CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - AUGUST 23, 2021

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Headlines:

Cap Reached for Remaining H-2B Visas for Returning Workers for FY 2021 – USCIS has received enough petitions for returning workers to reach the additional 22,000 H-2B visas made available under the FY 2021 H-2B supplemental visa temporary final rule.

USCIS Extends Flexibilities Through October for Certain OPT Applicants Filing Work Authorization Applications – USCIS extended flexibilities through October 31, 2021, for certain applicants filing Form I-765, Application for Employment Authorization, for OPT and STEM OPT.

Court Orders State Dept. to Adjudicate More Than 9,000 DV-2020 Visas – A federal court ordered the Department of State to adjudicate more than 9,000 DV-2020 cases that were not processed before the fiscal year deadline. The case concerned the Department's suspension of the processing and issuance of diversity visas for certain classes of foreign nationals during the COVID-19 pandemic.

Settlement Agreement Reached in 'No Blank Space Rejection Policy' Case – USCIS reached a settlement agreement that allows certain individuals to receive updated receipt dates for resubmitted immigration benefit applications or petitions originally rejected under the former "No Blank Space" rejection policy.

DHS Seeks Comments on Public Charge Rulemaking – DHS is seeking data and information from the public that the agency intends to use to develop a new proposed public charge rule.

OFLC Announces Enhancements to Foreign Labor Application Gateway – The Department of Labor's Office of Foreign Labor Certification announced several enhancements to the Foreign Labor Application Gateway (FLAG) system

State Dept. Updates Guidance for Afghans; Pro Bono Help Needed With Afghan SIV/P-2 Applications – The Department of State released new information for Afghan nationals seeking to leave Afghanistan. Also, an online form has been posted for those interested in helping with applications on a pro bono basis.

Federal Judge Blocks Biden Administration's Immigration Enforcement Priorities; ICE Suspends Memo – According to reports, the judge's action upends the hope that many employees and others around the country have had to reopen their removal orders under the Biden prosecutorial discretion policy, and OPLA offices nationwide are not considering prosecutorial discretion requests.

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Cap Reached for Remaining H-2B Visas for Returning Workers for FY 2021

As of August 13, 2021, U.S. Citizenship and Immigration Services (USCIS) has received enough petitions for returning workers to reach the additional 22,000 H-2B visas made available under the fiscal year (FY) 2021 H-2B supplemental visa temporary final rule. USCIS said it will reject and return any cap-subject petitions for H-2B returning workers received after August 13, along with any accompanying fees.

USCIS said it will continue to accept H-2B petitions for workers who are exempt from the congressionally mandated cap, including petitions for:

- Current H-2B workers in the United States who extend their stay, change employers, or change the terms and conditions of their employment;
- Fish roe processors, fish roe technicians, or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of Northern Mariana Islands or Guam from November 28, 2009, until Dec. 31, 2029.

USCIS is also currently accepting cap-subject petitions for the first half of FY 2022 for employment start dates on or after October 1, 2021, and before April 1, 2022.

Details:

- USCIS alert, Aug. 19, 2021,

https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2021

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USCIS Extends Flexibilities Through October for Certain OPT Applicants Filing Work Authorization Applications

Pursuant to a court order, U.S. Citizenship and Immigration Services (USCIS) extended flexibilities through October 31, 2021, for certain applicants filing Form I-765, Application for Employment Authorization, for optional practical training (OPT) and science, technology, engineering, and mathematics (STEM) OPT.

For applicants who timely filed Form I-765 for OPT and STEM OPT and whose applications were later rejected, USCIS will accept a refiled Form I-765 as filed on the original filing date if:

- The original, timely filed application was received on or after October 1, 2020, through October 31, 2021, inclusive; and
- USCIS subsequently rejected it.

USCIS said refiled applications must be received by November 30, 3021, for USCIS to treat the application as though filed on the original received date. Additionally, for applications received through October 31, 2021, applicants can file Form I-765 up to 120 days before the program end date.

Details:

- USCIS alert, July 29, 2021, https://www.uscis.gov/news/alerts/uscis-extends-flexibilities-to-certain-applicants-filing-form-i-765-for-opt

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Court Orders State Dept. to Adjudicate More Than 9,000 DV-2020 Visas

A federal court ordered the Department of State to adjudicate more than 9,000 DV-2020 cases that were not processed before the fiscal year deadline. The case concerned the Department's suspension of the processing and issuance of diversity visas for certain classes of foreign nationals during the COVID-19

pandemic, particularly selectees of the diversity visa lottery during the fiscal year that ended September 30, 2020.

The court ordered the Department to process the DV-2020 applications in a random order until all of the reserved diversity visas have been granted. "The parties shall notify the court by August 25, 2021, whether they have agreed to a time within which to process the reserved visas. The court will issue a final order once that question is resolved," the court said, finding that the defendants acted arbitrarily and capriciously in excluding diversity visas from mission-critical processing, and that the defendants unreasonably delayed and unlawfully withheld adjudication of their diversity visas.

Details:

- *Gomez v. Biden*, order filed Aug. 17, 2021, https://innovationlawlab.org/media/Gomez_Order-SJ_08.17.21.pdf

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Settlement Agreement Reached in 'No Blank Space Rejection Policy' Case

U.S. Citizenship and Immigration Services (USCIS) announced on August 19, 2021, that it reached a settlement agreement in *Vangala v. USCIS*. The agreement allows certain individuals to receive updated receipt dates for resubmitted immigration benefit applications or petitions originally rejected under the former "No Blank Space" rejection policy. Under the former policy, USCIS rejected filings with any blank fields or spaces.

