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

MID-NOVEMBER 2018 IMMIGRATION UPDATE

Posted on November 19, 2018 by Cyrus Mehta

Headlines:

University of California Wins Preliminary Injunction in DACA Ninth Circuit Appeal – The court said that the rescission of DACA was based "solely on a misconceived view of the law" and is reviewable, and that plaintiffs are likely to succeed on their claim that it must be set aside.

Trump Administration Bars Certain Asylum Claims, Groups File Lawsuit – President Trump has issued a presidential proclamation targeting potential mass migration through the southern border of the United States with Mexico, in response to reports of a "caravan" of a large number of people primarily from Central America with a stated goal of entering the United States. DOJ and DHS published a related interim final rule limiting asylum claims, and the EOIR and USCIS released guidance. The ACLU and other groups have sued, claiming that the proclamation and rule violate asylum applicants' rights.

DOL To Implement New LCA Form – The Department of Labor announced several revisions to Form ETA-9035, the Labor Condition Application (LCA) for H-1B, H-1B1, and E-3 employment. A new LCA form incorporating these revisions will be fully implemented on November 19, 2018.

USCIS, CBP Extend Form I-129 Pilot Program for Canadian L-1 Nonimmigrants – USCIS and CBP are extending the joint agency pilot program for Canadian citizens seeking L-1 nonimmigrant status under the North American Free Trade Agreement (NAFTA) through April 30, 2019.

Payment Methods Change at Two USCIS Los Angeles Field Offices – Applicants, petitioners, or other requesters who are paying a filing fee at the USCIS Los Angeles Field Office and Los Angeles County Field Office can no longer pay by money order or cashier's check. They can still pay by check, debit

card, credit card, or reloadable pre-paid credit or debit card.

USCIS Reissues Receipt Notices for Extensions of Conditional Permanent Resident Status – USCIS has begun issuing new receipt notices for certain Forms I-751, Petition to Remove Conditions on Residence, to replace previously issued receipt notices containing inaccurate information.

Construction Begins on New USCIS Texas Service Center – The future home of the Texas Service Center is being built at the northwest corner of President George Bush Turnpike and Beltline Road in Irving, Texas, near Dallas/Fort Worth International Airport.

USCIS Expands 'Modernization Program' to Detroit, Los Angeles – The program ends self-scheduling of InfoPass appointments and instead encourages applicants to use USCIS online information resources to view general how-to information and check case status through the USCIS Contact Center.

Details:

Back to Top

University of California Wins Preliminary Injunction in DACA Ninth Circuit Appeal

In an action challenging the Department of Homeland Security's rescission of Deferred Action for Childhood Arrivals (DACA), the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of preliminary injunctive relief stopping termination of the program.

In 2017, Acting Secretary of Homeland Security Elaine Duke issued a memorandum rescinding DACA. The University of California and others filed lawsuits, which were consolidated. Among other things, the Ninth Circuit concluded that plaintiffs had stated a plausible equal protection claim under the U.S. Constitution.

The court noted that the Supreme Court's recent decision in *Trump v. Hawaii* does not foreclose this claim. There, statements by President Trump allegedly revealing religious animus against Muslims were at the heart of the plaintiffs' case, the court noted. Here, plaintiffs provided "substantially greater evidence of discriminatory motivation, including the rescission order's disparate impact on Latinos and persons of Mexican heritage, as well as the order's unusual history. Moreover, our case differs from *Hawaii* in several potentially important

respects, including the physical location of the plaintiffs within the geographic United States,...the lack of a national security justification for the challenged government action, and the nature of the constitutional claim raised," the court said.

The court said that the rescission of DACA was based "solely on a misconceived view of the law" and is reviewable, and that plaintiffs are likely to succeed on their claim that it must be set aside under the Administrative Procedure Act (APA). The court therefore affirmed the district court's entry of a preliminary injunction, and said that the district court also properly dismissed plaintiffs' APA notice-and-comment claim, and their claim that the DACA rescission violates their substantive due process rights. The district court also properly denied the government's motion to dismiss plaintiffs' APA arbitrary-and-capricious claim, their claim that the new information-sharing policy violates their due process rights, and their claim that the DACA rescission violates their right to equal protection, the Ninth Circuit said.

