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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - JANUARY 26, 2021

Posted on January 26, 2021 by Cyrus Mehta

Headlines:

President Biden Sets in Motion a Flurry of Immigration Actions in First Days – Newly inaugurated President Joseph R. Biden launched a sweeping array of immigration-related executive orders, regulatory actions, and legislative proposals.

DHS Pauses Certain Removals for 100 Days – The Department of Homeland Security announced that it is pausing for 100 days removals for certain noncitizens ordered deported, with exceptions.

DOS Announces Reconsideration of Visa Denials Based on Travel Bans – The Department of State will undertake a review to ensure that those whose immigrant visa applications were denied because of Trump administration proclamations may have their applications reconsidered.

President Biden Orders COVID-19 Related Public Health Measures for Domestic and International Travelers – Among other things, the order requires a negative COVID-19 test within 72 hours before boarding a flight to the United States for most travelers.

Census Bureau Director Under Trump Resigns Amid Flurry of Accusations re Data on Undocumented Immigrants – The Census Bureau's former director resigned after whistleblowers complained about the handling of data and reporting on undocumented immigrants, and following implementation of a court order.

Trump Grants Last-Minute Deferred Enforced Departure to Certain Venezuelans – On January 19, 2021, former President Trump announced Deferred Enforced Departure (DED) for certain Venezuelans for 18 months who meet requirements.

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President Biden Sets in Motion a Flurry of Immigration Actions in First Days

Newly inaugurated President Joseph R. Biden wasted no time in his first days in office, launching a sweeping array of immigration-related executive orders, regulatory actions, and legislative proposals. Below is a summary:

Executive Orders

- "Proclamation on Ending Discriminatory Bans on Entry to the United States." This order revokes a variety of Trump administration orders and proclamations that prevented certain individuals from the United States, such as those from primarily Muslim countries and from largely African countries, from entering the United States. The new order states that these Trump administration orders and proclamations "are a stain on our national conscience and are inconsistent with our long history of welcoming people of all faiths and no faith at all." The order says that such orders and proclamations also "have undermined our national security," "jeopardized our global network of alliances and partnerships" and are a "moral blight that has dulled the power of our example the world over," in addition to separating families and "inflicting pain that will ripple for years to come." Among other things, the order also states that when visa applicants request "entry to the United States, we will apply a rigorous, individualized vetting system." https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/
- "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)." This order refers to DACA guidance issued in 2012 under the Obama administration that "deferred the removal of certain undocumented immigrants who were brought to the United States as children, have obeyed the law, and stayed in school or enlisted in the military." The new order directs the Secretary of Homeland Security, in consultation with the Attorney General, to "take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA."

https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/

- "Reinstating Deferred Enforced Departure for Liberians." This order defers through June 30, 2022, with some exclusions, "the removal of any Liberian national, or person without nationality who last habitually resided in Liberia, who is present in the United States and who was under a grant of DED as of January 10, 2021." The order also provides for employment authorization for such persons through June 30, 2022, and calls for a notice to be published in the Federal Register. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/reinstating-deferred-enforced-departure-for-liberians/
- "Proclamation on the Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction." Among other things, this order calls for a pause on construction work and funding for the southern U.S. border wall and an assessment of related legal, administrative, and contractual issues. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/
- "Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities." This order revokes a Trump administration order issued January 25, 2017 ("Enhancing Public Safety in the Interior of the United States") and states that the Biden administration will "reset the policies and practices for enforcing civil immigration laws to align enforcement" with certain values and priorities, including protecting national and border security, addressing the humanitarian challenges at the southern border, ensuring public health and safety, and adhering to "due process of law as we safeguard the dignity and well-being of all families and communities." https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/

