



IMMIGRATION UPDATE- NOVEMBER 25, 2019

Posted on November 26, 2019 by Cyrus Mehta

Headlines:

Despite Courts Enjoining DHS Public Charge Rule, State Department Proceeding with Implementing its Own Version – Four courts issued injunctions against the controversial rule, two of which were nationwide, and one of which barred USCIS from issuing new forms related to the rule.

DHS Secretary Resigns – After only serving six months as Acting Secretary, Kevin McAleenan resigned from the position, which has been held by four different individuals during the Trump administration.

Immigrants Lead the Way for America in the Awarding of Nobel Prizes– Four immigrants to the United States have been named Nobel laureates for 2019.

Trump Administration Attempts Bar on Immigrants Lacking Health Insurance, but Judge Issues TRO – Applicants who receive an immigrant visa after the order goes into effect on November 3rd need to demonstrate that upon entry, they will have insurance in place within a month before issuance of the visa.

USCIS Indicates H-1B Registration Tool Must Pass Testing to Take Effect in 2020 – Ken Cuccinelli announced during a speech at SHRM's Global Mobility and Immigration Symposium in Washington D.C. that the new H-1B online cap registration tool must demonstrate its ability through the testing phase before it can be in place before the beginning of the next filing season early next year..

DOS Releases Instructions for the 2021 Diversity Immigrant Visa Program – The Department of State (DOS) has released instructions outlining how to apply for the 2021 Diversity Immigrant Visa Program, which provides 55,000 diversity visas to individuals from countries which historically have low rates of

immigration to the United States.

ABIL Global: Brexit No-Deal Contingency Plans: An Overview – This article provides an overview of contingency plans in several countries in the event of a possible "no-deal Brexit."

Firm in the News...

Despite Courts Enjoining DHS Public Charge Rule, State Department Proceeding with Implementing its Own Version.

Last month, four courts issued injunctions barring the Trump Administration from implementing the controversial public charge rule that would dramatically change the way immigration law operates in the United States. Two of the courts issued nationwide injunctions. One barred USCIS from using forms released at the last minute and another issued an injunction limited to just the West Coast states. USCIS quickly took down the new forms from its web site.

With one week's notice, the State Department recently made the surprising move of releasing an interim public charge final rule. The short notice caught immigration lawyers off guard, and many are concerned that there will not be enough time to convince a court to stop the rule from going into force. DOS indicated the day of the USCIS rule being blocked that it would ignore what the courts have said about the DHS rule and would implement their rule at midnight on October 15, 2019 even though it had not issued any guidance on how it plans to implement its new rule. However, on October 15th, a State Department official told CBS News that it has now decided to delay implementation of the rule until a new form is issued. In the meantime, the State Department rule is expected to face a legal challenge.

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DHS Secretary Resigns

After just six months serving as Acting DHS Secretary, Kevin McAleenan handed in his resignation last month. McAleenan was the fourth DHS Secretary of the Trump Administration. He focused his time at the agency cracking down on asylum applicants and reducing overall entries to the US. While McAleenan considered himself successful at the agency, he was said to have had an embattled relationship with a White House taking increasingly extreme positions on immigration. McAleenan offered to stay on the job until the end of

October and DHS was still promoting McAleenan's activities several days after his resignation announcement.

As for a replacement for McAleenan, no name has yet been provided by the Administration, though some are speculating it will be USCIS Ken Cuccinelli. Cuccinelli would likely face a very tough confirmation battle in the Senate. Of late, the Trump Administration has simply been appointing key appointees as "Acting" Directors and Secretaries. The Federal Vacancies Act dictates who can be appointed to acting and interim positions and Cuccinelli's USCIS appointment appears to violate the law and potentially providing a legal argument to someone seeking to challenge actions taken by USCIS. Trump has named Chad Wolf as his choice to replace McAleenan, though Wolf still must receive Senate confirmation.

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Immigrants Lead the Way for America in the Awarding of Nobel Prizes

Four immigrants to the United States have been named Nobel laureates for 2019. They include French-born Esther Duflo and Indian-born Abhijit Banerjee in the field of economics. British immigrant M. Stanley Whittingham won for chemistry and Canadian-born James Peebles won for physics.

According to Stuart Andersen at the National Foundation for American Policy, nearly 40% of Nobel Prizes awarded to Americans in Chemistry, Physics and Medicine since 2000 have been awarded to immigrants.

