



IMMIGRATION UPDATE - AUGUST 10, 2020

Posted on August 10, 2020 by Cyrus Mehta

Headlines:

[Executive Order Heightens Scrutiny of Contractors Employing Foreign Workers](#)

– The order instructs the Secretaries of Labor and Homeland Security to take action to protect U.S. workers from "any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites)," among other things.

[Court Extends Temporary Restraining Order in Case Challenging EAD Delays](#)

– On August 6, a U.S. District Court extended a temporary restraining order to August 24, 2020, to allow the parties time to negotiate a consent decree to resolve the plaintiff's claims.

[Courts Rule, Agencies Issue Guidance on Public Charge Rule Injunction](#) – USCIS and DOS said they are complying with the injunction against implementation of the February 2020 public charge final rule.

[State Dept. Issues Additional Guidance on National Interest Exceptions](#) – The updated guidance lists exceptions for certain H-1B, H-2B, H-4, J-1, J-2, L-1, and L-2 visas, and for those aging out of their current immigrant visa classifications.

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Executive Order Heightens Scrutiny of Contractors Employing Foreign Workers

President Donald Trump issued a new executive order on August 3, 2020, "Executive Order on Aligning Federal Contracting and Hiring Practices With the

Interests of American Workers." The order instructs the Secretaries of Labor and Homeland Security to take action to protect U.S. workers from "any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H-1B visa holders, including secondary employers, adhere to the requirements of section 212(h)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(n)(1))."

The order, which makes no immediate changes, also instructs the heads of each executive department and agency that entered into contracts in fiscal years 2018 and 2019 to assess whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States. The order further asks for information on:

- The nature of the work performed by temporary foreign labor on such contracts; whether opportunities for U.S. workers were affected by such hiring; and any potential effects on national security;
- Whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States and, if so, whether opportunities for U.S. workers were affected; whether affected U.S. workers were eligible for assistance under the Trade Adjustment Assistance program; and any potential effects on national security; and
- Any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of federal procurement and on national security.

Among other things, the order also asks the heads of each agency that enters into contracts to "propose action, if necessary and as appropriate and consistent with applicable law, to improve the economy and efficiency of Federal procurement and protect the national security."

Details:

- Executive Order,
<https://www.whitehouse.gov/presidential-actions/executive-order-aligning-federal-contracting-hiring-practices-interests-american-workers/>

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Court Extends Temporary Restraining Order in Case Challenging EAD Delays

On August 3, 2020, the U.S. District Court for the Southern District of Ohio extended a temporary restraining order (TRO) in a case challenging delays in issuance of employment authorization documents (EADs). On August 6, the court extended the TRO to August 24, 2020. The latest extension is intended to allow the parties time to negotiate a consent decree to resolve the plaintiff's claims.

The plaintiff, arguing on behalf of approximately 75,000 putative class members, sought emergency relief requiring USCIS to print and issue EADs immediately. The plaintiff stated that USCIS significantly slowed and/or stopped printing EADs, which are essential for those with work authorization to obtain or keep their jobs. The plaintiff noted that USCIS had not provided the EADs to which the plaintiff and class members were legally entitled because the agency terminated its contract with a third party without any intention or plan to replace that contract with another contract or method to print and issue EADs in a timely manner.

Details:

- *Subramanya v. USCIS*,
<https://www.classaction.org/media/subramanya-v-united-states-citizenship-and-immigration-services-et-al.pdf>
- August 6, 2020, order, <https://www.aila.org/File/Related/20080438a.pdf>
- August 3, 2020, order,
<https://www.balglobal.com/wp-content/uploads/2020/08/TRO-08-03-2020.pdf>

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Courts Rule, Agencies Issue Guidance on Public Charge Rule Injunction

On August 4, 2020, the U.S. Court of Appeals for the Second Circuit extended a temporary restraining order in Connecticut, New York, and Vermont, upholding a prior injunction against the public charge final rule implemented by the Trump administration in February 2020.

Also, on July 29, 2020, the U.S. District Court for the Southern District of New York (SDNY) issued a nationwide injunction barring the Department of Homeland Security from enforcing, applying, implementing, or treating as

effective the public charge final rule for any period during which there is a declared national health emergency in response to the COVID-19 pandemic.

