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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - JUNE 22, 2020

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Headlines:

Trump Says Proclamation Imminent, May Suspend Entry of Nonimmigrant Workers, With Exceptions – A Presidential Proclamation is expected imminently to suspend the entry of many nonimmigrant workers, possibly until the end of the year.

USCIS Issues New H-1B Policy Memo and Rescinds Two Earlier Memos Following Litigation – USCIS has issued a new memorandum and rescinded two policy memoranda regarding the adjudication of certain petitions for H-1B nonimmigrant classification.

Supreme Court Rules DHS Violated APA, DACA Stands (At Least for Now) – The Court noted in its decision that DHS may rescind DACA and that the dispute instead was primarily about the procedure the agency followed in doing so.

ICE Announces Extension of I-9 Physical Presence Requirement Flexibility for 30 Days – Due to continued precautions related to the COVID-19 pandemic, the policy for employers operating 100 percent remotely in light of COVID-19 is extended to July 19, 2020.

USCIS Eliminates 30-Day Timeframe for Processing Asylee Initial EADs – USCIS plans to eliminate the 30-day timeframe for processing asylum applicants' employment authorization documents, effective August 21, 2020.

State Dept. Faces Backlog in 'Phase One' Reopening of U.S. Passport Operations – DOS reportedly faced a backlog of approximately 1.7 million applications as it began opening passport agencies and centers under Phase One of its reopening plan in response to the COVID-19 pandemic.

DOS Issues Final Rule Changing Special Immigrant 'Exceptional' Criteria – The rule codifies the circumstances that will be considered "exceptional" for

purposes of assessing special immigrant status qualification.

USCIS Extends Transitional Parole in Northern Marianas – Parole and work authorization, if applicable, will be extended through August 17, 2020.

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Trump Says Proclamation Imminent, May Suspend Entry of Nonimmigrant Workers, With Exceptions

A Presidential Proclamation is expected imminently to suspend the entry of many nonimmigrant workers, possibly until the end of the year. In an interview with Fox News on June 20, 2020, President Trump said, "e're going to be announcing something tomorrow or the next day on the visas," although he did not elaborate on exactly what would be included. Asked about possible exceptions, he said, "You need them for big businesses where they have certain people that have been coming in for a long time, but very little exclusion and they're pretty tight. And we may even go very tight for a period of time."

Speculation is focusing on some H-1B, H-2B, J-1, and L-1 visa holders. As far as is known, the proclamation would only affect nonimmigrant workers outside the United States, not those already in the United States. Reportedly, exceptions may include medical workers and those necessary for securing the U.S. food supply chain.

A Presidential Proclamation that took effect April 23, 2020, suspended the entry of many immigrants outside the United States for 60 days, with some exceptions, and noted that it could be modified or extended in the future. At that time, excluded from the ban were lawful permanent residents; those seeking to enter the United States as physicians, nurses, or other healthcare professionals, to perform medical or other research intended to combat the spread of COVID-19; or to perform work essential to combating, recovering from, or otherwise alleviating the effects of, the COVID-19 pandemic; those applying for visas to enter the United States as EB-5 immigrant investors; spouses and children of U.S. citizens; members of the U.S. armed forces; and some others.

Details:

- NPR, "Trump Expected to Suspend H-1B, Other Visas Until End of Year, " https://www.npr.org/2020/06/20/881245867/trump-expected-to-suspend-h-1b-other-visas-until-end-of-year
- S. News & World Report, "Trump Says He Will Announce Visa Restrictions Sunday or Monday: Fox News Interview," https://www.usnews.com/news/top-news/articles/2020-06-20/trump-says-he-will-announce-visa-restrictions-sunday-or-monday-fox-news-interview
- April 2020 Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak, https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/

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USCIS Issues New H-1B Policy Memo and Rescinds Two Earlier Memos Following Litigation

Following up on an agreement resulting from recent litigation, U.S. Citizenship & Immigration Services (USCIS) has issued a new memorandum and rescinded two policy memoranda regarding the adjudication of certain petitions for H-1B nonimmigrant classification:

- Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Jan. 8, 2010), which provided guidance on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period; and
- Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (Feb. 22, 2018), which provided guidance relating to H-1B petitions filed for workers who would be employed at one or more third-party worksites, and was intended to be read together with the 2010 memorandum and as a complement to that policy.

Among other things, the new memo states that evidence of specific day-to-day assignments is not required to establish that a position is in a specialty occupation (the so-called "itinerary" requirement). The memo states that USCIS

will abstain from applying the itinerary requirement "in the limited instance of applicable H-1B applications until the Department of Homeland Security or USCIS issues new adjudicative and/or regulatory guidance on this requirement." However, the memo notes, "officers should continue to apply the itinerary requirement at 8 CFR 214.2(h)(2)(i)(F) for H-1B petitions filed by agents."

