



## IMMIGRATION UPDATE - MARCH 16, 2021

*Posted on March 16, 2021 by Cyrus Mehta*

### Headlines:

#### [DHS Rescinds Public Charge Rule, Withdraws Appeals of Injunctions Blocking It](#)

– DHS rescinded regulations resulting from a final rule that was vacated by a federal district court. Under the now-rescinded rule, the government could deny applications for green cards, temporary nonimmigrant status, and naturalization if the government found they relied on—or were at risk of relying on—public benefits. The Biden administration also withdrew the federal government's appeals of injunctions blocking the DHS public charge rule.

#### [State Dept. Releases Guidance for Those Previously Refused Visas Under Travel Bans](#)

– The Department issued guidance in response to President Biden's signing of two proclamations that ended travel bans on certain nationals, based on visa type, from Burma, Eritrea, Iran, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela, and Yemen.

#### [State Dept. Extends Expansion of Interview Waiver Eligibility](#)

– The Department has temporarily expanded the ability of consular officers to waive the in-person interview requirement for individuals applying for a nonimmigrant visa in the same classification. The temporary expansion is effective until December 31, 2021.

#### [USCIS May Reopen H-1B Petitions Denied Under Three Rescinded Policy Memos](#)

– USCIS announced that it may reopen and/or reconsider adverse H-1B decisions on Form I-129, Petition for a Nonimmigrant Worker, that were made based on three rescinded policy memoranda.

#### [ABIL Asks for Withdrawal of H-1B Lottery Rule Prioritizing Wages; DHS Delays Effective Date Until May 14](#)

– ABIL formally submitted a comment asking the Department to withdraw its final rule prioritizing wages in adjudicating H-1B

applications. DHS delayed the effective date of the wage rule until May 14, 2021.

[Lawsuit Challenges USCIS Rejections of H-1B Petitions Filed After October 1](#) – A lawsuit filed in a federal district court on behalf of seven U.S. employers whose H-1B petitions were rejected challenges USCIS's "arbitrary and capricious refusal to accept timely and properly filed H-1B petitions" subject to the annual cap.

[DHS Designates Venezuela, Burma for TPS for 18 Months](#) – The Department of Homeland Security has designated Venezuela and Burma for temporary protected status for 18 months.

[State Dept. Launches Monthly Live "Chats with Charlie" re Visa Bulletin](#) – The Visa Bulletin for April 2021 announces the launch of live "Chats with Charlie" to discuss information provided in the monthly Visa Bulletin. The first chat is scheduled for March 17, 2021, to discuss the April Visa Bulletin.

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#### **Details:**

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### **DHS Rescinds Public Charge Rule, Withdraws Appeals of Injunctions Blocking It**

The Department of Homeland Security (DHS) rescinded regulations resulting from a final rule issued in August 2019 that was vacated by a federal district court. Under the now-rescinded rule, the government could deny applications for green cards, temporary nonimmigrant status, and naturalization if the government found they relied on—or were at risk of relying on—public benefits. The Biden administration also withdrew the federal government's appeals of injunctions blocking the DHS public charge rule. However, 11 Republican-led states said that they plan to ask courts to continue the litigation.

USCIS will issue updated guidance on affected forms. In the interim, USCIS said it will not reject any Form I-485 based on the inclusion or exclusion of Form I-944, and will not reject Forms I-129, I-129CW, I-539, or I-539A based on whether the public benefits questions (Forms I-129 (Part 6), I-129CW (Part 6), I-539 (Part 5), and I-539A (Part 3)) have been completed or left blank. Those issued Requests For Evidence (RFEs) and Notices of Intent to Deny (NOIDs) will not need to submit information or documents solely as required by the public

charge rule. However, all other requests raised in the RFE/NOID must be answered.