The court noted:

The Executive wields awesome power in the enforcement of our nation's immigration laws. Our decision today does not curb that power, but rather enables its exercise in a manner that is free from legal misconceptions and is democratically accountable to the public. Whether Dulce Garcia and the hundreds of thousands of other young dreamers like her may continue to live productively in the only country they have ever known is, ultimately, a choice for the political branches of our constitutional government. With the power to make that choice, however, must come accountability for the consequences.

Judge Owens concurred in the judgment but disagreed with the portion of the majority's opinion stating that the court may review the rescission of DACA for compliance with the APA. He noted that DACA's rescission may be reviewed for compliance with the Constitution. "I would hold that Plaintiffs have plausibly alleged that the rescission of DACA was motivated by unconstitutional racial animus in violation of the Equal Protection component of the Fifth Amendment, and that the district court correctly denied the government's motion to dismiss this claim," he said.

Judge Owens noted that, as the majority detailed, the record assembled at this early stage was promising. "Plaintiffs highlight (1) the disproportionate impact DACA's rescission has on 'individuals of Mexican heritage, and Latinos, who

together account for 93 percent of approved DACA applications'; (2) a litany of statements by the President and high-ranking members of his Administration that plausibly indicate animus toward undocumented immigrants from Central America; and (3) substantial procedural irregularities in the challenged agency action."

The Ninth Circuit's opinion, *Regents of the University of California v. U.S. Department of Homeland Security*, is at http://cdn.ca9.uscourts.gov/datastore/opinions/2018/11/08/18-15068.pdf.

Back to Top

Trump Administration Bars Certain Asylum Claims, Groups File Lawsuit

President Donald J. Trump has issued a presidential proclamation targeting potential mass migration through the southern border of the United States with Mexico, in response to reports of a "caravan" of a large number of people primarily from Central America with a stated goal of entering the United States. The Departments of Justice (DOJ) and Homeland Security (DHS) published a related interim final rule limiting asylum claims, and the Executive Office for Immigration Review (EOIR) and U.S. Citizenship and Immigration Services (USCIS) released guidance. The American Civil Liberties Union (ACLU), the Southern Poverty Law Center (SPLC), and the Center for Constitutional Rights (CCR) filed a federal lawsuit challenging the asylum proclamation and rule. Below are highlights of these developments:

Presidential proclamation. Among other things, the proclamation, issued on November 9, 2018, "suspend and limit" the "entry of any alien into the United States across the international boundary between the United States and Mexico." The suspension and limitation "shall not apply to any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States." The proclamation notes that those "who enter the United States unlawfully through the southern border in contravention of this proclamation will be ineligible to be granted asylum under the regulation promulgated by the Attorney General and the Secretary of Homeland Security that became effective earlier today. Those aliens may, however, still seek other forms of protection from persecution or torture." The proclamation also notes that under this suspension, "aliens entering through the southern border, even those without proper

documentation, may, consistent with this proclamation, avail themselves of our asylum system, provided that they properly present themselves for inspection at a port of entry."

The proclamation also orders the Secretaries of State and Homeland Security to consult with the government of Mexico "regarding appropriate steps—consistent with applicable law and the foreign policy, national security, and public-safety interests of the United States—to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter, dissuade, and return such aliens before they physically enter United States territory through the southern border."

The proclamation is in effect for 90 days. It is unclear what federal agencies will do during that time, although EOIR and USCIS have released guidance (see below). Reportedly, several hundred migrants have arrived in Tijuana just south of the border, and many more are still more than a thousand miles away. An estimated 5,000 are in Guadalajara, several thousand of whom have reportedly received temporary visas to remain in Mexico.

Interim final rule. The interim final rule, published on November 9, 2018, states that "aliens subject to such a proclamation concerning the southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum."

