CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - DECEMBER 14, 2020

Posted on December 14, 2020 by Cyrus Mehta

Headlines:

DHS, DOJ Issue Final Rule Tightening Asylum Regulations – DHS and DOJ issued a final rule tightening the regulations governing asylum, withholding of removal, and protections under the Convention Against Torture. The final rule generally adopts a proposed rule issued in June 2020 with few substantive changes.

USCIS Issues DACA Guidance Under Court Order – Following litigation related to DACA that resulted in a U.S. district court order, USCIS released guidance effective December 7, 2020.

TPS 'Document Validity' Extended for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan – DHS is automatically extending the validity of TPS-related documentation for beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal through October 4, 2021.

No Change in Spring 2021 Guidance for International Students – Nonimmigrant students should continue to abide by SEVP guidance issued in March 2020, a SEVP spokesperson said.

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DHS, DOJ Issue Final Rule Tightening Asylum Regulations

On December 11, 2020, the Departments of Homeland Security (DHS) and Justice (DOJ) issued a final rule tightening the regulations governing asylum,

withholding of removal, and protections under the Convention Against Torture. Despite more than 87,000 mostly negative comments, the final rule generally adopts a proposed rule issued on June 15, 2020, with few substantive changes.

The final rule provides that individuals found to have a credible fear will have their claims adjudicated by an immigration judge within the Executive Office for Immigration Review (EOIR) in "streamlined proceedings" and specifies the standard of review that applies. The final rule also amends the regulations related to the standards for adjudication of applications for asylum and statutory withholding, and revises the definition of "frivolous" as applied to filing an asylum application, among other things.

The final rule provides several adverse factors that will "ordinarily" result in asylum denials as a matter of discretion. Among those discretionary factors are missed deadlines for paying taxes, spending more than 14 days in any one country that permitted applications for similar protections, unlawfully entering or attempting to enter the United States "unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country"; and transiting through more than one country before arriving in the United States.

According to some commenters, the rule will severely restrict the ability of people fleeing persecution to apply for asylum in the United States and will make it very difficult for a variety of groups, such as those facing persecution on the basis of gender or sexual orientation, to obtain asylum. Also, the rule allows immigration judges to deny asylum applications without a hearing if they lack certain evidence, which could harm applicants without a lawyer.

Details:

- DHS/DOJ final rule, https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review
- "New Asylum Rule Bars Gays, Lesbians Facing Persecution, Immigrants Threatened With Violence," San Francisco Chronicle, https://www.sfchronicle.com/nation/article/New-asylum-rule-bars-gays-lesbians-facing-15795663.php
- "Cómo la regla final de asilo del gobierno de Trump deja sin opciones a los migrantes," Univision,

https://www.univision.com/noticias/inmigracion/estas-son-las-claves-de-la-regla-final-de-asilo-de-trump (Spanish)

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USCIS Issues DACA Guidance Under Court Order

Following litigation related to Deferred Action for Childhood Arrivals (DACA) that resulted in a U.S. district court order issued December 4, 2020, U.S. Citizenship and Immigration Services (USCIS) released guidance effective December 7, 2020. USCIS is:

- Accepting first-time requests for consideration of deferred action under DACA, DACA renewal requests, and applications for advance parole documents based on the terms of the DACA policy in effect before September 5, 2017, and in accordance with the court's order; and
- Extending one-year grants of deferred action and one-year work authorization documents under DACA to two years.

USCIS said it will take "appropriate steps to provide evidence of the one-year extensions of deferred action and employment authorization documents under DACA to individuals who were issued documentation on or after July 28, 2020, with a one-year validity period under the defunct policy."

USCIS' statement says that the Department of Homeland Security (DHS) "will comply with the order while it remains in effect, but DHS may seek relief from the order."

Details:

- USCIS news alert, https://www.uscis.gov/news/alerts/deferred-action-for-childhood-arrivals-response-to-december-4-2020-order-in-batalla-vidal-et-al-v
- December 4, 2020, court order, http://cdn.cnn.com/cnn/2020/images/12/04/batalla_vidal_et_al_v_nielsen_et_al__nyedce-16-04756__0354.0.pdf
- "Judge Orders Trump Administration To Restore DACA As It Existed Under Obama," NPR, https://www.npr.org/2020/12/04/943355234/judge-orders-trump-administration-to-restore-daca-as-it-existed-under-obama

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TPS 'Document Validity' Extended for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan

The Department of Homeland Security (DHS) is automatically extending the validity of temporary protected status (TPS)-related documentation for beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal for nine months from the current expiration date of January 4, 2021, through October 4, 2021.

