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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE- DECEMBER 18, 2019

Posted on December 18, 2019 by Cyrus Mehta

Headlines

Possible Retrogression in EB-2 Worldwide and EB-3 Worldwide in January – This year retrogression in the employment-based second and third preference visa categories may come much earlier than usual.

House Passes Bill to Address Labor Shortage in Agriculture; Senate Prospects Unclear – Among other things, the bill would provide a path to legal status for agricultural laborers, allowing additional green cards, and making it easier to hire H-2A workers.

USCIS Announces Implementation of H-1B Electronic Registration for FY 2021 Cap Season – USCIS will open an initial registration period from March 1 through March 20, 2020.

USCIS Expands Guidance on 'Good Moral Character' Determinations – Among other things, the updates to the agency's Policy Manual provide additional examples of unlawful acts and instructions for USCIS adjudicators, and further identify unlawful acts that may affect good moral character determinations based on judicial precedent.

Two Courts Grant Trump Administration's Motions on Public Charge Inadmissibility Determinations Rule Challenge – Related litigation continues in other courts.

U.S. Grounds Hundreds of Saudi Aviation Students After Pensacola Attack – According to reports, the "pause" affects more than 800 students nationwide, although they are permitted to continue attending classroom training.

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Possible Retrogression in EB-2 Worldwide and EB-3 Worldwide in January

Charles Oppenheim, a Department of State spokesperson, has warned that this year retrogression in the employment-based second and third preference visa categories may come much earlier than usual. Historically, these categories have become backlogged in late summer shortly before the end of the federal fiscal year but remained current most of the rest of the year.

While EB-2 and EB-3 Worldwide are presently listed as Current, Section E of the December 2019 Visa Bulletin warned that "a steadily increasing level of Employment-based demand for adjustment of status cases" at U.S. Citizenship and Immigration Services could require establishment of Final Action Dates in the EB-2, EB-3, and EB-3 Other Worker categories as early as January 2020. Mr. Oppenheim noted that if the demand subsides—a temporary effect of clearing the pent-up demand from this summer's retrogressions—these categories could remain Current.

The Alliance of Business Immigration Lawyers recommends that clients consider filing any eligible EB-2 Worldwide and EB-3 Worldwide adjustment-of-status applications before the end of the calendar year.

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House Passes Bill to Address Labor Shortage in Agriculture; Senate Prospects Unclear

By a bipartisan vote of 260-165, the U.S. House of Representatives passed legislation intended to ease the agricultural labor shortage by providing a path to legal status for agricultural laborers, allowing additional green cards, and making it easier to hire H-2A workers. The bill would also make E-Verify mandatory nationwide for farm employers and cap workers' wages, among other things.

The bill establishes a "certified agricultural worker (CAW)" status. The bill states that the Department of Homeland Security (DHS) may grant CAW status to an applicant who (1) performed at least 1,035 hours of agricultural labor during the two-year period before October 30, 2019, (2) was inadmissible or deportable on that date, and (3) has been continuously present in the United States from that date until receiving CAW status. The bill would impose additional crime-related inadmissibility grounds on CAW applicants and make some other grounds inapplicable. CAW status would be valid for 5.5 years and could be extended, and DHS could grant dependent status to the spouse or

children of a principal alien.

The bill makes various changes to the H-2A program, such as (1) modifying the method for calculating and making adjustments to the H-2A worker minimum wage, (2) specifying how an employer may satisfy requirements that it attempted to recruit U.S. workers, (3) requiring H-2A employers to guarantee certain minimum work hours, and (4) making the program available for year-round agricultural work and reserving a visa allocation for the dairy industry.

The bill also calls for DHS to establish a pilot program allowing certain H-2A workers to apply for "portable" status, which gives the worker 60 days after leaving a position to secure new employment with a registered H-2A employer.

Prospects in the Senate are unclear. Reportedly, some Republicans object to the legislation's wage calculation formula and provision of "amnesty" to undocumented farmworkers, and a lack of inclusion of the meat and poultry sectors.

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USCIS Announces Implementation of H-1B Electronic Registration for FY 2021 Cap Season

U.S. Citizenship and Immigration Services (USCIS) announced that it has completed a pilot-testing phase and is implementing an electronic registration process for the next H-1B lottery. Employers seeking to file H-1B cap-subject petitions for the fiscal year 2021 cap, including those eligible for the advanced degree exemption, must first electronically register and pay the associated $10 H-1B registration fee. USCIS will open an initial registration period from March 1 through March 20, 2020.