#### Details:

- "DHS Secretary Statement on the 2019 Public Charge Rule," USCIS, Mar. 9, 2021, <https://www.uscis.gov/news/news-releases/dhs-secretary-statement-on-the-2019-public-charge-rule>
- Final Rule: Inadmissibility on Public Charge Grounds; Implementation of Vacatur, <https://bit.ly/3cuVnJG>
- USCIS guidance, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>
- Joint Stipulation to Dismiss, *DHS v. State of New York*, <https://bit.ly/3cspEsn>
- "States Seek to Take Over Defense of 'Public Charge' Rule," Reuters, Mar. 11, 2021, <https://www.reuters.com/article/immigration-publiccharge/states-seek-to-take-over-defense-of-public-charge-rule-idUSL1N2L93DH>

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### **State Dept. Releases Guidance for Those Previously Refused Visas Under Travel Bans**

On March 10, 2021, the Department of State issued guidance in response to President Biden's signing of two proclamations on January 20, 2021, that ended travel bans on certain nationals, based on visa type, from Burma, Eritrea, Iran, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela, and Yemen.

Following the Department's review, eligible immigrant visa applicants whose entry was refused previously under the travel bans and who did not qualify for waivers before January 20, 2020, may submit new visa applications. Those whose entry was refused under the bans and were determined not to qualify for a waiver on or after January 20, 2020, may request their local embassy or consulate to reconsider their cases within one year of the date of waiver refusal without submitting a new application or fee.

Nonimmigrant visa applicants whose entry was refused previously due to the

travel bans and who did not qualify for waivers may submit new visa applications.

The Department can immediately process visa applications for eligible individuals from the affected countries. However, local U.S. embassies or consulates may not be able to schedule all affected applicants for visa interviews immediately due to COVID-19-related restrictions. Applicants should consult the website of their nearest U.S. embassy or consulate to determine if their cases qualify for expedited processing.

#### Details:

- Rescission of Presidential Proclamations 9645 and 9983, Dept. of State, Mar. 10, 2021, <https://travel.state.gov/content/travel/en/News/visas-news/rescission-of-p-residential-proclamations-9645-and-9983.html>

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### **State Dept. Extends Expansion of Interview Waiver Eligibility**

The Department of State, in consultation with the Department of Homeland Security, extended until December 31, 2021, a temporary expansion of the ability of consular officers to waive the in-person interview requirement for individuals applying for a nonimmigrant visa in the same classification to those whose nonimmigrant visas expired within 48 months. The temporary policy was due to expire March 31, 2021.

Previously, only those applicants whose nonimmigrant visas expired within 24 months were eligible for interview waivers. This change "will allow consular officers to continue processing certain nonimmigrant visa applications while limiting the number of applicants who must appear at a consular section, thereby reducing the risk of COVID-19 transmission to other applicants and consular staff," the Department of State said. Travelers should review the website of the nearest U.S. embassy or consulate for details on available services and eligibility information and instructions on applying for a visa without an interview.

#### Details:

- "Expansion of Interview Waiver Eligibility," Dept. of State, Mar. 11, 2021,

<https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html>

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## **USCIS May Reopen H-1B Petitions Denied Under Three Rescinded Policy Memos**

U.S. Citizenship and Immigration Services (USCIS) announced on March 12, 2021, that it may reopen and/or reconsider adverse H-1B decisions on Form I-129, Petition for a Nonimmigrant Worker, that were made based on three rescinded policy memoranda. USCIS said it "will generally use its discretion to accept a motion to reopen filed more than 30 days after the decision, if filed before the end of the validity period requested on the petition or labor condition application, whichever is earlier, and the decision was based on one or more policies in the rescinded H-1B memoranda below." The rescinded memos include:

- "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Reference AFM Chapter 31.3(g)(16))," HQ 70/6.2.8 (Jan. 8, 2010)
- "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," [PM-602-0157](#) (Feb. 22, 2018)
- "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions'," [PM-602-0142](#) (Mar. 31, 2017)

USCIS made the rescissions in memoranda issued on June 17, 2020, and on February 3, 2021.

### Details:

- "USCIS May Reopen H-1B Petitions Denied Under Three Rescinded Policy Memos," USCIS, Mar. 12, 2021, <https://www.uscis.gov/news/alerts/uscis-may-reopen-h-1b-petitions-denied-under-three-rescinded-policy-memos>
- USCIS June 17, 2020, memorandum, PM-602-0114, [https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114\\_ITServeMemo.pdf](https://www.uscis.gov/sites/default/files/document/memos/PM-602-0114_ITServeMemo.pdf)
- USCIS February 3, 2021, memorandum, PM-602-0142.1, [https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1\\_RescissionOfPM-602-0142.pdf](https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf)

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## **ABIL Asks for Withdrawal of H-1B Lottery Rule Prioritizing Wages; DHS Delays Effective Date Until May 14**

The Alliance of Business Immigration Lawyers (ABIL) formally submitted a comment asking the Department of Homeland Security (DHS) to withdraw its final rule prioritizing wages in adjudicating H-1B applications.

