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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - DECEMBER 20, 2021

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Headlines:

Immigration Provisions of Social Spending Bill in Limbo as Senate Democrats Struggle With Parliamentarian Rejections, Uncertainties – Lawmakers struggled to consider their options, including revisions to the immigration provisions or simply moving ahead without parliamentarian approval.

DHS Extends I-9 Flexibility to April 30, 2022 – DHS extended the flexibility policy in complying with certain physical inspection requirements related to Form I-9, Employment Eligibility Verification, until April 30, 2022.

USCIS Releases Fourth-Quarter Data Showing Persistent Backlogs, Some Progress – USCIS released fourth-quarter fiscal year (FY) 2021 reports offering a snapshot of statistics for the entire fiscal year.

State Dept. Changes DV-2022 Document Submission Processing Requirements –Once the DS-260 immigrant visa application is received for all applicants associated with a case, that case will be eligible to be scheduled for a visa interview.

Smuggling, Forced Labor Ring Busted in Indictment – Two dozen defendants were indicted on federal conspiracy charges after a transnational, multi-year investigation into an alleged human smuggling and labor trafficking operation that illegally imported agricultural workers from Mexico, Guatemala, and Honduras, fraudulently using the H-2A visa program, and kept them in brutal conditions on Georgia farms.

Labor Dept. Issues Final Rule on Adjudication of H-2A Applications for Temporary and Seasonal Range Workers for Herding and Production of Livestock – Effective January 18, 2022, the Department of Labor is amending its regulations regarding the adjudication of temporary need for employers

seeking to employ nonimmigrant workers for herding or production of livestock on the range.

Labor Dept. Issues 2022 Adverse Effect Wage Rates for H-2A Range, Non-Range Occupations – The Department of Labor published the 2022 Adverse Effect Wage Rates for the employment of temporary or seasonal workers to perform range (herding or production of livestock) and non-range agricultural labor or services.

Justice Dept. Adjusts Certain Immigration-Related Penalties on Employers – The Department of Justice has adjusted for inflation the civil monetary penalties assessed after December 13, 2021, for violations occurring after November 2, 2015.

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Immigration Provisions of Social Spending Bill in Limbo as Senate Democrats Struggle With Parliamentarian Rejections, Uncertainties

After the Senate parliamentarian rejected a plan that included work permits and protection from deportation favored by Democrats for inclusion in the "social spending" budget reconciliation bill, lawmakers struggled to consider their options, including revisions to the immigration provisions or simply moving ahead without parliamentarian approval. Several Democratic senators issued a joint statement: "We strongly disagree with the Senate parliamentarian's interpretation of our immigration proposal, and we will pursue every means to achieve a path to citizenship in the Build Back Better Act."

The parliamentarian has not yet addressed other immigration provisions included in the social spending bill, such as green card backlog relief, and their fate remains uncertain.

Details:

- "Immigration Loss Leaves Democrats Eyeing Risky Alternatives," Bloomberg Government, Dec. 17, 2021, https://about.bgov.com/news/immigration-defeat-leaves-democrats-eyeing-risky-alternatives/
- "Biden's Build Back Better Delayed Until 2022, Immigration Reform

Rejected in Bill," U.S. News & World Report, Dec. 17, 2021, https://www.usnews.com/news/politics/articles/2021-12-17/bidens-build-back-better-delayed-until-2022-immigration-reform-rejected-in-bill

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DHS Extends I-9 Flexibility to April 30, 2022

The Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced an extension of the flexibility policy in complying with certain physical inspection requirements related to Form I-9, Employment Eligibility Verification. The flexibility policy was set to expire December 31, 2021, but because of ongoing pandemic issues, DHS extended it until April 30, 2022.

DHS said that eligible employees working exclusively in remote settings are temporarily exempt from the physical inspection requirements associated with the Employment Eligibility Verification (Form I-9) until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier. If employees are physically present at a work location*, no exceptions* are being implemented now for in-person verification of identity and employment eligibility documentation.

Employers are advised to monitor the DHS and ICE workforce enforcement announcements for updates on ending the extension and resuming normal operations. E-Verify participants who meet the criteria and choose the remote inspection option should continue to follow current guidance and create cases for their new hires within three business days from the date of hire, DHS said.

Details:

- ICE Announces Extension to Compliance Flexibility, Dec. 15, 2021, https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3

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USCIS Releases Fourth-Quarter Data Showing Persistent Backlogs, Some Progress

U.S. Citizenship and Immigration Services (USCIS) released fourth-quarter fiscal

year (FY) 2021 reports offering a snapshot of statistics for the entire fiscal year. The agency noted:

- **Employment-based adjustments:** USCIS said it faced an unprecedented challenge of processing more than 237,000 employment-based permanent residence (green card) applications—which 122,000 immigrant visa numbers that the Department of State was unable to process in FY 2020 due to COVID-19 pandemic restrictions. By the end of FY 2021, USCIS had approved more than 172,000 employment-based adjustment of status applications, which the agency said was 50% above the typical baseline.
- **Processing delays:** Across the agency, the volume of pending cases increased as well as associated processing times. To address the backlogs, USCIS said it reused biometrics for 2.5 million applicants since March 2020; reduced the number of pending biometrics appointments from 1.4 million in January 2021 to 155,000 as of the end of September; and fully eliminated the "front-log" of cases awaiting intake processing (which was more than 1 million receipts in January 2021 and was eliminated in July) by expanding staffing and overtime at USCIS Lockbox facilities.