Regulatory Actions

- A memorandum to the heads of executive departments and agencies sent by Ronald Klain, President Biden's chief of staff, states that President Biden is calling for a regulatory freeze pending review of any new or

pending rules, with possible exceptions for emergency or urgent situations. The memo states that no rule should be proposed or issued "in any manner," including by sending a rule to the Office of the Federal Register (OFR), "until a department or agency head appointed or designated by" President Biden reviews and approves the rule. President Biden ordered that rules that have been sent to the OFR but not published in the Federal Register to be immediately withdrawn. For rules that have been published or issued in any manner but have not yet taken effect, President Biden ordered department and agency heads to "consider postponing the rules' effective dates for 60 days" so they can be reviewed. The memo also calls for consideration of opening a 30-day comment period. The memo calls for the Office of Management and Budget director to implement the regulatory review. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/

Legislative Proposals

- President Biden will soon send a proposed immigration reform bill to Congress. According to a fact sheet issued by the White House, the legislation, called the "U.S. Citizenship Act of 2021," would:
- Provide worker protections and improvements to the employment verification process.
- Clear employment-based visa backlogs, recapture unused visas, reduce lengthy wait times, and eliminate per-country visa caps.
- Make it easier for graduates of U.S. universities with advanced STEM degrees to stay in the United States.
- Create an earned roadmap to citizenship for undocumented individuals, allowing undocumented persons to apply for temporary legal status and apply for a green card after five years if they pass criminal and national security background checks and pay their taxes. DACA "Dreamers," temporary protected status beneficiaries, and immigrant farmworkers who meet specific requirements would be eligible for green cards immediately. After three years, all green card holders who pass additional checks and demonstrate knowledge of English and U.S. civics could apply for U.S. citizenship. Applicants must be physically present in the United States on or before January 1, 2021. A waiver is included for certain family unity or other humanitarian purposes.

- Reform family-based immigration.
- Increase diversity visas from 55,000 to 80,000.
- Promote immigrant and refugee integration and citizenship.
- Prioritize border controls that include technology and infrastructure improvements.
- Manage the border and provide various resources to protect border communities.
- Crack down on criminal organizations.
- Address underlying regional causes of migration.
- Reform immigration courts.
- Support asylum seekers and other vulnerable populations.
- Change the word "alien" to "noncitizen" in U.S. immigration laws.

It will be interesting to follow these myriad proposals and actions as they make their way through the agencies, the regulatory and legislative processes, and the courts. Some Republicans have already signaled their resistance to aspects of the legislative proposals. Sen. Lindsey Graham (R-SC), for example, said comprehensive immigration reform "is going to be a tough sell given this environment, but doing DACA, I think, is possible." Stay tuned.

Details:

- "Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System," Biden-Harris Transition Press Release, Jan. 20, 2021, https://cdn.vox-cdn.com/uploads/chorus_asset/file/22246670/Fact_Sheet__America_s_Citizenship_Act_of_2021.pdf
- "Senate Republicans Throw Cold Water on Biden's Immigration Proposal," https://www.nbcnews.com/politics/immigration/senate-republicans-throw-cold-water-biden-s-immigration-proposal-n1255232

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DHS Pauses Certain Removals for 100 Days

The Department of Homeland Security (DHS) announced on January 20, 2021, that it is pausing for 100 days removals for certain noncitizens ordered deported, with exceptions. DHS said the action is intended "to ensure we have a fair and effective immigration enforcement system focused on protecting

national security, border security, and public safety" and to "allow DHS to ensure that its resources are dedicated to responding to the most pressing challenges that the United States faces." Among those issues, a press release states, are "immediate operational challenges at the southwest border in the midst of the most serious global public health crisis in a century."

DHS said it will "continue to enforce our immigration laws" throughout "this interim period." The memo calls for a review of policies and practices related to immigration enforcement.

Meanwhile, Ken Paxton, Texas Attorney General, sued the Biden administration over the new policy to pause removals, stating that the "unlawful reversal" "ignored basic constitutional principles and violated written pledge" made in the last weeks of the Trump administration "to work cooperatively with the State of Texas to address shared immigration enforcement concerns."