ABIL said the final rule "would unlawfully and unjustifiably give preference to workers who earn higher wages, despite the fact that these wages are drawn from limited federal data sources" that are "not designed for application to the H-1B visa program, and bear no relation to the value a highly skilled worker adds to the United States." ABIL believes that because of the wide variety of occupational categories into which H-1B beneficiaries may fall, the use of wage data as a proxy for high skills and qualifications "will not accomplish the outcomes DHS desires" and instead "will unfairly discriminate against and burden law-abiding employers," particularly small and medium-size businesses that will find the H-1B program unaffordable as a result.

ABIL also warned that the final rule is likely to "cause more work to be commissioned offshore" and thus undermine opportunities for U.S. workers along with the Biden administration's desire that more work be performed in the United States.

Cyrus Mehta and Kaitlyn Box of Cyrus D. Mehta & Partners PLLC assisted in preparing the comment on behalf of ABIL. CDMP also separately prepared and submitted its own comment opposing the rule.

On March 12, 2021, DHS delayed the effective date of the wage rule until May 14, 2021. DHS said the 60-day delay would allow the agency to "review any questions of fact, law, or policy."

### Details:

- Comment Submitted by Alliance of Business Immigration Lawyers, Mar. 10, 2021, <https://www.regulations.gov/comment/USCIS-2020-0019-1279>
- Comment submitted by Cyrus D. Mehta & Partners opposing the wage based H-1B lottery rule, <https://www.regulations.gov/comment/USCIS-2020-0019-1253>
- Notice delaying effective date of final rule, DHS,

<https://www.govinfo.gov/content/pkg/FR-2021-03-12/pdf/2021-05269.pdf>

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## **Lawsuit Challenges USCIS Rejections of H-1B Petitions Filed After October 1**

The American Immigration Council (AIC) sued on March 11, 2021, in federal court on behalf of seven U.S. employers whose H-1B petitions were rejected. The lawsuit challenges U.S. Citizenship and Immigration Services' (USCIS) "arbitrary and capricious refusal to accept timely and properly filed H-1B petitions" subject to the annual cap. AIC said USCIS rejected the petitions filed after October 1 "simply because the H-1B worker's intended employment start date—naturally—also fell after October 1." Based on this timeline, AIC said, "USCIS created an absurd choice: foreign workers needed to start on October 1 (and not a day later), or the U.S. employer had to misrepresent the intended employment start-date by 'back-dating' the petition." In fact, AIC noted, USCIS had accepted some with an employment start date after October 1 without issue. Details: "Challenging USCIS' Arbitrary Rejections of Petitions Filed After October 1," American Immigration Council,

<https://www.americanimmigrationcouncil.org/litigation/challenging-uscis%E2%80%99-arbitrary-rejections-h-1b-petitions-filed-after-october-1> ·

Complaint, <https://bit.ly/30DKhfF>

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## **DHS Designates Venezuela, Burma for TPS for 18 Months**

The Department of Homeland Security (DHS) has designated Venezuela and Burma for temporary protected status (TPS) for 18 months. **Venezuela TPS** Venezuela has been designated for TPS until September 2022. The 180-day registration period for eligible individuals to submit TPS applications began March 9, 2021, and is effective through September 5, 2021. DHS said the designation is due to "extraordinary and temporary conditions in Venezuela" that prevent its nationals from returning safely, "including a complex humanitarian crisis marked by widespread hunger and malnutrition, a growing influence and presence of non-state armed groups, repression, and a crumbling infrastructure." The new TPS designation for Venezuela enables eligible Venezuelan nationals (and individuals without nationality who last resided in Venezuela) currently residing in the United States to file initial