The interim final rule states that DHS and DOJ are amending its regulations "to specify a screening process for aliens who are subject to this specific bar to asylum eligibility." The rule states that the regulations "ensure that aliens in this category who establish a reasonable fear of persecution or torture could seek withholding of removal under the INA or protection from removal under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT')."

The interim final rule is effective November 9, 2018; comments are due by January 8, 2019, and should be submitted via the method provided for in the interim final rule.

EOIR guidance. The EOIR issued guidance on November 8, 2018, effective the next day. The guidance notes that the interim final rule does not change the

credible-fear standard for asylum claims, "although the amended regulations would expand the scope of the inquiry in the process." Those subject to the presidential proclamation who are deemed ineligible for asylum "can still obtain review from an immigration judge regarding whether the asylum officer correctly determined that the alien was subject to a limitation or suspension on entry imposed by a proclamation or order," the guidance states. Moreover, "if the immigration judge reverses the asylum officer's determination, the alien can assert the asylum claim in section 240 proceedings."

The guidance states that those determined to be ineligible for asylum by virtue of contravening a proclamation or order will still be screened "but in a manner that reflects that their only potentially viable claims would be for statutory withholding of removal or protection under the Convention Against Torture (CAT)":

After determining the alien's ineligibility for asylum under the credible-fear standard, an asylum officer will apply the reasonable-fear standard to assess whether further proceedings on a statutory withholding or CAT protection claim are warranted. If the asylum officer determines that the alien has not established a reasonable fear, the alien then can seek review of that decision from an immigration judge and will be subject to removal only if the immigration judge agrees with the negative reasonable-fear finding. Conversely, if either the asylum officer or the immigration judge determines that the alien clears the reasonable-fear threshold, the alien will be placed in section 240 proceedings, just like aliens who receive a positive credible-fear determination for asylum."

The EOIR guidance notes that the interim final rule does not alter existing procedures for other types of credible-fear review or reasonable-fear review proceedings.

USCIS guidance. The USCIS memorandum, issued November 9, 2018, provides USCIS asylum officers with guidance for considering and processing claims of asylum, statutory withholding of removal, and protection under the CAT, including in the credible fear context, to conform to the interim final rule. The memorandum states broadly that it "supersedes all previous guidance dealing with asylum, refugee, statutory withholding of removal, and CAT issues that is inconsistent with this memorandum or with the Interim Final Rule."

The USCIS guidance states that asylum officers must read the entire interim

final rule. The guidance notes, among other things, that "aliens subject to a suspension or limitation of entry under an INA § 212(f) or § 215(a)(1) presidential proclamation concerning the southern land border, but who nonetheless enter the United States in contravention of such an order, are ineligible for asylum. As the new regulation indicates, however, this new asylum bar is subject to five limitations:

- The bar applies only prospectively to INA § 212(f) or § 215(a)(1) orders that go into effect on or after November 9, 2018 (the date that this rule went into effect).
- The INA § 212(f) or § 215(a)(1) order must involve the suspension or limitation of entry.
- The INA § 212(f) or § 215(a)(1) order must be aimed at some specified class of aliens and would apply only to entry along the southern border with Mexico.
- The INA § 212(f) or § 215(a)(1) order is not a bar to asylum eligibility if it disclaims any effect on asylum eligibility for aliens within its scope, or expressly provides for a waiver or exception for which the alien may be eligible.
- The bar on asylum eligibility applies only to aliens who seek entry from outside the United States and became subject to an INA § 212(f) or § 215(a)(1) order after November 9, 2018 (regardless of whether they were inside the United States on that date).

Although this new rule may affect the eligibility for asylum of a person who is subject to an INA § 212(f) or § 215(a)(1) order, the USCIS guidance notes, "such aliens are still subject to various procedures under immigration laws. Under existing law, expedited removal procedures—streamlined procedures for expeditiously reviewing claims and removing certain aliens—apply to those individuals who arrive at a port of entry or those who are specifically designated such as those who have entered illegally and are encountered by an immigration officer within 100 miles of the border and within 14 days of entering." The interim final rule does not change this framework, the guidance notes.