The memo also notes that USCIS may issue approvals for H-1B petitions with validity periods shorter than the time period requested by the H-1B petitioner. However, the decision must be accompanied by a brief explanation as to why the validity period has been limited, the memo states. This includes, but is not limited to, instances in which the certified labor condition application has a validity period of shorter duration than that specified on the H-1B petition.

In addition, the memo states that guidance concerning "benching" remains unchanged:

Except in certain limited circumstances, "benching" is prohibited by law to prevent foreign workers from unfair treatment by their employers and to ensure that the job opportunities and wages of U.S. workers are being protected. The failure to work according to the terms and conditions of the petition approval may support, among other enforcement actions, revocation of the petition approval, a finding that the beneficiary failed to maintain status, or both."

Some note that this appears to run counter to the court's reasoning in *IT Serve v. Cissna* and INA section 212(n)(2)(C)(vii)(1). Among other things, Congress permitted employers to place holders of H-1B visas in "non-productive status" as long as the employer continued to pay the approved full-time wage. These observers say that an employer's inability to work but still pay this individual the required wage should not result in jeopardy for the foreign national's status.

Under the recent litigation, USCIS entered into an agreement with ITServe Alliance, Inc., an information technology trade group, to overturn more than 200 H-1B denials. The move came after a federal court ruled in March that USCIS policies narrowly defining employer-employee relationships, as well as other regulatory requirements for H-1B classification, were implemented outside of proper notice-and-comment rulemaking.

Details:

- New USCIS memo (June 17, 2020), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2020/PM-602-0114_ITServeMemo.pdf
- Settlement agreement, https://bit.ly/30Efdhh
- *ITServe Alliance, Inc., v. Cissna*, https://nfap.com/wp-content/uploads/2020/03/ITServe-Order-DDC.pdf
- USCIS February 2018 memo to be rescinded, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," https://bit.ly/3cY3fl1
- Klasko Client Alert, https://bit.ly/3hjsOAm
- National Law Review, "Recent USCIS Settlement Offers Substantial Relief to H-1B Employers," https://www.natlawreview.com/article/recent-uscis-settlement-offers-substantial-relief-to-h-1b-employers

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Supreme Court Rules DHS Violated APA, DACA Stands (At Least for Now)

On June 18, 2020, the Supreme Court ruled that Elaine C. Duke, then-Acting Secretary of the Department of Homeland Security (DHS), violated the Administrative Procedure Act (APA) in 2017 when she rescinded the Deferred Action for Childhood Arrivals (DACA) program, in place since 2012, at the direction of the Attorney General. DACA granted certain people who entered the United States as children the ability to apply for a two-year "forbearance of removal" and to be eligible for work authorization and various benefits. There are approximately 700,000 DACA recipients.

The Court noted in its decision that the Department of Homeland Security may rescind DACA and that the dispute instead was primarily about the procedure the agency followed in doing so. The government had argued that its decision was unreviewable, but the Court disagreed. For several reasons, the Court found the rescission of DACA to be "arbitrary and capricious," noting that "e do not decide whether DACA or its rescission are sound policies," but only "whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do

about the hardship to DACA recipients." The appropriate recourse, the Court found, was "to remand to DHS so that it may consider the problem anew."

USCIS subsequently issued a statement calling DACA recipients "illegal aliens" and asserting that the Court's decision "has no basis in law and merely delays the President's lawful ability to end the illegal amnesty program."

While the conventional wisdom is that it will be easy for Trump to rescind DACA again if he provides a better rationale, there is more to Justice Roberts opinion than meets the eye from page 24 onwards as he faults the administration for not factoring reliance interests. DACA recipients have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on the DACA program. The consequences of the rescission would “radiate outward” to DACA recipients’ families, including their 200,000 US citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. Trump will be smacked down again as justifying the rescission with such heavy duty reliance interests will be a tall order.

According to some observers, it is unlikely that the DACA program can be discontinued this year. Any such effort, and ensuing legal challenges, could take months or years. In the meantime, it is possible that a lower court could open the program once again to new applicants, and a presidential election looms. Stay tuned.

Details:

- Supreme Court's decision, https://www.supremecourt.gov/opinions/19pdf/18-587_5ifl.pdf
- USCIS statement, https://www.uscis.gov/news/news-releases/uscis-statement-supreme-courts-daca-decision

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ICE Announces Extension of I-9 Physical Presence Requirement Flexibility for 30 Days

U.S. Immigration and Customs Enforcement (ICE) announced another extension of physical presence flexibility related to Employment Eligibility Verification (Form I-9) compliance that was granted earlier this year. Due to continued

precautions related to the COVID-19 pandemic, the policy for employers operating 100 percent remotely in light of COVID-19 is extended for an additional 30 days, to July 19, 2020.

On March 19, 2020, due to precautions implemented by employers and employees associated with COVID-19, the Department of Homeland Security (DHS) announced that it would exercise prosecutorial discretion to defer the physical presence requirements associated with the I-9 process. On May 19, DHS extended this policy for an additional 30 days.