applications for TPS. Only those who can demonstrate continuous residence in the United States as of March 8, 2021, are eligible for TPS under Venezuela's designation. A Federal Register notice provides additional details on how and when to apply for TPS and related employment authorization. The notice also provides information about Deferred Enforced Departure (DED) for eligible Venezuelan nationals (and persons without nationality who last habitually resided in Venezuela), and explains how eligible individuals may apply for DED-related employment authorization with USCIS, based on the January 19, 2021, memorandum from former President Donald Trump directing the Secretary to take appropriate measures for the implementation of DED for Venezuelan nationals for 18 months, through July 20, 2022. **Burma TPS** The new designation of Burma for TPS, which DHS said was in response to a military coup and security forces' violence against civilians that is causing a "complex and deteriorating humanitarian crisis," enables eligible Burmese nationals (and individuals without nationality who last habitually resided in Burma) currently residing in the United States to file initial applications for TPS. For Burma, only those who can demonstrate continuous residence in the United States as of March 11, 2021, will be eligible for TPS under Burma's 18-month designation. An upcoming Federal Register notice will provide additional details on how and when to apply for TPS and related employment authorization. Details:

"Secretary Mayorkas Designates Venezuela for Temporary Protected Status for 18 Months," USCIS, Mar. 8, 2021,

<https://www.uscis.gov/news/news-releases/secretary-mayorkas-designates-venezuela-for-temporary-protected-status-for-18-months> · "Secretary

Mayorkas Designates Burma for Temporary Protected Status," USCIS, Mar. 12, 2021,

<https://www.dhs.gov/news/2021/03/12/secretary-mayorkas-designates-burma-temporary-protected-status> · Federal Register notice on Venezuela TPS,

Mar. 9, 2021,

<https://www.federalregister.gov/documents/2021/03/09/2021-04951/designation-of-venezuela-for-temporary-protected-status-and-implementation-of-employment>

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### **State Dept. Launches Monthly Live "Chats with Charlie" re Visa Bulletin**

The Department of State's Visa Bulletin for April 2021 announces the launch of



live monthly "Chats with Charlie." @TravelGov will begin hosting "Chats with Charlie" on its YouTube channel (<https://www.youtube.com/user/TravelGov>) to discuss information provided in the monthly Visa Bulletin. The first chat is scheduled for March 17, 2021, at 1 pm ET to discuss the April Visa Bulletin. Questions can be emailed to [VisaBulletin@state.gov](mailto:VisaBulletin@state.gov) ahead of the event with "Chat with Charlie Question" in the subject line. Questions will also be taken via the YouTube Live Chat feature and will be answered in real time. The Department said the event is intended to address issues of general interest related to the content of the Visa Bulletin. No policy, case, or post-specific questions will be accepted. Details: April 2021 Visa Bulletin, Dept. of State, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-april-2021.html>

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### **Firm in the News**

**Cyrus Mehta** was quoted by India West in "President Biden Unlikely to Rescind Trump's H-1B Ban." He said, "The optics aren't great. Biden hasn't taken any actions to rescind it, possibly because of push-back from organized labor and a thrashing from Republicans. Biden needs support to pass a stimulus bill." [https://www.indiawest.com/news/business/president-biden-unlikely-to-rescind-trump-s-h-1b-ban/article\\_ed7563ea-7fe6-11eb-92fa-6378f2d25fce.html](https://www.indiawest.com/news/business/president-biden-unlikely-to-rescind-trump-s-h-1b-ban/article_ed7563ea-7fe6-11eb-92fa-6378f2d25fce.html)

**Mr. Mehta** was quoted by American Bazaar in "H-1B Visa Holders Seek Extension of 60-Day Grace Period After Job Loss Due to Pandemic." He said, "Biden should at least allow the H-1B ban to lapse on March 31 even though he does not rescind it before the date. Although it would be powerful if he affirmatively rejects the ban any time from now till March 31." <https://www.americanbazaaronline.com/2021/03/11/h-1b-visa-holders-seek-extension-of-grace-period-due-to-job-losses-444512/?amp>

**Mr. Mehta** and **Kaitlyn Box** wrote a practice advisory for AILA entitled "The Ethics of Representing a Client in Person During the Pandemic." The advisory is available on AILA InfoNet at Doc. No. 21031137 ( March 11, 2021) and <https://www.aila.org/practice/ethics/ethics-resources/2016-2019/the-ethics-of-representing-a-client-in-person>

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