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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE AUGUST 27, 2019

Posted on August 27, 2019 by Cyrus Mehta

Headlines:

New DOJ Interim Rule, Effective Immediately, Makes Significant Changes to EOIR – A new Department of Justice interim rule, effective August 26, 2019, and published on the same day, makes significant changes to several components of the Executive Office for Immigration Review (EOIR) and its lines of authority. The immigration judges' union immediately protested.

18 Attorneys General Challenge Sweeping Expansion of Expedited Removal – Eighteen attorneys general have filed an amicus brief challenging a new DHS expansion of expedited removal of undocumented immigrants. The signers support a preliminary injunction to bar implementation while the court case is proceeding. The American Civil Liberties Union also has filed a federal lawsuit.

USCIS Issues Guidance on Discretionary Employment Authorization for Foreign Nationals Paroled Into the United States – The policy guidance includes a list of positive and negative factors an officer may consider when "balancing the totality of the circumstances and determining whether an applicant warrants a favorable exercise of discretion."

Controversial New Rule Allows Indefinite Detention of Minors, Families – The Departments of Homeland Security and Health and Human Services announced a final rule, effective October 22, 2019, to terminate the *Flores* settlement agreement and "ensure the humane detention of families." Many advocates and others expressed concern.

Firm in the News

New DOJ Interim Rule, Effective Immediately, Makes Significant Changes

to EOIR

A new Department of Justice interim rule, effective August 26, 2019, and published on the same day, makes significant changes to several components of the Executive Office for Immigration Review (EOIR) and its lines of authority.

Among other things, the interim rule:

- Outlines the functions and roles of the new Office of Policy and transfers the Office of Legal Access Programs (OLAP) to a division in the Office of Policy.
- Delegates authority from the Attorney General to the EOIR Director when appeals pending before the Board of Immigration Appeals (BIA) have not been "timely resolved in order to allow more practical flexibility in efficiently deciding appeals." Specifically, the rule states that with limited exceptions, appeals assigned to a single Board member must be adjudicated within 90 days of completion of the record, and appeals assigned to a three-member panel must be completed within 180 days after assignment. Appeals not completed within these time limits that are not subject to an exception will be assigned by the BIA Chairman either to him- or herself or to a Vice Chairman for a final decision within 14 days, "or the Chairman shall refer them to the Attorney General."
- Distinguishes functions performed by the Office of Policy and the Office of the General Counsel (OGC). Specifically, the rule transfers some of OGC's current programs to the Office of Policy. The rule explains that the General Counsel, subject to the supervision of the Director, remains the chief legal counsel and supervisor of legal activities related to specific categories of issues, but expressly provides that the General Counsel "does not have authority to influence the adjudication of specific cases under the , including as an advisor on disciplinary matters related to the adjudication of cases under the INA. It also explains that the General Counsel may continue to advise on matters of immigration law, provided that the advice does not direct or influence specific adjudications under the Act."
- Changes the titles of members of the BIA. Specifically, the rule provides that members of the Board will also be known as "Appellate Immigration Judges."

The rule states that it is exempt from the usual requirements of prior notice

and comment and a 30-day delay in effective date because it is an "internal delegation of administrative authority." The DOJ said it is providing an opportunity for "post-promulgation comment" before the final rule is issued. Written comments must be received by October 25, 2019.

Reaction. Ashley Tabaddor, president of the National Association of Immigration Judges (NAIJ), called the new interim rule "an unprecedented attempt at agency overreach" and said that it "ends any transparency and assurance of independent decision making over individual cases." Characterizing the new rule as a "wolf in sheep's clothing," Ms. Tabaddor said that although the rule is "couched in bureaucratic language, the impact of this regulation is to substitute the policy directives of a single political appointee over the legal analysis of non-political, independent adjudicators." She said NAIJ would "provide a more detailed analysis in the days ahead," noting that NAIJ received notice of the action on the same day the press was advised.

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18 Attorneys General Challenge Sweeping Expansion of Expedited Removal

Eighteen attorneys general have filed an amicus brief challenging a new Department of Homeland Security expansion of expedited removal of undocumented immigrants. The new rule, released in July, allows for any undocumented immigrant who cannot show that he or she has been in the United States at least two years to be removed from the United States without access to an immigration court. Under the prior system, only immigrants in the United States for less than two weeks who were caught within 100 miles of the border were subject to expedited removal. The signers of the amicus brief support a preliminary injunction to bar implementation while the court case is proceeding. The American Civil Liberties Union also has filed a federal lawsuit.

The attorneys general are from California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington, in addition to Washington, DC. New York's attorney general, Letitia James, released a statement noting that the new policy "significantly increases the risk that people will be erroneously deported" and that for those in proceedings, "virtually eliminates access to the protections afforded during formal

immigration hearings." The statement notes that because of the policy, mixed-status households may be separated with little or no time to prepare and that immigrants may be "even less likely to report crime or exploitation or seek needed medical care, negatively affecting both public safety and health." The statement also notes that the policy "could have a substantial economic impact on New York and other states."

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USCIS Issues Guidance on Discretionary Employment Authorization for Foreign Nationals Paroled Into the United States

U.S. Citizenship and Immigration Service (USCIS) recently issued policy guidance on its discretion to grant employment authorization to foreign nationals paroled into the United States, including those who are otherwise inadmissible.

The agency noted that employment authorization for such parolees is not automatic and that the agency "will only consider employment authorization for parolees when, based on the facts and circumstances of each individual case, USCIS finds that a favorable exercise of discretion is warranted." The policy guidance includes a list of positive and negative factors an officer may consider when "balancing the totality of the circumstances and determining whether an applicant warrants a favorable exercise of discretion."

USCIS said the policy update does not affect individuals paroled into the United States under the International Entrepreneur Rule. Such parolees are authorized to work based on their parole under current Department of Homeland Security regulations governing the International Entrepreneur parole program.

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Firm in the News:

David Isaacson, authored a new blog entry. " 'An Act of Cruel Injustice': If the Trump Administration is Relying on Grudging Court Acceptance of Cruel Results as Support for the New Public Charge Rule, What Does That Say About the Rule?" https://bit.ly/2ZuIASM.

Cyrus Mehta was quoted in a Time of India article entitled *The Long, Winding Road to H-1B Just Got Narrower*, https://timesofindia.indiatimes.com/business/india-business/the-long-winding-r

oad-to-h-1b-just-got-narrower/articleshow/70751436.cms