Details:

- "Acting Secretary of DHS Directs a Review of Immigration Enforcement Practices and Policies," DHS press release, Jan. 20, 2021, https://www.dhs.gov/news/2021/01/20/acting-secretary-dhs-directs-review-immigration-enforcement-practices-and-policies
- "Memorandum From Acting Secretary Pekoske on Immigration Enforcement Policies," https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf
- Texas v. United States, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2021/Press/1%20Complaint_0.pdf
- "Texas Sues Biden Administration Over 100-Day Deportation 'Pause,' " Washington Post, https://www.washingtonpost.com/national/texas-biden-lawsuit-ice-deportations/2021/01/22/4548eec2-5cea-11eb-aaad-93988621dd28_story.html (subscription)

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DOS Announces Reconsideration of Visa Denials Based on Travel Bans

On January 22, 2021, the Department of State (DOS) announced that it will

undertake a review "to ensure that individuals whose immigrant visa applications were denied on the basis of the suspension and restriction on entry imposed by P.P. 9645 or 9983 may have their applications reconsidered." In addition to considering whether to reopen such applications, the agency will consider whether to charge an additional fee for processing them and will develop a plan to expedite their consideration. The review is taking place in response to President Biden's proclamation signed on January 20, 2021, ending travel restrictions under earlier Trump administration proclamations that suspended entry into the United States of certain nationals, based on visa type, from Burma, Eritrea, Iran, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela, and Yemen.

The DOS announcement also noted:

Pending the Department's review, under current Department regulations Immigrant visa (IV) applicants who were previously refused due to either P.P. 9645 or 9983 and were determined not to qualify for a waiver before January 20, 2020, must submit a new visa application (DS-260) and pay a new visa application processing fee. IV applicants refused due to either P.P. 9645 or 9983 and whose eligibility for a waiver was still being evaluated, or who were determined not to qualify for a waiver within one year of January 20, 2021, and who also request their local embassy or consulate to resume processing on their case within one year of January 20, 2021 may be able to resume processing of their case without submitting a new application or paying a new visa application processing fee. Embassies and consulates will prioritize the adjudication of applications for those individuals who remain in the waiver process.

Nonimmigrant visa applicants who were previously refused due to either P.P. 9645 or 9983 and did not qualify for a waiver will need to submit a new visa application (DS-160) and pay a new visa application processing fee if they wish to reapply for a visa.

The announcement warns that processing may be affected by COVID-19 pandemic-related restrictions at U.S. embassies and consulates on a post-by-post basis.

Details:

- "Rescission of Presidential Proclamations 9645 and 9983," Department of

State, Jan. 22, 2021, https://travel.state.gov/content/travel/en/News/visas-news/rescission-of-presidential-proclamations-9645-and-9983.html

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President Biden Orders COVID-19 Related Public Health Measures for Domestic and International Travelers

On January 21, 2021, President Biden signed an executive order to implement public health measures "consistent with CDC guidelines on public modes of transportation and at ports of entry to the United States."

Among other things, the order requires a negative COVID-19 test within 72 hours before boarding a flight to the United States for most travelers. The order calls for an assessment of alternative measures (e.g., testing, self-quarantining) for travelers entering the United States from countries where COVID-19 tests are inaccessible, "particularly where such inaccessibility of tests would affect the ability of United States citizens and lawful permanent residents to return to the United States."

The order also calls for diplomatic outreach to the governments of Canada and Mexico regarding public health protocols for land ports of entry.

Details:

- "Executive Order on Promoting COVID-19 Safety in Domestic and International Travel," Jan. 21, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-promoting-covid-19-safety-in-domestic-and-international-travel/

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Census Bureau Director Under Trump Resigns Amid Flurry of Accusations re Data on Undocumented Immigrants

The U.S. Census Bureau announced on January 16, 2021, that it is complying with a court order in a case brought by the National Urban League against former President Trump's orders to exclude data on undocumented immigrants from the 2020 Census. Specifically, the Bureau instructed its staff

not to finalize, report, or publicly disclose any reports, estimates, or data relating to such orders before the change of administration, and to provide detailed notice before releasing any such information that is finalized. This action also followed complaints about how the Bureau's director was handling data on undocumented immigrants.