The guidance also states:

Effective with this Interim Final Rule, aliens who are barred from receiving asylum under § 208.13(c)(3) must show a reasonable fear of persecution or

torture during the expedited removal process to be placed into INA § 240 proceedings where they can be considered for statutory withholding or CAT protection, respectively. In other words, such aliens cannot be placed in proceedings before an immigration judge to determine whether they are entitled to statutory withholding or CAT protection by showing a mere significant possibility that they would be persecuted or tortured. Notably, the higher reasonable fear standard does not apply to the statutory withholding and CAT protection screening for all aliens subject to expedited removal under INA § 235. This higher standard applies only to aliens subject to the mandatory bar in 8 C.F.R. § 208.13(c)(3), as stated in the new § 208.30(e)(5). All other aliens need only show a credible fear of persecution or torture to pass the screening to be considered by an immigration judge for statutory withholding and CAT.

An asylum officer "must evaluate whether there is a reasonable possibility that the alien will be persecuted or tortured, not a reasonable possibility that the alien will more likely than not be persecuted or tortured," the guidance states. The USCIS guidance sets forth details on how the new screening process will proceed depending on the circumstances.

Lawsuit. As noted above, the ACLU, SPLC, and CCR have filed a federal lawsuit challenging the asylum proclamation and rule, charging that the Trump administration violated the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA). The case, *East Bay Sanctuary Covenant v. Trump*, was filed in federal court in San Francisco. It was brought on behalf of East Bay Sanctuary Covenant, Al Otro Lado, Innovation Law Lab, and the Central American Resource Center in Los Angeles.

Plaintiffs argue that together, the rule and proclamation "bar people from obtaining asylum if they enter the United States somewhere along the southern border other than a designated port of arrival, in direct violation of Congress's clear command that manner of entry cannot constitute a categorical asylum bar." In addition, the complaint states, the government published the rule "without the required procedural steps and without good cause for immediately putting the rule into effect." Plaintiffs seek a declaration that these actions violate the INA and APA, and an order enjoining the proclamation and rule.

The presidential proclamation is at https://www.whitehouse.gov/presidential-actions/presidential-proclamation-ad

dressing-mass-migration-southern-border-united-states/. The interim final rule is at https://www.gpo.gov/fdsys/pkg/FR-2018-11-09/pdf/2018-24594.pdf. The EOIR guidance is at https://www.justice.gov/eoir/page/file/1109531/download. The USCIS guidance is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-09-PM-602-0166-Procedural_Guidance_for_Implementing_Regulatory_Changes_Created_by_Interim_Final_Rule.pdf. The ACLU statement is at https://www.aclu.org/news/groups-file-federal-lawsuit-challenging-new-trump-asylum-ban. The complaint is at https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-complaint.

Back to Top

DOL To Implement New LCA Form

The Department of Labor (DOL) announced several revisions to Form ETA-9035, the Labor Condition Application (LCA) for H-1B, H-1B1, and E-3 employment. Employers use the LCA to disclose the wages offered to professional temporary workers, as well as the prevailing wages for their occupation in the area of employment. The DOL has advised that a new LCA form incorporating these revisions will be fully implemented on November 19, 2018.

Important changes to the LCA form include requiring employers to indicate whether the H-1B, H-1B1, or E-3 worker will be placed at a third-party worksite, and requiring disclosure of the name and address of the third-party organization. The revised form will require employers to identify all intended places of employment and estimate the total number of foreign workers at each anticipated worksite. The new form also institutes additional requirements for H-1B dependent employers and willful violators.

Even if employers do not regularly place workers at worksites they do not control, they should consider the impact of the new rule on H-1B sponsorship by their contractors, the Alliance of Business Immigration Lawyers (ABIL) notes. If a vendor supplies workers to the employer as a contractor, that employer's name will now be publicly disclosed by the Department of Labor. Employers who want to review their contractual arrangements with vendors who sponsor workers from abroad should contact their local ABIL attorney.

