



IMMIGRATION UPDATE - DECEMBER 28, 2020

Posted on December 28, 2020 by Cyrus Mehta

Headlines:

[Trump Signs Appropriations Bill Extending Several Immigration Programs; State Dept. Issues Related Guidance](#) – President Trump signed the Consolidated Appropriations Act of 2021, which extends the expiring E-Verify, Conrad 30, and non-minister religious worker green card programs, among other things.

[I-9 Flexibility Extended to January 31](#) – The flexibility applies only to employers and workplaces that are operating remotely.

[Filing Window for H-2B Applications With Work Start Dates on April 1 or After Opens in January](#) – H-2B applications requesting an April 1 start date will be denied if they are filed before January 1.

[In Response to Litigation, OFLC Updates Implementation of H-2A Adverse Effect Wage Rate Methodology](#) – A court order prevents DOL from further implementing the H-2A AEWR final rule, which took effect on December 21, 2020, and orders DOL to use the methodology established by the agency's 2010 H-2A regulation to establish the hourly AEWRs for all non-range occupations.

[DHS, DOJ Issue Final Rule on Asylum and Withholding of Removal Security Bars for Public Health Concerns](#) – DHS and DOJ issued a joint final rule clarifying that the security bar for "danger to the security of the United States" for asylum and withholding of removal may encompass emergency public health concerns due to a communicable disease.

[CBP Issues Temporary Travel Restrictions at Borders With Canada, Mexico](#) – **On December 22, 2020, CBP issued two notices extending temporary travel restrictions related to the COVID-19 pandemic and applicable to land ports of entry and ferry service between the United States and Canada,**

and between the United States and Mexico. "Essential travel" is still exempted.

Firm in the News

Details:

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Trump Signs Appropriations Bill Extending Several Immigration Programs; State Dept. Issues Related Guidance

On December 27, 2020, President Trump signed the Consolidated Appropriations Act of 2021, which extends several expiring immigration programs. The E-Verify, Conrad 30, and non-minister religious worker green card programs are reauthorized through September 30, 2021, and the EB-5 Regional Center Program is reauthorized through June 30, 2021. These programs had been set to expire on December 28, 2020. The legislation also provides that certain nonimmigrants who pay taxes and meet other requirements may be eligible for a COVID-19 pandemic recovery rebate.

The Department of State's Visa Bulletin for January 2021, which was released before Congress voted on this legislation, stated that with respect to the employment fourth preference Certain Religious Workers (SR) category, an extension means that "the December dates would continue to be applied, potentially for the remainder of the month. ...If there is legislative action extending this category for January, the final action date would immediately become 'Current' for January for all countries except El Salvador, Guatemala, and Honduras, which would be subject to a March 1, 2018 final action date, and for Mexico, which would be subject to a December 1, 2018 final action date."

With respect to the employment fifth preference (I5 and R5) categories, the bulletin states that an extension means that "the December dates would continue to be applied, potentially for the remainder of the month. ...If there is legislative action extending this category for January, the final action date would immediately become 'Current' for January for all countries except China-mainland born, which would be subject to an August 15, 2015 final action date, and for Vietnam, which would be subject to a September 15, 2017 final action date."

Details:

- Consolidated Appropriations Act, 2021,
<https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR133SA-RCP-116-68.pdf>
- January 2021 Visa Bulletin,
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-january-2021.html>

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I-9 Flexibility Extended to January 31

U.S. Immigration and Customs Enforcement announced an additional 30-day extension to January 31, 2021, of flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to the COVID-19 pandemic. The flexibility applies only to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented now for in-person verification of identity and employment eligibility documentation for the I-9 process.

