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US IMMIGRATION & NATIONALITY LAW

# IMMIGRATION UPDATE - JULY 12, 2021

*Posted on July 12, 2021 by Cyrus Mehta*

**Headlines:**

USCIS Announces Updated Receipt Guidance for I-9 Process – USCIS announced updated guidance on receipts for the I-9 employment authorization verification process.

OFLC Implements District Court Order Requiring Backpay for Qualifying H-2A Workers – Certain H-2A employers must make wage adjustment payments to qualifying workers and certify compliance by September 4, 2021.

OFLC Completes Randomization Process, Publishes List of Randomized H-2B Applications for Employers Seeking H-2B Workers Starting October 1, 2021 – OFLC completed the randomization process to randomly assign to analysts for review and processing all H-2B applications submitted during a three-day filing window requesting an October 1, 2021, work start date. OFLC published the Assignment Group(s) for 873 H-2B applications covering 21,116 worker positions with a work start date of October 1, 2021.

National Interest Exceptions Extended to One Year, Embassies Report – U.S. Embassies in London and Berlin have reported that "all National Interest Exceptions (NIE) are now valid for 12 months and multiple entries as long as you are traveling for the same purpose for which you originally received an NIE." The guidance does not apply to CBP requests and NIEs previously issued by CBP.

USCIS Extends and Redesignates Yemen for TPS, Suspends Certain Requirements for Yemeni F-1 Students – DHS announced the extension and redesignation of Yemen for temporary protected status through March 3, 2023. The agency also announced the suspension of certain regulatory requirements for Yemeni F-1 nonimmigrant students.

D.C. Court of Appeals Issues Decision in Wang v. Blinken – On July 9, 2021, the D.C. Court of Appeals issued its opinion in *Wang v. Blinken*, interpreting INA § 203(d) to include the counting of derivatives toward the EB-5 investor cap.

**Details:**

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## USCIS Announces Updated Receipt Guidance for I-9 Process

U.S. Citizenship and Immigration Services (USCIS) announced updated guidance on receipts for the I-9 employment authorization verification process:

- When employees present a receipt showing that they applied to replace a List A, B, or C document that was lost, stolen, or damaged, they should show their employer the replacement document for which the receipt was given. However, USCIS acknowledged that this is not always possible due to document delays, changes in status, or other factors.
- If the employee does not present the original document for which the previously provided receipt was issued but presents, within the 90-day period, another acceptable document (or documents) to demonstrate his or her identity and/or employment authorization, employers may now accept such documentation.

In cases where an employee presents a document (or documents) other than the actual replacement document, the employer should complete a new Section 2 and attach it to the original Form I-9, USCIS said. In addition, the employer should provide a note of explanation either in the Additional Information box included on page 2 of the Form I-9 or as a separate attachment.

Details:

- USCIS guidance, June 25, 2021, https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents/updated-receipts-guidance

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## OFLC Implements District Court Order Requiring Backpay for Qualifying H-2A

## Workers

Under a court order in *United Farm Workers v. DOL*, the Department of Labor's Office of Foreign Labor Certification (OFLC) announced on July 6, 2021, that H-2A employers that submitted job orders (Form ETA-790/790A) to state workforce agencies or applications for H-2A temporary labor certification (Form ETA-9142A) to DOL between December 21, 2020, and February 23, 2021, must make wage adjustment payments to qualifying workers and certify compliance by September 4, 2021.

The payments must be made to qualifying H-2A workers and U.S. farmworkers in corresponding employment who worked during the period from January 15, 2021, to February 23, 2021, and received an hourly wage below the geographically applicable 2021 Adverse Effect Wage Rate (AEWR). Each wage adjustment payment must equal the total number of hours a farmworker worked from January 15, 2021, to February 23, 2021, multiplied by the difference between the wage received and the geographically applicable 2021 AEWR.

Details:

- OFLC notice, July 6, 2021, https://www.dol.gov/agencies/eta/foreign-labor
- Court order, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/ECF%2074%20-%20Modification%20to%20Backpay%20Order.pdf

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## OFLC Completes Randomization Process, Publishes List of Randomized H-2B Applications for Employers Seeking H-2B Workers Starting October 1, 2021

The Department of Labor's Office of Foreign Labor Certification (OFLC) completed the process to randomly assign to analysts for review and processing all H-2B applications submitted during the three-day filing window (July 3-5, 2021) requesting an October 1, 2021, work start date. OFLC published the Assignment Group(s) for 873 H-2B applications covering 21,116 worker positions with a work start date of October 1, 2021.

Since the number of H-2B applications received during the three-day filing window collectively requested fewer worker positions for certification than the number of visas available under the semi-annual visa allotment for the first half

of fiscal year 2022, all H-2B applications filed within that time period that requested workers starting October 1, 2021, were randomly given a unique number in accordance with OFLC's randomization process and were placed into the same group for assignment to analysts for review and processing.