As of November 19, 2018, the new LCA form will become mandatory, meaning that H-1B,
H-1B1, and E-3 employers filing an LCA on or after November 19 must use the revised form and comply with the new third-party worksite disclosure requirements. Certified LCAs submitted before November 19 will remain valid until they expire.

This revised LCA form marks the first time that the DOL has inquired in detail about third-party placements and required H-1B employers to disclose end-client or vendor names. Earlier this year, in a February 2018 policy memorandum, USCIS enacted similar requirements for H-1B petitions involving third-party worksites. The DOL states that these heightened requirements for H-1B third-party worksite petitions are aligned with the DOL's June 6, 2017, news release directing agencies to increase protections for U.S. workers and "aggressively confront visa program fraud and abuse."

The new LCA form and instructions are at https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201805-1205-001&icID=13104. The February 2018 policy memo is at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf. The June 2017 news release is at https://www.dol.gov/newsroom/releases/opa/opa20170606.

Back to Top

USCIS, CBP Extend Form I-129 Pilot Program for Canadian L-1 Nonimmigrants

U.S. Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (CBP) are extending the joint agency pilot program for Canadian citizens seeking L-1 nonimmigrant status under the North American Free Trade Agreement (NAFTA) through April 30, 2019. Earlier this year, the USCIS California Service Center (CSC) and the CBP Blaine, Washington, port of entry (POE) announced this pilot program, which was scheduled to run from April 30, 2018, through October 31, 2018.

The pilot program allows, but does not require, Canadian citizens to request that USCIS remotely adjudicate their petitioning employer's Form I-129 or I-129S before their arrival or when they arrive at the Blaine POE. USCIS continues to encourage these Canadian citizens and their petitioning

employers to email public.engagement@uscis.dhs.gov with feedback on their experience with the pilot program. Over the next six months, USCIS said, it and CBP will continue to work together to determine the efficiency of the program, identify shortcomings, and look for ways to improve it.

The latest USCIS announcement is at https://www.uscis.gov/news/alerts/uscis-and-cbp-extend-form-i-129-pilot-program-canadian-l-1-nonimmigrants. More information on the pilot program is at https://www.uscis.gov/working-united-states/information-employers-employees/form-i-129i-129s-pilot-program-canadian-l-1-nonimmigrants. The earlier pilot program announcement is at https://www.uscis.gov/news/alerts/uscis-and-cbp-implement-form-i-129-pilot-program-canadian-l-1-nonimmigrants.

Back to Top

Payment Methods Change at Two USCIS Los Angeles Field Offices

Effective November 5, 2018, applicants, petitioners, or other requesters who are paying a filing fee at the U.S. Citizenship and Immigration Services (USCIS) Los Angeles Field Office and Los Angeles County Field Office can no longer pay by money order or cashier's check. They can still pay by check, debit card, credit card, or reloadable pre-paid credit or debit card, which USCIS personnel will process through a new electronic system. USCIS is launching a pilot at these two field offices to test electronic payment processing, which will increase transaction security and reduce processing errors that could cause USCIS to reject applications and petitions. Other than limiting the types of payment USCIS will accept through this new system, applicants will not experience a change in how they pay their fees, the agency said.

USCIS said it will inform anyone who has made an appointment at these two field offices that the agency is no longer accepting money orders or cashier's checks for in-person fee payments, but it will continue to accept personal, attorney, and business checks.

USCIS will update rejection notices to alert applicants who have mailed in their fees to the Los Angeles Field Office or Los Angeles County Field Office to explain that it no longer accepts these payment methods.

The agency said it will analyze how the electronic payment process works in these two offices before deciding whether to implement the changes more

broadly.

The USCIS notice is at https://www.uscis.gov/news/alerts/fee-payment-changes-two-uscis-los-angeles-field-offices.

Back to Top

USCIS Reissues Receipt Notices for Extensions of Conditional Permanent Resident Status

On October 16, 2018, U.S. Citizenship and Immigration Services (USCIS) began issuing new receipt notices for certain Forms I-751, Petition to Remove Conditions on Residence, to replace previously issued receipt notices containing inaccurate information.

