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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - SEPTEMBER 21, 2020

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Headlines:

DV-2020 Applicants Cannot Be Denied Visas Under COVID Guidance, Court Says – The order states that the government must undertake "good-faith efforts" to expeditiously process and adjudicate DV-2020 diversity visa and derivative beneficiary applications and issue or reissue diversity and derivative beneficiary visas to eligible applicants by September 30, 2020.

Ninth Circuit Rules President Can End TPS – TPS beneficiaries from Haiti, Nicaragua, and Sudan could be required to leave the United States (or find another legal way to stay) by March 2021. Those from El Salvador, by far the largest group at an estimated 263,000, could be expelled by November 2021. An appeal to the Supreme Court is likely.

DOL Interim Final Rule Expected to Raise Wages for H-1B, H-1B1, E-3, and PERM Workers – No description has been provided for the rule, which is at the OMB awaiting approval.

USCIS Sends Reminder to Ensure Employees Choose the Correct Attestation on Form I-9 – USCIS sent a reminder that employers are not held liable for any erroneous attestations an employee makes in Section 1 of Form I-9, Employment Eligibility Verification. Rather, an employer must ensure that the employee checks only one box to complete Section 1. To ensure employees can complete Section 1 accurately, the employer must provide them with the entire Form I-9, including the instructions.

I-9 Requirements Flexibility Extended for Additional 60 Days – DHS and ICE announced an extension for 60 days of certain flexibilities for employers in complying with requirements related to Form I-9, Employment Eligibility Verification, because of ongoing precautions related to COVID-19.

DHS Extends Measures to Limit Non-Essential Travel Across Land Borders – DHS said the measures were part of a collaborative "North American" approach intended to limit the further spread of coronavirus.

USCIS Issues Policy Alert on O Nonimmigrant Visa Classifications – The new guidance (1) expands on how officers determine whether an O-1 petitioner has satisfied the evidentiary criteria and established in the totality of the evidence that a beneficiary has extraordinary ability, or extraordinary achievement in the motion picture and television industry, as applicable; and (2) clarifies the circumstances under which a petitioner may rely on "comparable evidence" to meet the evidentiary requirements for certain O-1 beneficiaries.

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DV-2020 Applicants Cannot Be Denied Visas Under COVID Guidance, Court Says

In *Gomez v. Trump*, a federal judge preliminarily stayed a presidential proclamation suspending immigrant visas as applied to diversity visa (DV)-2020 selectees and their derivative beneficiaries. The order states that the government must undertake "good-faith efforts" to expeditiously process and adjudicate DV-2020 diversity visa and derivative beneficiary applications and issue or reissue diversity and derivative beneficiary visas to eligible applicants by September 30, 2020, giving priority to the named diversity visa plaintiffs in several consolidated cases and their derivative beneficiaries.

Among other things, the court preliminarily enjoined the government from interpreting and applying COVID-19 guidance to DV-2020 selectees and their derivative beneficiaries in any way that requires embassy personnel, consular officers, or administrative processing centers (such as the Kentucky Consular Center) to refuse processing, reviewing, adjudicating 2020 diversity visa applications, or issuing or reissuing diversity visas on the ground that the DV-2020 selectee or derivative beneficiary does not qualify under the "emergency" or "mission critical" exceptions to the COVID guidance.

The court ordered the Department of State to report, by September 25, 2020, which of the named DV-2020 plaintiffs received diversity visas, the status of processing of the named DV-2020 plaintiffs' applications who have not yet

received visas, and the number of unprocessed DV-2020 visa applications and unused diversity visas remaining for fiscal year 2020.

U.S. District Judge Amit P. Mehta signed an amended order on September 14, 2020, rejecting as "illogical" related Department of State guidance announcing that applicants subject to a 14-day quarantine rule would not receive visas if they were not exempt or had not quarantined for 14 days in another location. DOS subsequently updated its guidance on September 17 to state that consistent with the court's order, "no DV-2020 applicants will be prevented from applying for or receiving a visa due to these regional COVID if otherwise eligible. The DOS guidance, however, maintains restrictions for other reasons, such as based on Presidential Proclamations related to country of origin. The guidance also warns that "due to resource constraints, limitations due to the COVID-19 pandemic, and country conditions, it will be unable to accommodate all DV applicants before September 30, 2020."

Details:

- Memorandum opinion and order, September 4, 2020, *Gomez v. Trump*, https://www.bloomberglaw.com/public/desktop/document/GOMEZetalvTRUMPetalDocketNo120cv01419DDCMay282020CourtDocket/3?1599485496
- Amended order, September 14, 2020, https://www.courtlistener.com/recap/gov.uscourts.dcd.218517/gov.uscourts.dcd.218517.132.0_2.pdf
- State Department guidance, updated September 17, 2020, https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-DV-2020-update.html

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Ninth Circuit Rules President Can End TPS

The U.S. Court of Appeals for the Ninth Circuit ruled on September 14, 2020, that President Trump can phase out temporary protected status (TPS) for more than 300,000 people in the United States. TPS beneficiaries from Haiti, Nicaragua, and Sudan could be required to leave the United States (or find another legal way to stay) by March 2021. Those from El Salvador, by far the largest group at an estimated 263,000, could be expelled by November 2021.

An appeal to the Supreme Court is likely.