Details:

- OFLC notice, July 9, 2021, https://www.dol.gov/agencies/eta/foreign-labor
- Assignment groups for H-2B applications submitted July 3-5, 2021, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2B%20Randomization%20List%20July%202021.pdf

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## National Interest Exceptions Extended to One Year, Embassies Report

U.S. embassies in London and Berlin have reported that "all National Interest Exceptions (NIE) are now valid for 12 months and multiple entries as long as you are traveling for the same purpose for which you originally received ." According to the U.S. embassy in Berlin, this new policy was effective July 5, 2021.

Presidential Proclamation 10143 allows the entry of any noncitizen whose entry would be in the national interest. Previously, all NIEs were only valid for 30 days and only approved for a single entry into the United States. Those already issued NIEs now may enter the country multiple times, provided they are traveling for the same pre-approved purpose stated in their original NIE.

U.S. Customs and Border Protection (CBP) confirmed that the above guidance does not apply to CBP requests and NIEs previously issued by CBP.

Details:

- Klasko Client Alert, July 6, 2021, https://bit.ly/36rX7Rh
- of State announcement, updated July 6, 2021, https://travel.state.gov/content/travel/en/News/visas-news/extension-validity-for-nies-for-china-iran-brazil-south-africa-schengen-uk-ireland-india.html

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## USCIS Extends and Redesignates Yemen for TPS, Suspends Certain Requirements for Yemeni F-1 Students

On July 9, 2021, the Department of Homeland Security (DHS) announced the extension and redesignation of Yemen for temporary protected status (TPS). On the same date, DHS announced the suspension of certain regulatory requirements for Yemeni F-1 nonimmigrant students who are experiencing severe economic hardship because of the current crisis in Yemen.

**TPS extended and redesignated.** TPS for Yemen is extended and redesignated for 18 months, from September 4, 2021, through March 3, 2023. The extension allows currently eligible TPS beneficiaries to retain TPS through March 3, 2023, so long as they otherwise continue to meet the eligibility requirements for TPS. The redesignation allows additional individuals who have been continuously residing in the United States since July 5, 2021, to obtain TPS, if otherwise eligible.

The notice sets forth procedures necessary for Yemeni nationals (or individuals having no nationality who last habitually resided in Yemen) either to submit an initial registration application under the redesignation and apply for an employment authorization document (EAD) or, if they already have TPS, to re-register under the extension and to apply for renewal of their EADs with U.S. Citizenship and Immigration Services (USCIS). USCIS will issue new EADs with a March 3, 2023, expiration date to eligible beneficiaries under Yemen's TPS designation who timely reregister and apply for EADs under the extension, or who timely register and apply for EADs under the redesignation.

**Requirements suspended for Yemeni students.** Effective September 4, 2021, through March 3, 2023, Yemeni citizens (regardless of country of birth) who are lawful F-1 nonimmigrant students can request employment authorization, work an increased number of hours while school is in session, and reduce their course loads while continuing to maintain F-1 status. DHS said it will deem an F-1 nonimmigrant student who receives employment authorization "by means of this notice to be engaged in a 'full course of study' for the duration of the employment authorization, if the nonimmigrant student satisfies the minimum course load requirement described in this notice."

Details:

- DHS/USCIS notice extending/redesignating Yemen TPS, July 9, 2021,

https://www.govinfo.gov/content/pkg/FR-2021-07-09/pdf/2021-14670.pdf

- DHS/ICE notice suspending certain requirements for Yemeni F-1 students, July 9, 2021, https://www.govinfo.gov/content/pkg/FR-2021-07-09/pdf/2021-14676.pdf
- USCIS release, July 7, 2021, https://www.uscis.gov/news/news-releases/dhs-publishes-federal-register-notice-extending-and-re-designating-yemen-for-temporary-protected
- Secretary Mayorkas announcement, July 6, 2021, https://www.uscis.gov/news/news-releases/secretary-mayorkas-announces-extension-and-re-designation-of-yemen-for-temporary-protected-status

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## D.C. Court of Appeals Issues Decision in *Wang v. Blinken*

On July 9, 2021, the D.C. Court of Appeals issued its opinion in *Wang v. Blinken*, interpreting INA § 203(d) to include the counting of derivatives toward the EB-5 investor cap. Plaintiffs had argued that INA § 203(d) is ambiguous and could also be interpreted as not including the counting of family members. Judge Walker, who authored the opinion, interpreted the key phrase "same status" at 8 U.S.C. § 1153(d) to mean that because an EB-5 investor's family members get the same type of visa, they must also be counted against the cap, and reasoned that "same order of consideration provided in the respective subsection," which refers to the worldwide cap on employment-based visas, further indicates that spouses and children of EB-5 investors are subject to the cap.

Details:

- Opinion: https://www.cadc.uscourts.gov/internet/opinions.nsf/A556BEBE1606BBA08525870D0050CBCF/$file/20-5076-1905648.pdf

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