



## IMMIGRATION UPDATE - NOVEMBER 23, 2020

*Posted on November 23, 2020 by Cyrus Mehta*

### Headlines:

[DHS Extends Form I-9 Requirement Flexibility](#) – DHS and ICE announced an extension until December 31, 2020, of flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to ongoing precautions related to the COVID-19 pandemic.

[USCIS Reaches H-2B Cap for First Half of Fiscal Year 2021](#) – November 16, 2020, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2021. USCIS will reject new cap-subject H-2B petitions received after November 16 that request an employment start date before April 1, 2021.

[USCIS Updates Guidance on Naturalization Applicants](#) – USCIS updated policy guidance to clarify the circumstances when the agency would find applicants ineligible for naturalization because they were not lawfully admitted for permanent residence.

[State Dept. Revises Guidance to Implement Court Order in \*NAM v. DHS\*](#) – DOS released revised guidance implementing a court order in *National Association of Manufacturers v. Department of Homeland Security* that clarified its earlier order enjoining the government from enforcing a Trump administration ban on H, L, and J nonimmigrants

[DHS Issues Proposed Rule to Eliminate Work Authorization for Some With Final Orders of Removal](#) – DHS proposes to eliminate employment authorization eligibility for those who have final orders of removal but are temporarily released from custody on an order of supervision, with one "narrow" exception.

[TPS Designation for South Sudan Extended for 18 Months; EADs Extended Through May 1, 2021](#) – DHS extended the temporary protected status

designation for South Sudan for 18 months, through May 2, 2022. Current beneficiaries who want to maintain their status must re-register by January 4, 2021.

[DHS Issues Proposed Rule to Expand Biometrics Collection](#) – DHS proposes to "permit collection of biometrics from aliens departing from airports, land ports, seaports, or any other authorized point of departure" and "to amend the regulations to provide that all aliens may be required to be photographed upon entry and/or departure."

[USCIS Publishes Guidance on E-Verify Tentative Nonconfirmations](#) – The photo E-Verify transmitted should be identical to the photo that appears on an employee's DHS or DOS-issued document.

[Visa Bulletin for December Includes Info on Diversity Visas, Scheduled Expiration of Two Employment Visa Categories](#) – The Visa Bulletin for December 2020 includes information on the diversity visa immigrant category rank cut-offs that will apply in December and January. It also includes information on the scheduled expiration of two employment visa categories on December 11, 2020: the employment fourth preference Certain Religious Workers (SR) category and the employment fifth preference categories (I5 and R5).

[OFLC Consolidates Adverse Effect Wage Rate Info for H-2A Program](#) – The webpage contains the monthly AEWRs for range occupations and the hourly AEWRs for non-range occupations.

[USCIS Updates Guidance on Discretionary Factors for Adjustment of Status Applications](#) – The update provides "a non-exhaustive list of positive and negative factors that may be relevant to whether an adjustment of status applicant warrants a favorable exercise of discretion." It also lists the privileges, rights, and responsibilities of lawful permanent residents (LPRs) as a reference for officers to consider when determining whether the grant of LPR status is in the best interest of the United States.

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**Details:**

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## **DHS Extends Form I-9 Requirement Flexibility**

The Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) extended until December 31, 2020, flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to ongoing precautions related to the COVID-19 pandemic. The temporary guidance was set to expire November 19, 2020.

DHS noted that this provision only applies to employers and workplaces that are operating remotely. The original news release gives more information on how to obtain, remotely inspect, and retain copies of the identity and employment eligibility documents to complete Section 2 of Form I-9. DHS said that 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:

- DHS notice, <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-0>
- Original DHS news release, <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>
- DHS website, <https://www.dhs.gov/>
- ICE website, <https://www.ice.gov/news/overview>

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## **USCIS Reaches H-2B Cap for First Half of Fiscal Year 2021**

U.S. Citizenship and Immigration Services announced on November 18, 2020, that it received enough petitions to reach the congressionally mandated cap on H-2B visas for temporary nonagricultural workers for the first half of fiscal year 2021. November 16, 2020, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before April 1, 2021. USCIS will reject new cap-subject H-2B petitions received after November 16 that request an employment start date before April 1, 2021.

USCIS continues to accept H-2B petitions that are exempt from the congressionally mandated cap, including the following types:

- Current H-2B workers in the United States who are extending their stay and, if applicable, changing the terms of their employment or changing their employers;
- Fish roe processors, fish roe technicians, and/or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of the Northern Mariana Islands and/or Guam from November 28, 2009, until December 31, 2029.

USCIS noted that Congress has set the H-2B cap at 66,000 per fiscal year, with 33,000 for workers who begin employment in the first half of the fiscal year (October 1 through March 31) and 33,000 (plus any unused numbers from the first half of the fiscal year) for workers who begin employment in the second half of the fiscal year (April 1 through September 30).