Details:

- ICE release announcing extension, https://www.ice.gov/news/releases/ice-announces-another-30-day-extension-flexibility-rules-related-form-i-9-compliance

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USCIS Eliminates 30-Day Timeframe for Processing Asylee Initial EADs

U.S. Citizenship and Immigration Services (USCIS) plans to eliminate the 30-day timeframe for processing asylum applicants' employment authorization documents (EADs), effective August 21, 2020.

USCIS said the 30-day timeframe was imposed by regulation more than 20 years ago, and that USCIS needs sufficient time to receive, screen, and process applications; address national security and fraud concerns; verify identity; and "further deter those who may attempt to defraud the legal immigration system."

The final rule also removes the requirement that asylum applicants submit their work authorization renewal requests to USCIS 90 days before their current employment authorization expires. Under the final rule, asylum applicants will be able to file a renewal work authorization application up to 180 days before the expiration date.

Details:

- USCIS final rule, https://www.govinfo.gov/content/pkg/FR-2020-06-22/pdf/2020-13391.pdf

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State Dept. Faces Backlog in 'Phase One' Reopening of U.S. Passport Operations

The Department of State (DOS) reportedly faces a backlog of approximately 1.7 million applications as it begins opening passport agencies and centers under Phase One of its reopening plan in response to the COVID-19 pandemic. A spokesperson said that was a "slight increase" over the usual monthly amount, and that capacity to handle the backlog is growing.

Passport centers that have reopened recently include Arkansas; Atlanta, Georgia; Boston, Massachusetts; Buffalo, New York; Chicago, Illinois; Colorado; Connecticut; Dallas, Texas; Detroit, Michigan; El Paso, Texas; Honolulu, Hawaii; Houston, Texas; Los Angeles, California; Miami, Florida; Minneapolis, Minnesota; National Passport Center (Portsmouth, New Hampshire); New Orleans, Louisiana; New York; Philadelphia, Pennsylvania; San Diego, California; San Francisco, California; San Juan, Puerto Rico; Seattle, Washington; Vermont; Washington; Western Passport Center; and Special Issuance Agency (Washington, DC).

Details:

- DOS announcement on reopening of passport operations, which includes details on COVID-19-related restrictions, https://travel.state.gov/content/travel/en/passports/get-fast/passport-agencies.html
- State Dept. Reopens 11 Passport Services Sites, Confronts Million-Case Backlog, https://federalnewsnetwork.com/workforce/2020/06/state-dept-reopens-11-passport-services-sites-confronts-million-case-backlog/

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DOS Issues Final Rule Changing Special Immigrant 'Exceptional' Criteria

The Department of State (DOS) has published a final rule, effective December 16, 2020, that codifies in regulation the eligibility criteria for special immigrant status and the application process. The final rule states that special immigrants are those who have been employed by, and "performed faithful service for," the U.S. government abroad for at least 15 years, along with their accompanying spouses and children. DOS emphasized that the rule affects only the granting of special immigrant status to long-term employees of the U.S.

government abroad under INA section 101(a)(27)(D) and does not affect the granting of special immigrant status under any of the authorities for that status, including any of the other provisions in INA section 101(a)(27) or those specific to nationals of Iraq and Afghanistan.

The rule codifies the circumstances that will be considered "exceptional" for purposes of assessing special immigrant status qualification. DOS said the rule excludes certain criteria (e.g., high visibility in a sensitive position; valuable services and assistance to the U.S. community at post apart from performance of official duties; and others) that were included in the Foreign Affairs Manual and were "the Department's policies that preceded this rule." The regulation adds two new criteria.

Details:

- DOS final rule, https://www.govinfo.gov/content/pkg/FR-2020-06-16/pdf/2020-12344.pdf

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USCIS Extends Transitional Parole in Northern Marianas

U.S. Citizenship and Immigration Services (USCIS) will automatically extend transitional parole, and employment authorization if applicable, in the Commonwealth of the Northern Mariana Islands (CNMI) for current parolees whose parole status will expire on June 29, 2020. The parole and work authorization, if applicable, will be extended through August 17, 2020.

USCIS said the purpose of this temporary extension is "to encourage all eligible parolees to apply for CNMI long-term resident status within the application period."

Details:

- USCIS announcement, https://www.uscis.gov/news/alerts/uscis-extends-transitional-parole-certain-aliens-present-commonwealth-northern-mariana-islands

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Cyrus Mehta was quoted by India West in an article entitled "Trump

Administration Expected to Suspend H-1B Visa Program Citing Unemployment, Even as Tech Jobs Go Unfilled" (June 15, 2020) , which is available at https://www.indiawest.com/news/global_indian/trump-administration-expected-to-suspend-h-1b-visa-program-citing-unemployment-even-as-tech-jobs/article_aec4b48e-af35-11ea-a8d0-535ae8c73788.html

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