In August 2018, USCIS issued receipt notices for certain pending I-751 petitions to extend conditional permanent resident (CPR) status from 12 months to 18 months. USCIS said it issued these receipt notices to provide an additional six months of CPR status to the I-751 petitioners while they continue to wait for their petitions to be adjudicated. Some of the receipt notices contained incorrect information that does not affect the extension of the CPR status, USCIS noted.

Petitioners who received incorrect receipt notices will receive corrected ones shortly, USCIS said. The agency asks those who have not received a corrected receipt notice by November 15, 2018, to notify the USCIS Contact Center at https://www.uscis.gov/contactcenter.

The USCIS notice, which includes additional details depending on the situation, is at https://www.uscis.gov/news/alerts/uscis-reissues-receipt-notices-extensions-conditional-permanent-resident-status.

Back to Top

Construction Begins on New USCIS Texas Service Center

U.S. Citizenship and Immigration Services (USCIS), the General Services Administration (GSA), and federal contractor Trammell Crow Company and Gensler broke ground on October 12, 2018, on the future home of the Texas Service Center (TSC) at the northwest corner of President George Bush Turnpike and Beltline Road in Irving, Texas, near Dallas/Fort Worth

International Airport.

The TSC will be the sole occupant of the planned 267,000-square-foot building, housing approximately 1,000 employees who currently work in three buildings on two campuses that are 17 miles apart. The consolidation is anticipated to take place in spring 2020.

According to USCIS, the TSC processed more than 1 million requests per year for the last five fiscal years.

USCIS has five service centers that provide immigration benefits for petitions that do not require interviews: California Service Center, Nebraska Service Center, Potomac Service Center, Texas Service Center, and Vermont Service Center.

The USCIS announcement is at https://www.uscis.gov/news/news-releases/construction-begins-new-home-uscis-texas-service-center.

Back to Top

USCIS Expands 'Modernization Program' to Detroit, Los Angeles

U.S. Citizenship and Immigration Services (USCIS) is expanding its Information Services Modernization Program to key field offices, beginning with the Detroit Field Office and the five offices in the Los Angeles District. Field offices in the Newark, Great Lakes, and San Francisco districts will implement the program during the first quarter of fiscal year (FY) 2019. USCIS anticipates expanding the program to all remaining field offices by the end of FY 2019.

The program ends self-scheduling of InfoPass appointments and instead encourages applicants to use USCIS online information resources to view general how-to information and check case status through the USCIS Contact Center. Under the program, applicants can obtain their case status and other immigration information without having to visit a local field office.

Based on surveys and other data, USCIS determined that most people who made in-person information service appointments through InfoPass could have received the same information by calling the USCIS Contact Center or checking the USCIS website. When it is determined that an applicant needs in-person assistance under the program, personnel at the USCIS Contact Center will help schedule an appointment without the individual having to search for available

timeslots, USCIS said.

Early results indicate that the program "provides essential assistance while saving the public time and effort. The program will also allow USCIS to better align resources to reduce case processing times," USCIS said.

The USCIS announcement is at https://www.uscis.gov/news/news-releases/uscis-expand-information-services-modernization-program-key-locations.

Back to Top

Firm in the News

Cyrus Mehta was quoted by *The Times of India* in an article entitled "Band, baaja, baarat smoothens entry in US for Indian spouses". The article is at https://timesofindia.indiatimes.com/india/band-baaja-baarat-smoothens-entry-in-us-for-indian-spouses/articleshow/66493981.cms

Mr. Mehta was a guest speaker on a panel entitled “Ethics” at the 2018 Northeast Attorney Conference, Fragomen Worldwide, in New York, NY, on November 5, 2018.

Cyrus Mehta was quoted by *The Times of India* in an article entitled "Consulting, audit companies biggest users of H-1Bs in last five years". The article is at https://timesofindia.indiatimes.com/business/india-business/consulting-audit-firms-biggest-users-of-h-1bs/articleshow/66484570.cms

Back to Top