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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - JULY 06, 2021

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Headlines:

Biden Administration Kicks Off Cross-Agency Naturalization Campaign – The Biden administration announced an interagency campaign to promote naturalization "to all who are eligible."

District Court Vacates Final Rule Affecting Wages for H-1B, PERM Workers; OFLC Updates Implementation – In light of delays and a June district court order vacating the final rule, the operative version of the regulations "continues to be the version in place on October 7, 2020, prior to the publication" of the interim final rule, the Office of Foreign Labor Certification said.

USCIS Releases Guidance Following June 30 Expiration of EB-5 Regional Center Program – The agency released guidance on July 1, 2021, noting that the lapse does not affect EB-5 petitions filed by investors who are not seeking a visa under the Regional Center Program.

State Dept. Provides Guidance on COVID-19 Restrictions and Exceptions, Including National Interest – The exceptions include general categories like U.S. citizens, lawful permanent residents, and certain types of workers, as well as national interest.

ABIL Global: Canada – This article discusses the demise of the Owner Operator Labour Market Impact Assessment, and what options remain for entrepreneurs hoping to come to Canada.

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Biden Administration Kicks Off Cross-Agency Naturalization Campaign

On July 2, 2021, the Biden administration announced an interagency campaign to promote naturalization "to all who are eligible." Secretary of Homeland Security Alejandro Mayorkas said that the strategy "will ensure that aspiring citizens are able to pursue naturalization through a clear and coordinated process."

U.S. Citizenship and Immigration Services (USCIS) said that the interagency strategy for promoting naturalization reflects the collaboration of USCIS; the Departments of Education, Health and Human Services, State, Labor, Housing and Urban Development, Defense, Justice, Veterans Affairs, and Agriculture, and the Social Security Administration. These agencies are part of the interagency naturalization working group established pursuant to President Biden's executive order 14012, issued in February, to prioritize citizenship education and awareness through capacity building and expanded partnerships.

Activities will include:

- Use of data regarding potential naturalization-eligible populations;
- Citizenship public education and awareness campaign;
- National and community targeted outreach through traditional and social media;
- Stakeholder engagement;
- Promotion of citizenship and education resources;
- The USCIS Outstanding Americans by Choice initiative;
- The USCIS Citizenship and Integration Grant Program; and
- Capacity building through collaboration and partnerships.

USCIS reported that more than 9,400 new citizens will be naturalized in 170 ceremonies between June 30 and July 7, 2021. This year's Independence Day activities included a naturalization ceremony with President Biden at the White House on July 2 and a ceremony with Secretary Mayorkas administering the oath of allegiance virtually to 22 military service members serving overseas, which took place on June 30.

Details:

- Interagency Strategy for Promoting Naturalization, July 2, 2021,

https://www.uscis.gov/promotingnaturalization

- "Biden Unveils Push to Encourage U.S. Citizenship," The Hill, July 2, 2021, https://thehill.com/policy/national-security/561356-biden-unveils-push-to-encourage-us-citizenship
- Executive Order 14012, https://bit.ly/2V0Dzkp (release); https://www.uscis.gov/sites/default/files/document/reports/Interagency_Strategy_for_Promoting_Naturalization_Final.pdf (report)
- "Biden Thanks New Citizens for Choosing America at a White House Naturalization Ceremony," New York Times, July 2, 2021, https://www.nytimes.com/2021/07/02/us/politics/biden-naturalization-ceremony.html

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District Court Vacates Final Rule Affecting Wages for H-1B, PERM Workers; OFLC Updates Implementation

On June 23, 2021, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce v. DHS*, vacating the final rule, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" and remanding the matter to the U.S. Department of Labor. The Department did not oppose the vacating of the rule. In its motion, the Department stated that until the agency conducts further review, it "cannot say for certain the extent to which the final rule may need to be revised, but the concerns raised to this point suggest that there may need to be significant changes to the rulemaking going forward."

The Department published the final rule on January 14, 2021, following district court orders that set aside an October 8, 2020, interim final rule. The final rule amended the Department's regulations governing the prevailing wages for employment opportunities that U.S. employers seek to fill with foreign workers on a permanent or temporary basis under the PERM, H-1B, H-1B1, or E-3 visa programs. The Department has twice delayed the effective date of the final rule. In light of these delays and now the June order vacating the final rule, the operative version of the regulations at 20 CFR §§ 656.40 and 655.731 "continues to be the version in place on October 7, 2020, prior to the publication" of the interim final rule, the Office of Foreign Labor Certification said.

The Department will need to issue a new regulation if it wishes to change the current prevailing wage for high-skilled foreign nationals. In April 2021, the Department requested information from the public on data sources for calculating the prevailing wage for H-1B visa holders and employment-based immigrants. DOL may use the information it received from the public if it decides to make changes to the prevailing wage system for foreign-born professionals.

Details:

- OFLC announcement (scroll down to June 29, 2021), https://www.dol.gov/agencies/eta/foreign-labor
- Request for Information, Employment and Training Administration, Dept. of Labor, April 2, 2021, https://bit.ly/36ax1Ch

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USCIS Releases Guidance Following June 30 Expiration of EB-5 Regional Center Program

The EB-5 Immigrant Investor Regional Center Program expired on June 30, 2021. U.S. Citizenship and Immigration Services released related guidance on July 1, 2021, noting that the lapse does not affect EB-5 petitions filed by investors who are not seeking a visa under the Regional Center Program. Due to the lapse, USCIS will reject the following forms received on or after July 1, 2021:

- Form I-924, Application for Regional Center Designation Under the Immigrant Investor Program, except when the application type indicates that it is an amendment to the regional center's name, organizational structure, ownership, or administration; and
- Form I-526, Immigrant Petition by Alien Investor, when it indicates that the petitioner's investment is associated with an approved regional center.