U.S. Citizenship and Immigration Services (USCIS) stated that as long as the SDNY decision is in effect, the agency will apply the 1999 public charge guidance that was in place before the public charge rule was implemented on February 24, 2020, to the adjudication of any application for adjustment of status on or after July 29, 2020. In addition, USCIS said it will adjudicate "any application or petition for extension of nonimmigrant stay or change of nonimmigrant status on or after July 29, 2020, consistent with regulations in place before the Public Charge Rule was implemented; in other words, we will not apply the public benefit condition."

USCIS noted:

For applications and petitions that USCIS adjudicates on or after July 29, 2020, pursuant to the SDNY injunction, USCIS will not consider any information provided by an applicant or petitioner that only relates to the evidence required by the Public Charge Rule, including information provided on the Form I-944 or any supporting documentation included with that form, or information on the receipt of public benefits in Part 5 on Form I-539, Part 3 on Form I-539A, Part 6 on Form I-129, or Part 6 on Form I-129CW, or any additional documentation pertaining to the public benefit condition. Applicants and petitioners whose applications or petitions are postmarked on or after July 29, 2020, should not include the Form I-944 or provide information about the receipt of public benefits on Form I-485, Form I-129, Form I-129CW, Form I-539, or Form I-539A.

USCIS will issue guidance regarding the use of affected forms. In the interim, USCIS will not reject any Form I-485 on the basis of the inclusion or exclusion of Form I-944, nor Forms I-129 and I-539 based on whether Part 6, or Part 5, respectively, has been completed or left blank.

In any public charge inadmissibility determination, USCIS said, it will consider the receipt of public benefits consistently with prior public charge guidance.

The Department of State (DOS) also issued a statement on August 7, 2020, in relation to the SDNY ruling. DOS said it is complying with the order and is updating its guidance to consular officers on how to proceed under the preliminary injunction. In the interim, DOS said:

isa applications that appear to be ineligible under INA 212(a)(4) will be refused for administrative processing to allow for consultation with the Department, including legal review to ensure compliance with applicable court orders. Visa applicants are not requested to take any additional steps at this time and should attend their visa interviews as scheduled. Applicants are not required to complete nor should they present the DS-5540, Public Charge Questionnaire.

Details:

- "Injunction of the Inadmissibility on Public Charge Grounds Final Rule," USCIS, <https://bit.ly/3a8ER07>
- USCIS Policy Manual, Alert, Part G—Public Charge Ground of Inadmissibility, <https://www.uscis.gov/policy-manual/volume-8-part-g>
- Public Charge page, USCIS, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>
- "Update on Public Charge," DOS, <https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html>
- Prior public charge guidance, Federal Register notice (March 28, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>
- "Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS," <https://www.aila.org/advo-media/issues/all/public-charge-changes-at-uscis-doj-and-dos>

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State Dept. Issues Additional Guidance on National Interest Exceptions

COVID-19-related travel bans remain in place for several countries and regions. The Department of State (DOS) released guidance on July 22, 2020, stating that certain travelers may qualify for national interest exceptions. Subsequently, DOS updated its guidance on July 30, 2020, on national interest exceptions.

The July 30 guidance lists exceptions for certain H-1B, H-2B, H-4, J-1, J-2, L-1, and L-2 visas, and for those aging out of their current immigrant visa classifications.

Details:

- "National Interest Exceptions to Presidential Proclamations (10014 &

10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," DOS, issued July 30, 2020, <https://bit.ly/31rdBGc>

- "National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom, and Ireland," DOS, issued July 22, 2020, <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-from-certain-travelers-from-the-schengen-area-uk-and-ireland.html>

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Firm in the News

Cyrus Mehta was quoted by *India-West* in "In Fresh Blow to Business Immigration, Trump Bans Federal Agencies from Hiring H-1B Workers." Mr. Mehta said the Trump order was largely ceremonial: "This executive order does not say or do much damage to the H-1B visa program, which already has built-in protections in the law and regulations." The article is at <https://bit.ly/2XFkF0W>.

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