The agreement applies to three forms: Form I-589, Application for Asylum and for Withholding of Removal; Form I-918, Petition for U Nonimmigrant Status; and Form I-918, Supplement A, Petition for Qualifying Family Member of U-1 Recipient. Individuals whose forms were rejected under the former policy may resubmit their requests by July 20, 2022, to obtain an updated receipt reflecting the date their rejected request was originally filed. Individuals who had resubmitted these forms before the effective date of this settlement agreement (July 20, 2021) may also submit documentation by July 20, 2022, to obtain an updated receipt date.

Details:

- USCIS news release, Aug. 19, 2021,

https://www.uscis.gov/news/news-releases/uscis-reaches-settlement-agreement-in-no-blank-space-rejection-policy-case
- Settlement agreement, *Vangala v. USCIS*, https://www.uscis.gov/sites/default/files/document/legal-docs/Vangala_Order_Adopting_Settlement_7-20-2021.pdf

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DHS Seeks Comments on Public Charge Rulemaking

The Department of Homeland Security (DHS) announced on August 20, 2021, that it is seeking data and information from the public that the agency intends to use to develop a public charge regulatory proposal.

The purpose of public comment is "to ensure that the proposal is fair, consistent with law, and informed by relevant data and evidence. Public comment also will help DHS ensure that the proposed regulation does not impose undue burdens on noncitizens seeking admission to or adjustment of status in the United States," USCIS said.

Details:

- USCIS news release, Aug. 20, 2021, https://www.uscis.gov/news/news-releases/dhs-seeks-public-comment-on-public-charge-rulemaking
- Advance copy of proposed rule to be published in the Federal Register on Aug. 23, 2021, https://www.federalregister.gov/documents/2021/08/23/2021-17837/public-charge-ground-of-inadmissibility

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OFLC Announces Enhancements to Foreign Labor Application Gateway

On August 17, 2021, the Department of Labor's Office of Foreign Labor Certification (OFLC) announced several enhancements to the Foreign Labor Application Gateway (FLAG) system:

- A new "Notification Center" within user accounts that provides access to OFLC decisions and allows users to upload responses and view documents associated with labor certification applications

- The ability to "reuse" a previously filed Form ETA-9141, Application for Prevailing Wage Determination, to pre-populate key sections in a new request
- New options for reassigning cases among other authorized users within their account networks

Details:

- OFLC announcement, Aug. 17, 2021, https://www.dol.gov/agencies/eta/foreign-labor

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State Dept. Updates Guidance for Afghans; Pro Bono Help Needed With Afghan SIV/P-2 Applications

The Department of State released new information for Afghan nationals seeking to leave Afghanistan:

- Afghan immigrant visa applicants, including Special Immigrant Visa (SIV) applicants, should continue monitoring official U.S. government websites, including https://travel.state.gov/content/travel/en/traveladvisories/ea/AfghanistanEvacuation.html, for updated information, the Department of State said on August 20, 2021. Immigrant visa applicants outside of Afghanistan may request that their cases be transferred to the nearest U.S. Embassy or Consulate to complete processing. To request a case transfer, applicants can submit a request to the National Visa Center via https://nvc.state.gov/inquiry.
- Also, the Department of State said that Afghan nationals who are eligible for the SIV program but have not yet applied are "encouraged to submit one complete application package to the National Visa Center (AfghanSIVapplication@state.gov) to facilitate processing in an expeditious manner." The consular section at the U.S. Embassy in Kabul is closed.

Meanwhile, the American Immigration Lawyers Association (AILA) is receiving inquiries from Afghans abroad, U.S. veterans, and nonprofits seeking assistance regarding the review of Special Immigrant Visa (SIV)/P-2 applications. AILA has posted a form online for those interested in helping on a pro bono basis.

Details:

- Update on Visa Processing at U.S. Embassy Kabul, Dept. of State, Aug. 20, 2021, https://travel.state.gov/content/travel/en/News/visas-news/update-on-visa-processing-at-us-embassy-kabul.html
- Afghanistan Evacuation, Dept. of State, Aug. 21, 2021, https://travel.state.gov/content/travel/en/traveladvisories/ea/AfghanistanEvacuation.html
- Special Immigrant Visas for Afghans, Dept. of State, https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html
- Afghan Allies Application Review Form, AILA, https://airtable.com/shrU198Ld6VP7uOl9

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Federal Judge Blocks Biden Administration's Immigration Enforcement Priorities; ICE Suspends Memo

Due to an August 19, 2021, preliminary injunction issued by U.S. District Judge Drew Tipton in *Texas v. United States* that blocked, nationwide, the Biden administration's prioritization of enforcement action against those who are threats to national security or public safety, U.S. Immigration and Customs Enforcement's (ICE) Office of the Principal Legal Advisor (OPLA) suspended reliance on a May 27, 2021, OPLA memorandum, "Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities."

According to reports, the judge's action upends the hope that many employees and others around the country have had to reopen their removal orders under the Biden prosecutorial discretion policy, and OPLA offices nationwide are not considering prosecutorial discretion requests. ICE said that questions from noncitizens and their legal representatives about OPLA's exercise of prosecutorial discretion in individual cases should be referred to local OPLA offices.

Details:

- Preliminary injunction, Aug. 19, 2021,

http://myfloridalegal.com/webfiles.nsf/WF/GPEY-C62QED/$file/Texas+case.pdf

- ICE announcement, https://www.ice.gov/about-ice/opla/prosecutorial-discretion
- OPLA office locations, https://www.ice.gov/contact/field-offices?office=12
- Interim guidance memo, May 27, 2021, https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf

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