Details:

- ICE extension news release,
<https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-1>
- Original ICE news release with information on how to obtain, remotely inspect, and retain copies of identity and employment eligibility documents,
<https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>

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Filing Window for H-2B Applications With Work Start Dates on April 1 or After Opens in January

The Department of Labor's Office of Foreign Labor Certification (OFLC) reminded employers that the filing window to submit H-2B Applications for Temporary Employment Certification (Form ETA-9142B and appendices) requesting work start dates of April 1, 2021, or later will open on January 1,

2021. H-2B applications requesting an April 1 start date will be denied if they are filed before January 1.

OFLC said it will randomly order all H-2B applications requesting a work start date of April 1 that are filed during the initial three calendar days (January 1-3) using randomization procedures published on March 4, 2019.

Details:

- OFLC announcement (scroll to December 16, 2020),
<https://www.dol.gov/agencies/eta/foreign-labor>
- Randomization procedures,
<https://www.federalregister.gov/documents/2019/03/04/2019-03809/selection-procedures-for-reviewing-applications-filed-by-employers-seeking-temporary-employment-of>
- Foreign Labor Application Gateway,
https://flag.dol.gov/?_ga=2.244700421.1850708295.1609030229-1479692143.1589050892

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In Response to Litigation, OFLC Updates Implementation of H-2A Adverse Effect Wage Rate Methodology

On December 23, 2020, the U.S. District Court for the Eastern District of California issued an order in *United Farm Workers v. DOL* enjoining the Department of Labor (DOL) from implementing a final rule on adverse effect wage rate (AEWR) methodology for the temporary employment of H-2A nonimmigrants in non-range occupations. The court's order prevents DOL from further implementing the H-2A AEWR final rule, which took effect on December 21, 2020, and orders DOL to use the methodology established by the agency's 2010 H-2A regulation to establish the hourly AEWRs for all non-range occupations.

Effective immediately, and until further notice, H-2A job orders filed with the State Workforce Agency serving the area of intended employment on or after December 21, 2020, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the OFLC National Processing Center for emergency situations, must use the AEWRs in effect on December 20, 2020.

Details:

- OFLC announcement (scroll to December 24, 2020), <https://www.dol.gov/agencies/eta/foreign-labor>

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DHS, DOJ Issue Final Rule on Asylum and Withholding of Removal Security Bars for Public Health Concerns

The Departments of Homeland Security and Justice issued a final rule clarifying that the security bar for "danger to the security of the United States" for asylum and withholding of removal may encompass emergency public health concerns due to a communicable disease.

The final rule responds to comments and reflects (and, in some instances, modifies) intervening changes made to the regulations since the proposed rule was published in July 2020.

Details:

- Final rule, <https://bit.ly/2L1uXow>

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CBP Issues Temporary Travel Restrictions at Borders With Canada, Mexico

On December 22, 2020, U.S. Customs and Border Protection (CBP) issued two notices extending temporary travel restrictions related to the COVID-19 pandemic and applicable to land ports of entry and ferry service between the United States and Canada, and between the United States and Mexico.

From December 22, 2020, through January 21, 2020, travel from Canada and Mexico into the United States via land ports of entry and ferry service is limited to "essential travel," as defined in the notices. Essential travel includes, but is not limited to, returning U.S. citizens and lawful permanent residents; individuals traveling for medical purposes, to attend educational institutions, to work in the United States, for emergency response and public health purposes, to engage in lawful cross-border trade, and others. Those subject to the restrictions include those traveling for tourism, including sightseeing, recreation, gambling, or attending cultural events.

The notices do not apply to air, freight rail, or sea travel but do apply to passenger rail, passenger ferry travel, and pleasure boat travel.

Details:

- CBP Mexico notice, <https://bit.ly/3hwNbe9>
- CBP Canada notice, <https://bit.ly/3ruJbz3>

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Firm in the News

Cyrus Mehta co-authored a blog post with **Kaitlyn Box** that was heavily cited in an article in India West, on the Ninth Circuit Court of Appeals ruling that recognized the occupation of computer programmer as a specialty occupation. "In Innova Solutions, the Ninth Circuit reminds the USCIS, as the numerous lower court decisions have done, that the may not be used as a Holy Grail to deny H-1B petitions that are based on well-reasoned arguments by the petitioner and corroborated by substantial evidence, including expert opinions," he said. <https://bit.ly/3hiNIQH>

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