Details:

- USCIS notice, <https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021>

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### **USCIS Updates Guidance on Naturalization Applicants**

On November 18, 2020, U.S. Citizenship and Immigration Services (USCIS) updated policy guidance to clarify the circumstances when the agency would find applicants ineligible for naturalization because they were not lawfully admitted for permanent residence. "Applicants are ineligible for naturalization if they obtained lawful permanent residence (LPR) status in error, by fraud or otherwise not in compliance with the law," USCIS said.

The update also clarifies that USCIS reviews whether an applicant has abandoned LPR status when it adjudicates a naturalization application. If an applicant does not meet the burden of establishing maintenance of LPR status, USCIS said it generally denies the naturalization application and places the applicant in removal proceedings by issuing a Notice to Appear (NTA). The update also provides that USCIS generally denies a naturalization application

"filed on or after the effective date if the applicant is in removal proceedings pursuant to a warrant of arrest."

Details:

- USCIS notice,  
<https://www.uscis.gov/news/alerts/uscis-updates-policy-guidance-on-naturalization-applicants-who-did-not-properly-obtain-lawful>

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### **State Dept. Revises Guidance to Implement Court Order in *NAM v. DHS***

The Department of State (DOS) released a cable to the field with revised guidance implementing a court order issued on November 18, 2020, in *National Association of Manufacturers v. Department of Homeland Security*. The revised DOS guidance clarified the court's October 1, 2020, order enjoining the government from enforcing a Trump administration ban on H, L, and J nonimmigrants under section 2 of Presidential Proclamation 10052. Applicants are now considered covered by the *NAM* court's order as long as the petitioner or sponsoring entity is a member of one of the named plaintiff associations at the time of adjudication. The court further ordered that DOS "treat visa applicants covered by the injunction no less favorably than any other nonimmigrant visa applicant." The DOS guidance states that posts should extend the national interest exceptions under the proclamation to applicants covered by the injunction where regional COVID-19-related proclamations are in effect.

DOS said that an applicant is now considered covered by the *NAM* court order "if the applicant's petitioner, sponsor, or host organization (for J-1 visas) is either one of the named plaintiffs or a member of one of the named plaintiff associations as of the time of interview."

DOS said posts should continue to treat "petition-based work visas (including H's and L's) as Tier 2 (second only to cases involving humanitarian emergencies, applicants contributing to COVID-19 eradication, diplomatic visas which do not require in person appointments, etc.)" To comply with the order, "J-1 intern, trainee, teacher, camp counselor, au pair, or summer work travel program applicants should be considered Tier 2, as well."

An appeal of the October 1, 2020, injunction is pending.

### Details:

- DOS cable, [https://drive.google.com/file/d/1i-ag8fTx4xmKC\\_DQdb2UGbXI7L-EFUui/view](https://drive.google.com/file/d/1i-ag8fTx4xmKC_DQdb2UGbXI7L-EFUui/view)
- Presidential Proclamation 10052, <https://bit.ly/3pQQ2Cf>

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## **DHS Issues Proposed Rule to Eliminate Work Authorization for Some With Final Orders of Removal**

The Department of Homeland Security (DHS) proposes to eliminate employment authorization eligibility for those who have final orders of removal but are temporarily released from custody on an order of supervision, with one "narrow" exception. DHS proposes to continue to allow employment authorization for "aliens for whom DHS has determined that their removal is impracticable because all countries from whom travel documents have been requested have affirmatively declined to issue a travel document and who establish economic necessity." DHS said it intends for this rule "to reduce the incentive for aliens to remain in the United States after receiving a final order of removal and to strengthen protections for U.S. workers."

DHS also proposes to clarify that those who have been granted a deferral of removal based on the United States' obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) are similarly situated to those granted withholding of removal under the Immigration and Nationality Act and regulations implementing CAT, "in that they cannot be removed to the country in question while the order deferring their removal is in place." As such, DHS proposes to treat those granted CAT deferral of removal as employment authorized based on the grant of deferral of removal.

### Details:

- DHS notice of proposed rulemaking on eliminating work authorization for some with final orders of removal, <https://bit.ly/3fq6DIb>
- USCIS statement, <https://www.uscis.gov/news/news-releases/dhs-proposes-to-limit-work-permits-for-aliens-with-final-orders-of-removal>

- CAT, <https://bit.ly/3fodJgc>

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## **TPS Designation for South Sudan Extended for 18 Months; EADs Extended Through May 1, 2021**

The Department of Homeland Security extended the temporary protected status (TPS) designation for South Sudan for 18 months, through May 2, 2022. Current beneficiaries who want to maintain their status must re-register by January 4, 2021. U.S. Citizenship and Immigration Services (USCIS) has automatically extended the validity of certain employment authorization documents (EADs) issued under the TPS designation for South Sudan through May 1, 2021.

USCIS said that to complete or update the I-9 employment eligibility verification form for South Sudan TPS beneficiaries who present an EAD with a category code of A12 or C19 and an expiration date of November 2, 2020, the new expiration date of May 1, 2021, for the automatically extended EAD should be entered. "You must reverify these employees before they start work on May 2, 2021," USCIS said.