USCIS said it will continue to accept and review Form I-829, Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, including those filed on or after July 1, 2021. USCIS is rejecting all Forms I-485, Application to Register Permanent Residence or Adjust Status, and any associated Forms I-765, Application for Employment Authorization, and Forms I-131, Application for Travel Document, based on an approved Regional Center Form I-526.

Details:

- USCIS alert, July 1, 2021, https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program

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State Dept. Provides Guidance on COVID-19 Restrictions and Exceptions, Including National Interest

The Department of State released guidance on June 24, 2021, on restrictions and exceptions under four presidential proclamations that suspend entry into the United States of noncitizens who were physically present in any of 33 countries during the 14-day period preceding their entry or attempted entry into the United States.

The exceptions include general categories like U.S. citizens, lawful permanent residents, and certain types of workers, as well as national interest.

Details:

- "COVID-19 Travel Restrictions and Exceptions," Dept. of State, June 24, 2021, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/covid-19-travel-restrictions-and-exceptions.html

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ABIL Global: Canada

This article discusses the demise of the Owner Operator Labour Market Impact Assessment, and what options remain for entrepreneurs hoping to come to Canada.

In Canada, the starting point to obtain a work permit as a foreign national is a labour market impact assessment (LMIA). This requires a Canadian company to demonstrate that they advertised the position and that Canadian citizens and permanent residents were given a reasonable opportunity to apply for the position. Until recently, one of the most popular exemptions from advertising to support an LMIA application was the Owner Operator category. Where a foreign national owned more than 50 percent of a Canadian company, no advertising was required, and the Canadian company merely had to establish

that the impact of hiring the foreign national would have a neutral or positive impact on the Canadian labor market and that the job offer was genuine.

The Entrepreneur permanent residence category was eliminated approximately two decades ago. Since then, many of the provinces have designed entrepreneur programs, but these provincial programs typically require a minimum investment and creation of jobs in Canada and often take months to be approved. Accordingly, in the absence of a true entrepreneur program, the Owner Operator LMIA provided a path for many self-employed business entrepreneurs to initially come to Canada to work, gain Canadian experience working for a Canadian company, and then ultimately apply for permanent residence under the Express Entry path.

What options remain for entrepreneurs hoping to come to Canada and start a new business?

Recently, Immigration, Refugees and Citizenship Canada (IRCC) launched the Start-Up Visa Program. This program requires foreign nationals to secure financial backing from a designated angel fund or venture capital funds or the support of a business incubator. The Start-Up Visa Program has been underutilized, likely because entrepreneurs are not interested in sharing their business ideas or ownership in their future business.

There is also a C-11 work permit for Entrepreneurs/Self-Employed candidates, but it does not include a direct path to permanent residence. Since most successful candidates for permanent residence require "Canadian work experience," and self-employed work is not considered "Canadian work experience" (*Immigration and Refugee Protection Act*), it is unlikely that C-11 work permit holders will qualify for permanent residence.

With the elimination of the Owner Operator LMIA and limitations with the Start-Up Visa, C-11 work permit, and provincial programs for entrepreneurs, Canada is missing out on the potential to attract entrepreneurs. Given that it is well-established that new immigrants are often risk-takers and therefore make good entrepreneurs, this could have a negative long-term impact on Canada's immigration program and economy. This is particularly relevant in light of estimates of approximately a trillion dollars' worth of small and medium-sized businesses in Canada that are owned by baby boomers who are set to retire within the next 10 years. So far there has been no indication IRCC plans to develop more policies and programs to create paths for entrepreneurs.

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Cyrus Mehta and his colleague William Stock were quoted by Forbes in "Trump's H-1B Visa Wage Rule Is Dead: What's Next?" Highlights include:

- Mr. Mehta said, "If the Biden administration wants to develop a fair way to determine prevailing wages, the prevailing wage ought not to be based on surveys factoring wages paid by all employers in the industry. For instance, nonprofits find it very difficult to hire foreign national lawyers on H-1B visas or sponsor them for green cards as they have to rely on wage surveys that include what the largest law firms also pay entry-level lawyers, which can cross $200,000. The government should also not assume that all lawyers wish to only work for firms that pay the highest wages. Some lawyers desire to work for nonprofits or smaller firms as lifestyle choices or because they find the work truly challenging or are altruistic. Similarly, startups are also affected by formalistic prevailing wage surveys."
- Mr. Stock said, "The Standard Occupational Classification's 'Classification Principles and Coding Guidelines' states that first-level supervisors of professionals such as engineers, physicians and accountants are classified within those occupations, and not within the managerial occupations (such as Computer and Information Systems Managers). should incorporate this classification principle into its wage methodology to avoid setting artificially high wages for first-level supervisors of workers in those professional occupations."

The article is at https://www.forbes.com/sites/stuartanderson/2021/07/01/trumps-h-1b-visa-wage-rule-is-dead-whats-next/?sh=f9382384a218

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