Details:

- "Court Rules Trump Can End Temporary Protected Status for Immigrant Families," NBC News, https://www.nbcnews.com/news/latino/court-rules-trump-can-end-temporary-protected-status-immigrant-families-n1240072
- USCIS TPS guidance, https://www.uscis.gov/humanitarian/temporary-protected-status

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DOL Interim Final Rule Expected to Raise Wages for H-1B, H-1B1, E-3, and PERM Workers

According to reports, with no advance notice or publication in the regulatory agenda, the Department of Labor submitted an interim final rule on September 16, 2020, to the Office of Management and Budget (OMB) to change the wage minimums and related requirements for H-1B, H-1B1, E-3, and PERM workers. Expected to be included are the H-1B1 visa for Chile and Singapore professionals and the E-3 for Australia professionals.

This follows on the heels of another interim final rule sent to OMB by the Department of Homeland Security that will redefine the H-1B specialty occupation, the employer-employee relationship, and H-1B employment.

No description has been provided for the latest rule, “Restructuring of H-1B/H-1B1/E-3 and PERM Wage Levels,” but it is expected to raise the minimum wage for such workers. Publication as an interim final rule means that the rule will take effect without an opportunity for public comment beforehand, although comments can be made later. OMB has up to 90 days to review the rule before publication. Litigation is likely.

Details:

- Law360, "Labor Dept. Preps Wage Level Changes for High-Skilled Visas," https://bit.ly/3iQNdgA (available by registration)

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USCIS Sends Reminder to Ensure Employees Choose the Correct Attestation on Form I-9

U.S. Citizenship and Immigration Services (USCIS) disseminated a reminder on September 17, 2020, noting that employers are not liable for any erroneous attestations an employee makes in Section 1 of Form I-9, Employment Eligibility Verification. Rather, an employer must ensure that the employee checks only one box to complete Section 1. To ensure employees can complete Section 1 accurately, the employer must provide them with the entire Form I-9, including the instructions for completing the form.

Employers must not treat any employee different from others because of their selected or perceived citizenship, immigration status, or national origin, USCIS said in its email. Employers should never demand that employees select a specific attestation or ask for or demand documents for completion of Section 1. Additionally, when completing Section 2 of Form I-9, the employer should never ask or require employees to show specific documents because of their national origin, ethnicity, immigration or citizenship status, race, color, religion, age, gender or disability, or because of any other protected characteristic, USCIS said.

Details:

- Link to USCIS reminder, https://www.aila.org/File/Related/20091501a.pdf

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I-9 Requirements Flexibility Extended for Additional 60 Days

On September 15, 2020, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced an extension of certain flexibilities for employers in complying with requirements related to Form I-9, Employment Eligibility Verification. This temporary guidance was set to expire September 19, but because of ongoing precautions related to COVID-19, DHS has extended the policy for an additional 60 days.

This provision only applies to employers and workplaces that are operating remotely. USCIS said employers must monitor the DHS and ICE websites for additional updates about when the extensions end and normal operations resume. E-Verify participants who meet the criteria and choose the remote inspection option should continue to follow current guidance and create cases

for their new hires within three business days from the date of hire.

Details:

- USCIS notice, https://www.uscis.gov/i-9-central/form-i-9-related-news/form-i-9-requirements-flexibility-extended-for-an-additional-60-days
- ICE notice, https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility
- Original USCIS news release with details, https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance

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DHS Extends Measures to Limit Non-Essential Travel Across Land Borders

On September 18, 2020, the Department of Homeland Security (DHS) announced an extension until October 21, 2020, of measures to limit all non-essential travel across the U.S. borders with Canada and Mexico. DHS said in a statement, "The U.S., Mexican, and Canadian governments are taking necessary action to fight against this pandemic together."

A DHS statement said that nonessential travel includes travel related to tourism or recreation. Essential travel includes travel to preserve supply chains between the countries. "These supply chains ensure that food, fuel, and life-saving medicines reach people on both sides of the border," DHS said. Americans, Canadians, and Mexicans also cross the land borders every day to do essential work or for other urgent or essential reasons, and that travel will not be affected, DHS said. Also, U.S. citizens, lawful permanent residents, and "certain other travelers" are exempt.

DHS said the measures, first announced in March 2020, were part of a collaborative "North American" approach intended to limit the further spread of coronavirus. They were extended multiple times throughout the spring and summer.

Details:

- DHS fact sheet,

https://www.dhs.gov/news/2020/09/18/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus

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USCIS Issues Policy Alert on O Nonimmigrant Visa Classifications

On September 17, 2020, U.S. Citizenship and Immigration Services (USCIS) issued a policy alert and published a new section in its Policy Manual related to the "O" nonimmigrant visa classifications. The new guidance (1) expands on how officers determine whether an O-1 petitioner has satisfied the evidentiary criteria and established in the totality of the evidence that a beneficiary has extraordinary ability, or extraordinary achievement in the motion picture and television industry, as applicable; and (2) clarifies the circumstances under which a petitioner may rely on "comparable evidence" to meet the evidentiary requirements for certain O-1 beneficiaries.

O-1 nonimmigrant status is available to individuals of "extraordinary ability" in the sciences, arts, business, education, and athletics, and to those with a record of "extraordinary achievement" in the motion picture or television industry, who are coming to the United States temporarily to work in their areas of extraordinary ability or achievement. O-2 status is available for essential support personnel coming to the United States solely to assist an O-1 artist or athlete.

USCIS is also incorporating into the Policy Manual existing guidance relating to certain nonimmigrant athletes, coaches and entertainers (P-1, P-2, and P-3 nonimmigrant classifications), and their essential support personnel.

Details:

- USCIS policy alert, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20200917-ExtraordinaryAbility.pdf
- USCIS Policy Manual, Part M—Aliens of Extraordinary Ability or Achievement (O), https://www.uscis.gov/policy-manual/volume-2-part-m

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