The notice provides information about the effects of several court actions on the timeframes for retention of TPS by beneficiaries from these countries in the United States.

Details:

- DHS notice, https://bit.ly/2IJm0Q5

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No Change in Spring 2021 Guidance for International Students

According to reports, a spokesperson for the Student and Exchange Visitor Program (SEVP) announced that spring 2021 guidance related to the COVID-19 pandemic for international students in programs in "hybrid" or online modes will remain the same as before. "Nonimmigrant students should continue to abide by SEVP guidance originally issued in March 2020. The guidance enables schools and students to engage in distance learning in excess of regulatory limits due to the public health emergency generated by COVID-19," said Carissa Cutrell, SEVP Public Affairs Officer.

The announcement followed a multi-association letter led by the American Council on Education (ACE) and signed by NAFSA: Association of International Educators and other higher education associations asking U.S. Immigration and Customs Enforcement and SEVP for COVID-19 guidance for the spring term "as soon as possible," and to provide for "maximum flexibility." The letter said that currently, institutions and students are following the March guidance for F and M nonimmigrant students that was updated on August 7, 2020. The guidance allows international students on F and M visas to remain in the United States if their programs need to use an online-only instruction platform during the

pandemic, the letter noted. "Unfortunately, the guidance does not allow new international students to travel to the United States to begin a program if that program is online only due to COVID-19, or allow institutions to issue a Form I-20 'Certificate of Eligibility for Nonimmigrant Student Status' for those new students," the letter said.

The letter cited a recent survey, by the Institute of International Education and nine partner higher education associations, that found a 43 percent drop in international student enrollment in U.S. institutions this semester. The survey also found that 99 percent of institutions are either holding classes online or implementing a hybrid model.

Details:

- "Updates on Spring 2021 SEVP COVID-19 Guidance," NAFSA, https://www.nafsa.org/regulatory-information/sevp-covid-19-guidance-sources
- "Federal Guidance on Foreign Students Remains Same for Spring," Inside Higher Ed, https://www.insidehighered.com/quicktakes/2020/12/09/federal-guidance-foreign-students-remains-same-spring
- "New Process: Reporting School Procedural Adaptations to SEVP," ICE (August 2020), https://www.ice.gov/doclib/sevis/pdf/bcm2008-01.pdf
- "ICE Continues March Guidance for Fall School Term," ICE (July 2020), https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf
- "Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students," ICE (March 2020), https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf
- ACE letter, https://www.acenet.edu/Documents/Letter-DHS-international-student-guidance-Spring-2021-120420.pdf
- Fall International Enrollments Snapshot Reports, Institute of International Education, https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports

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Firm in the News

Cyrus Mehta spoke on a panel, "Ethical Issues in Pro Bono Representation 2020," under the aegis of the Practising Law Institute on December 10, 2020. The program highlighted ethical issues arising in pro bono representation across different legal disciplines. Mr. Mehta spoke about ethical issues arising in immigration pro bono practice with an emphasis on additional challenges that have arisen for immigration practitioners during the COVID-19 pandemic. https://www.pli.edu/programs/ethical-issues-in-pro-bono-representation

Mr. Mehta's view on the DOJ complaint accusing Facebook of citizenship discrimination are reflected in a Bloomberg Law available at https://news.bloomberglaw.com/daily-labor-report/dojs-facebook-allegations-risk-chilling-green-card-sponsorship?context=search&index=0. "This lawsuit could create a chilling effect on the labor certification program that employers use to sponsor skilled foreign worker nationals.". "If an employer scrupulously follows the Labor Department's complex rules governing the labor certification process, the employer could still be penalized by another branch of the federal government, based on this complaint," Mehta said……. "You can't just have them as guest workers and then throw them out after a few years," he said. "This lawsuit could create a chilling effect on the labor certification program that employers use to sponsor skilled foreign worker nationals."

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