Under the new process, USCIS said, employers seeking H-1B workers subject to the cap, or their authorized representatives, will complete a registration process that requires only basic information about their company and each requested worker. After the initial registration period, the H-1B random selection process, if needed, will be run on those electronic registrations. Only those with selected registrations will be eligible to file H-1B cap-subject petitions. The agency may determine that it is necessary to continue accepting registrations, or open an additional registration period, if it does not receive enough registrations and subsequent petitions projected to reach the numerical allocations.

USCIS said it will post step-by-step instructions on its website along with key dates and timelines as the initial registration period nears. USCIS will also conduct public engagements and other outreach activities.

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USCIS Expands Guidance on 'Good Moral Character' Determinations

U.S. Citizenship and Immigration Services (USCIS) recently expanded its policy guidance on good moral character (GMC) determinations.

On December 13, 2019, USCIS expanded its policy guidance regarding unlawful acts that may prevent an applicant from meeting the GMC requirement for naturalization. USCIS said this update to its Policy Manual provides additional examples of unlawful acts and instructions for USCIS adjudicators, and further identifies unlawful acts that may affect GMC determinations based on judicial precedent. USCIS said this update does not change the impact of an unlawful act on the agency's analysis of whether an applicant can demonstrate GMC. Adjudicators "are not limited by the examples listed in the Policy Manual," USCIS noted.

On December 10, 2019, USCIS issued separate policy guidance in the USCIS Policy Manual about how two or more convictions for driving under the influence (DUI) or post-sentencing changes to criminal sentencing might affect GMC determinations. USCIS said it was implementing two decisions from the attorney general, *Matter of Castillo-Perez* and *Matter of Thomas and Thompson*.

Based on those two decisions, USCIS noted that "hen applying for an immigration benefit for which GMC is required, applicants with two or more DUI convictions may be able to overcome this presumption by presenting evidence that they had good moral character even during the period within which they committed the DUI offenses." Also, USCIS said, "ost-sentencing orders that change a criminal alien’s original sentence will only be relevant for immigration purposes if they are based on a procedural or substantive defect in the underlying criminal proceeding."

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Two Courts Grant Trump Administration's Motions on Public Charge Inadmissibility Determinations Rule Challenge

On December 5, 2019, the U.S. Court of Appeals for the Ninth Circuit granted

the Department of Homeland Security's (DHS) motion for a stay of the preliminary injunctions granted by the U.S. District Courts for the Northern District of California and Eastern District of Washington with respect to a challenge to the Trump administration's public charge inadmissibility determinations rule. On December 9, 2019, the U.S. Court of Appeals for the Fourth Circuit granted DHS's motion for a stay of the preliminary injunction granted by the U.S. District Court for the District of Maryland.

DHS remains bound by a nationwide injunction issued in a case pending before the U.S. District Court for the Southern District of New York and an injunction limited to the state of Illinois pending before the U.S. District Court for the Northern District of Illinois. Related litigation continues before the U.S. Courts of Appeals for the Second and Seventh Circuits.

The final rule being challenged, issued in August 2019, prescribes how DHS would determine whether a person is inadmissible to the United States based on his or her likelihood of becoming a public charge at any time in the future.

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U.S. Grounds Hundreds of Saudi Aviation Students After Pensacola Attack

After an attack on Naval Air Station Pensacola by a Saudi military aviation student that resulted in multiple casualties, the United States has temporarily paused all flying by Saudi aviation students. According to reports, this affects more than 800 students nationwide, although they are permitted to continue attending classroom training.

Defense Secretary Mark Esper reportedly has also ordered a review after the Pensacola shootings.

Details: News report, https://www.bbc.com/news/world-us-canada-50737561

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Firm in the News...

Cyrus Mehta was quoted in a *Bloomberg Law* article entitled "*Trump Policy Limiting H-1B Visas Could Meet Its End in Texas*" on December 17, 2019. The article is at https://news.bloomberglaw.com/daily-labor-report/trump-policy-limiting-h-1b-v

isas-could-meet-its-end-in-texas