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Trump Administration's Announced Bar on Immigrants Lacking Health Insurance Temporarily Halted by Court

In early October, Donald Trump issued a proclamation blocking the admission of individuals applying for immigrant visas who cannot demonstrate their ability to acquire health insurance within 30 days of their entrance into the United States. Any applicants who receive an immigrant visa after the order was to go into effect on November 3rd would need to demonstrate when applying for a visa that within 30 days of entering the United States, they would have insurance in place. Individuals who were issued immigrant visas prior to November 3rd but entering after that date are not covered by the proclamation.

Under the executive action, approved health insurance coverage includes coverage under any of the following plans:

- an employer-sponsored plan, including a retiree plan, association health plan, and coverage provided by the Consolidated Omnibus Budget Reconciliation Act of 1985;
- an unsubsidized health plan offered in the individual market within a State;
- a short-term limited duration health policy effective for a minimum of 364 days — or until the beginning of planned, extended travel outside the United States;
- a catastrophic plan;
- a family member's plan;
- a medical plan under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;
- a visitor health insurance plan that provides adequate coverage for medical care for a minimum of 364 days — or until the beginning of planned, extended travel outside the United States;
- a medical plan under the Medicare program; or
- any other health plan that provides adequate coverage for medical care as determined by the Secretary of Health and Human Services or his designee.

For individuals over the age of 18, Medicaid is not considered acceptable health insurance coverage.

The Trump Administration is basing the action on Section 212(f) of the Immigration and Nationality Act which permits the President to bar the entry of people deemed to be detrimental to the interests of the United States. This is the section of the law used to justify the travel ban. Critics are already arguing that extending this provision beyond physical security issues is impermissible and a court challenge is expected soon.

A Federal Judge has issued a Temporary Restraining Order on the policy, which prevent its implementation for at least 28 days as of its issuance on November 2.

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USCIS Indicates H-1B Registration Tool Must Pass Testing to Take Effect in

2020

Ken Cuccinelli, Acting Director of United States Citizenship and Immigration Services (USCIS) announced during a speech at SHRM's Global Mobility and Immigration Symposium in Washington D.C. that the new H-1B online cap registration tool must demonstrate its ability through the testing phase before it can be in place before the beginning of the next filing season early next year. The new H-1B cap registration program would require employers seeking to file H-1B cap cases to register online in order to enter the H-1B lottery. Employers would then be allowed to file full petitions exclusively for registrations selected in the lottery, which would have to be filed with USCIS during a period of at least 90 days. A \$10 processing fee is applicable to all H-1B petitions at the time of submission. The primary concern is the system's ability to manage the volume that it is expected to face; a legitimate concern which could result in the program being removed altogether.

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DOS Releases Instructions for the 2021 Diversity Immigrant Visa Program

The Department of State (DOS) annually allocates visas for a class of immigrants known as "diversity immigrants" from countries with historically low rates of immigration to the United States. For Fiscal Year 2021, there will be 55,000 Diversity Visas (DVs) available at no cost.

Requirement 1: Individuals from eligible countries may qualify. The full list of eligible countries can be found beginning on page 16 of the [DOS announcement](#).

If not born in an eligible country, there are two other possible ways to qualify.

1. If your spouse was born in an eligible country.
2. If you were born in an ineligible country in which neither of your parents was born or legally resident at the time of your birth, you may claim the country of birth of one of your parents if it is a country whose natives are eligible for the DV program.

Requirement 2: Diversity Visa applicants must adhere to the education work requirement of the program by having either:

1. A minimum of a high-school or its equivalent, defined as successful completion of a 12-year course of formal elementary and secondary education;

OR

2. A minimum of two years of work experience within the past five years in an occupation which requires at least two years of training or experience to perform.

ABIL Global: Brexit No-Deal Contingency Plans: An Overview

This article provides an overview of contingency plans in several countries in the event of a possible "no-deal Brexit."

Belgium

The federal Belgian authorities have prepared emergency legislation for a no-deal Brexit.

An Act dated April 3, 2019 (hereafter "the Brexit Act") regulates the right to reside in Belgium for United Kingdom (UK) citizens and their family members between, in principle, the withdrawal date and December 31, 2020. Apart from one section regarding economy/insurance, the Brexit Act, and thus also its immigration rules, will take effect on the date confirmed by Royal Decree. This date will, logically speaking, be the withdrawal date in the event of a no-deal Brexit. The Brexit Act immigration rules will cease to be applicable on December 31, 2020, or an earlier date confirmed by Royal Decree.

The Belgian government has not yet issued a Royal Decree to confirm the date on which the Brexit Act will take effect. They await the outcome of the pending Brexit discussions.