Details:

- USCIS notices, <https://www.uscis.gov/news/alerts/re-registration-period-now-open-for-aliens-with-temporary-protected-status-under-south-sudans> and <https://bit.ly/3fkikjL>

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## **DHS Issues Proposed Rule to Expand Biometrics Collection**

The Department of Homeland Security (DHS) proposes to "permit collection of biometrics from aliens departing from airports, land ports, seaports, or any other authorized point of departure." In addition, to enable U.S. Customs and Border Protection (CBP) to verify identity by using facial recognition technology, DHS proposes "to amend the regulations to provide that all aliens may be required to be photographed upon entry and/or departure."

U.S. citizens may voluntarily opt out of participating in CBP's biometric

verification program.

Comments are due by December 21, 2020.

Details:

- DHS notice of proposed rulemaking on biometrics collection, <https://bit.ly/35Sq9tV>

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### **USCIS Publishes Guidance on E-Verify Tentative Nonconfirmations**

U.S. Citizenship and Immigration Services (USCIS) recently published a question and answer on photo mismatches of Department of Homeland Security (DHS) Tentative Nonconfirmations (TNCs).

USCIS said that the photo E-Verify transmitted should be identical to the photo that appears on an employee's DHS or Department of State-issued document. If the employer determines that the photos do not match, it results in a photo mismatch TNC. If the employee chooses to take action on this TNC, the employer must follow the instructions in the Further Action Notice to scan and upload an image of the employee's document into E-Verify, USCIS said.

Details:

- USCIS FAQs (scroll down to "What is a photo mismatch DHS tentative nonconfirmation (TNC)?," <https://www.e-verify.gov/common-e-verify-questions>

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### **Visa Bulletin for December Includes Info on Diversity Visas, Scheduled Expiration of Two Employment Visa Categories**

The Department of State's Visa Bulletin for December 2020 includes information on the diversity visa immigrant category rank cut-offs that will apply in December and January. It also includes information on the scheduled expiration of two employment visa categories on December 11, 2020: the employment fourth preference Certain Religious Workers (SR) category and the employment fifth preference categories (I5 and R5).

For SR visas, if there is no legislative action extending this category, it will

become "Unavailable" effective midnight December 10, 2020. For I5 and R5 visas, if there is legislative action extending these categories, the December dates would be applied for the entire month. If there is no legislative action extending this category, the category will become "Unavailable" effective midnight, December 11, 2020.

Details:

- December 2020 Visa Bulletin,  
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-december-2020.html>

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### **OFLC Consolidates Adverse Effect Wage Rate Info for H-2A Program**

The Department of Labor's Office of Foreign Labor Certification (OFLC) launched a new webpage that consolidates Adverse Effect Wage Rate (AEWR) information for the H-2A program. The webpage contains the monthly AEWRs for range occupations and the hourly AEWRs for non-range occupations.

The hourly AEWRs for non-range occupations on the new webpage will apply to H-2A job orders submitted on or after December 21, 2020, when the 2020 AEWR final rule becomes effective. During the transition to the new methodology, OFLC will also maintain a separate webpage that displays the hourly AEWRs in effect for job orders submitted before December 21, 2020.

Details:

- OFLC announcement, <https://www.dol.gov/agencies/eta/foreign-labor>
- AEWR final rule, <https://bit.ly/36Xgr8P>
- DOL FAQ on final rule,  
[https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A\\_AEWR\\_FR\\_FAQs\\_11\\_2\\_2020.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_AEWR_FR_FAQs_11_2_2020.pdf)

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### **USCIS Updates Guidance on Discretionary Factors for Adjustment of Status Applications**

U.S. Citizenship and Immigration Services (USCIS) is updating existing policy guidance regarding agency discretion in adjudications of adjustment of status

applications.

The update provides "a non-exhaustive list of positive and negative factors that may be relevant to whether an adjustment of status applicant warrants a favorable exercise of discretion." It also lists the privileges, rights, and responsibilities of lawful permanent residents (LPRs) as a reference for officers to consider when determining whether the grant of LPR status is in the best interest of the United States.

USCIS said this update "will assist officers in making more consistent discretionary decisions by providing a foundation to identify and analyze negative and positive factors in adjustment of status applications."

Details:

- USCIS notice,  
<https://www.uscis.gov/news/alerts/uscis-updates-policy-guidance-regarding-discretionary-factors-for-adjustment-of-status-applications>
- USCIS policy alert,  
<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20201117-AOSDiscretion.pdf>
- USCIS policy manual update,  
<https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-4>

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## **Firm in the News**

**Cyrus Mehta's** views are reflected in a *Bloomberg Law* article regarding a federal court decision invalidating DHS Secretary Wolf's decision on DACA on the grounds that he was not lawfully appointed, "DHS Rules Jeopardized by Court's Wolf Ruling Unless Senate Acts."

<https://news.bloomberglaw.com/daily-labor-report/dhs-rules-jeopardized-by-courts-wolf-ruling-unless-senate-acts>

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