald Trump's Relentless Threats to End Birthright Citizenship." "If Trump follows through, there will be a lawsuit and I think a court will agree that the Constitution cannot be altered through an executive order." Mr. Mehta also explained in detail the chaos that could ensue if such an executive order were to be upheld. The article is at https://www.firstpost.com/world/unconstitutional-lawyers-weigh-in-on-bizarre-scenarios-of-donald-trumps-relentless-threats-to-end-birthright-citizenship-5481731.html.

Cyrus Mehta was quoted by *The Economic Times* in an article entitled "US elections to decide fate of bill seeking better terms for H-1B visa holders". The article is at https://economictimes.indiatimes.com/nri/visa-and-immigration/us-elections-to-decide-fate-of-bill-seeking-better-terms-for-h-1b-visa-holders/articleshow/66441727.cms

Mr. Mehta was a speaker on a panel entitled “Ethics for the Immigration Practitioner, Mobilize, Organize, Resist: Immigrant Justice Lawyering in New York” at the Immigrant Advocates Response Collaborative (Immigrant ARC) on October 26, 2018.

Cyrus Mehta’s contribution was acknowledged in an article by AILA EB-5 Committee entitled “EB-5 Ethics Puzzler: Dual Representation”, AILA InfoNet, AILA Doc. No. 18102300, October 23, 2018.

David Isaacson spoke on a panel entitled “Naturalization: The Final Frontier (Or Not)” at the 2018 AILA Central Florida Chapter Annual Conference, in Clearwater Beach, FL, on October 27, 2018.

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