According to reports, apportionment data may not be available until March 2021, exceeding the statutory deadline of December 31, 2020. A memo issued January 12, 2021, by the Commerce Department's Office of Inspector General (OIG), the latest director of the U.S. Census Bureau under the Trump administration, stated that Director Steven Dillingham had been rushing to produce a technical report that would include data on documented and undocumented persons in the United States before the end of the Trump administration. Whistleblowers complained that they had not had "sufficient time to conduct their normal data quality checks" and expressed concern that the data required were "not ready for publication." The Commerce Department's memo further stated that Dr. Dillingham "inquired into a financial reward for speed on this directive." The OIG asked for information on various aspects of the report and the processes and timelines for producing it.

Subsequently, Dr. Dillingham resigned effective January 20, 2021, and *Politico* pronounced "dead" the Trump administration's push to exclude the undocumented from the Census.

Details:

- "Census Bureau Statement on National Urban League Case 21-Day Stay," https://www.census.gov/newsroom/press-releases/2021/national-urban-league-21-day-stay.html
- National Urban League v. Ross, https://www.census.gov/content/dam/Census/newsroom/press-kits/2021/456-stipulation-and-order-granting-stay.pdf
- "Request for Information Pursuant to the Inspector General Act of 1978, as Amended," Office of Inspector General, U.S. Department of Commerce, Jan. 12, 2021, https://www.oig.doc.gov/OIGPublications/OIG-21-019-M.pdf
- "Census Bureau Says Trump's Push to Exclude Undocumented is Dead," Politico, https://www.politico.com/news/2021/01/16/census-data-released-biden-trump-undocumented-immigrants-459893

- "Director's Blog: Farewell," Statement of Dr. Steven Dillingham, Director, U.S. Census Bureau, Jan. 18, 2021, https://www.census.gov/newsroom/blogs/director/2021/01/dillingham-farewell.html

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Trump Grants Last-Minute Deferred Enforced Departure to Certain Venezuelans

On January 19, 2021, former President Trump announced Deferred Enforced Departure (DED) for certain Venezuelans due to the "deteriorative condition within Venezuela, which presents an ongoing national security threat to the safety and well-being of the American people." The memo, published in the Federal Register on January 25, 2021, directs the deferral for 18 months of the removal of Venezuelans meeting certain requirements.

Details:

- "Deferred Enforced Departure for Certain Venezuelans," Federal Register, https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01718.pdf
- "Trump Grants Venezuelans Temporary Legal Status on His Way Out," Politico, Jan. 19, 2021, https://www.politico.com/news/2021/01/19/trump-venezuela-temporary-legal-status-460524

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Cyrus Mehta was quoted by the Times of India in "White House Freezes Recent Draconian Immigration Rules. Mr. Mehta said, "As the H-1B rule that sought to replace the lottery system with one based on wages will be frozen for 60 days, it probably will not impact the upcoming H-1B lottery process." https://timesofindia.indiatimes.com/world/us/white-house-freezes-recent-draconian-immigration-rules/articleshow/80387530.cms

Mr. Mehta was quoted by the Economic Times in "U.S. Pulls H-1B Rule Tweak That Vexed Technology Cos" on whether the midnight rules promulgated under the Trump administration will survive as well as how proposed immigration legislation proposed by the Biden administration will affect Indians. Referring to

a ban on issuing new H-1B visas that is still in place, Mr. Mehta said, "During that 60-day pause, the administration can issue a new rule to rescind the old rule or such a pause would give more time to challenge those rules in court if the Biden administration decides to go along with them. I can see the Biden administration being sympathetic towards the Department of Labor wage rule that increases the wage requirement to be paid to H-1B workers."

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