The Brexit Act immigration rules can be annulled, amended, completed, or replaced by a Royal Decree. They can, in principle, be summarized as follows:

- UK citizens and their family members who hold a right to reside in Belgium before the withdrawal date maintain this right after the withdrawal date. Residence permits expiring between the withdrawal date and, in principle, December 31, 2020, will be extended until, in principle, December 31, 2020;
- UK citizens and their family members who do not yet have a Belgian

residence permit should apply for a residence permit prior to the withdrawal date. Applications that are still pending on the withdrawal date will be processed under the pre-Brexit rules;

- Applications for residence permits filed after the withdrawal date will be processed according to the rules for third-country nationals, unless these applications are filed by family members of UK citizens, who are eligible to reside under the above-mentioned rules (they hold a right to reside on the withdrawal date or they have filed a residence permit application before the withdrawal date).

The Belgian government has also prepared Royal Decrees granting the right to work to UK citizens who reside in Belgium on the withdrawal date and who can continue to reside in Belgium after Brexit pursuant to the Brexit Act, until, in principle, December 31, 2020. This legislation has not yet been approved.

For UK citizens not protected by the Brexit Act, all three regions (Flanders, Brussels, and Wallonia) have implemented a three-month work permit (for employees)/professional card (for self-employed) exemption during the transition period, i.e., between the withdrawal date and December 31, 2020.

The Flanders region has issued a no-deal Brexit decree, dated March 22, 2019. This decree holds that "a provision...exempts UK nationals who wish to pursue economic activities on the territory of the Flemish Region after Brexit from a work permit or professional card during the transition period, provided their performance is limited to a maximum of ninety days. If their performance exceeds the maximum of ninety days, UK nationals will have to request a work permit or professional card, according to the procedure for third country nationals. However, an accelerated procedure will then be provided."

A similar provision is included in a decree for the Walloon region, dated April 4, 2019: during the transition period (this means until December 31, 2020), UK nationals can work as an employee or self-employed without a work permit or professional card, provided their work in the Walloon region does not exceed 90 days.

A similar short-term exemption during the transition period in a no-deal scenario has been implemented by a decree for the Brussels region, dated March 28, 2019. The text states that the exemption can be invoked "for a term of maximally 90 days, starting at the latest on 31 December 2020, in any 180-day period...provided a reciprocity measure exists."

Italy

With decree 25 March 2019, n. 22, the Italian government has outlined the measures that will apply if the United Kingdom (UK) leaves the European Union (EU) without a deal. In particular, article 14 refers to the residency rights of British nationals and their non-EU family members living in Italy, and article 15 refers to Italian citizenship applications. The legislative measures taken by the Italian government ensure that UK nationals legally resident in Italy at the time of Brexit will have the right, and sufficient time, to obtain long-term resident status under EU Directive 2003/109.

United Kingdom

On the same day the House of Commons voted to try and rule out the possibility of a no-deal Brexit, the Home Office released on September 5, 2019, an updated policy paper on no-deal immigration arrangements for EU citizens arriving after Brexit, currently scheduled for October 31, 2019.

In a no-deal scenario, EU citizens resident in the UK before that date are expected to be able to continue to reside in the UK and apply under the EU Settlement Scheme. On that basis, practitioners are advising that when possible EU citizens wishing to reside in the UK seek to arrive in the UK before October 31, 2019.

There has been ongoing uncertainty. For example, since August 19, 2019, when Home Secretary Priti Patel announced that there would effectively be an end to free movement after October 31, 2019, there has been concern in relation to what will happen to EU citizens who arrive in the UK for the first time after October 31, 2019, if there is a no-deal Brexit.

Firm in the News:

Cyrus Mehta was quoted by *Forbes* in an article entitled "*Companies Say U.S. Consulate In India Denies L-1 Visas At Alarming Rate*". The article is at <https://www.forbes.com/sites/stuartanderson/2019/11/18/companies-say-us-consulate-in-india-denies-l-1-visas-at-alarming-rate/#2afd3696e0aa>

Cyrus Mehta was quoted by *India West* in an article entitled "*In Long-Awaited Decision, DC Circuit Court Finds American Workers Unfairly Impacted by H-4 Work Authorization*". The article is at https://www.indiawest.com/news/global_indian/in-long-awaited-decision-dc-cir

[cuit-court-finds-american-workers/article_b958fea2-0583-11ea-9afc-c7aab4df221f.html](#)

Cyrus Mehta spoke on panels entitled "*Hot Topics* and *A Ship Without a Captain: Is Anyone a Manager or Executive?*" at the 2019 AILA Latin American and Caribbean Chapter Conference, Quito, Ecuador, on November 22, 2019.

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