The USCIS table below shows approved employment-based petitions awaiting visa availability by preference category and country of birth as of September 2021. The grand total was 438,377, with the most from India at 357,720.

Details:

- Immigration and Citizenship Data, USCIS. The data reports are available in downloadable CSV and PDF formats. https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data
- "USCIS Announces FY 2021 Accomplishments," Dec. 16, 2021, https://www.uscis.gov/newsroom/news-releases/uscis-announces-fy-2021-accomplishments

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State Dept. Changes DV-2022 Document Submission Processing Requirements

The Department of State (DOS) announced that as of December 9, 2021, individuals who were randomly selected to participate in the diversity visa (DV)

program for fiscal year (FY) 2022 only need to submit to the Kentucky Consular Center (KCC) the DS-260 immigrant visa application form for themselves and any accompanying family members. Once the DS-260 is received for all applicants associated with a case, that case will be eligible to be scheduled for a visa interview.

DOS said that DV-2022 selectees no longer must submit to the KCC any other required supporting documents for DV-2022 to be eligible for an in-person interview at an embassy or consulate. Rather, all supporting documents for DV-2022 selectees will be collected in connection with the interview and evaluated at the embassy or consulate where the visa application is made. DOS said it is treating this as a "pilot program" and will assess the costs and benefits later in the program year.

Details:

- DOS update, Dec. 9, 2021, https://travel.state.gov/content/travel/en/News/visas-news/diversity-visa-2022-update.html

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Smuggling, Forced Labor Ring Busted in Indictment

Two dozen defendants were indicted on federal conspiracy charges after a transnational, multi-year investigation into an alleged human smuggling and labor trafficking operation that illegally imported agricultural workers from Mexico, Guatemala, and Honduras, fraudulently using the H-2A visa program, and kept them in brutal conditions on Georgia farms, the U.S. Attorney's Office for the Southern District of Georgia announced.

The newly unsealed, 54-count indictment in *USA v. Patricio et al.* details felony charges resulting from "Operation Blooming Onion," an Organized Crime Drug Enforcement Task Forces (OCDETF) investigation. The multi-agency investigation, led by Homeland Security Investigations and other federal agencies, spanned at least three years. The 53-page indictment documents dozens of victims of "modern-day slavery" brought to the United States as contract agricultural laborers.

According to a statement from the U.S. Attorney's Office, exploitation of the workers included "being required to dig onions with their bare hands, paid 20

cents for each bucket harvested, and threatened with guns and violence to keep them in line. The workers were held in cramped, unsanitary quarters and fenced work camps with little or no food, limited plumbing and without safe water. The conspirators are accused of raping, kidnapping and threatening or attempting to kill some of the workers or their families, and in many cases sold or traded the workers to other conspirators. At least two of the workers died as a result of workplace conditions." The perpetrators are alleged to have received more than $200 million from the scheme, which also included money laundering and witness intimidation and tampering.

Details:

- "Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment," U.S. Attorney's Office, Southern District of Georgia, Nov. 22, 2021, https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment
- Indictment: *USA v. Patricio et al*., https://www.justice.gov/usao-sdga/press-release/file/1450546/download
- "Feds Bust 'Modern-Day Slavery' Ring Amid New Immigration Enforcement Effort," NBC News, Dec. 9, 2021, https://www.nbcnews.com/news/us-news/feds-bust-modern-day-slavery-ring-new-effort-immigration-enforcement-rcna8273

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Labor Dept. Issues Final Rule on Adjudication of H-2A Applications for Temporary and Seasonal Range Workers for Herding and Production of Livestock

Effective January 18, 2022, the Department of Labor (DOL) is amending its regulations regarding the adjudication of temporary need for employers seeking to employ nonimmigrant workers for herding or production of livestock on the range. Consistent with a court-approved settlement agreement, the final rule rescinds a regulatory provision that governed the period of need for such jobs under the H-2A visa classification to ensure that DOL's adjudication of temporary or seasonal need is conducted in the same manner for all applications for temporary agricultural labor certification.

Specifically, in this final rule, DOL is eliminating a presumptive period of need

for employment involving range herding and an absolute restriction on the period of need for employment involving range livestock activities. Instead, all employers applying for H-2A temporary agricultural labor certifications under the final rule must individually demonstrate that their need for workers is temporary or seasonal, regardless of occupation.

Details:

- DOL final rule, 86 Fed. Reg. 71373 (Dec. 16, 2021), https://bit.ly/3qbZNMn

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Labor Dept. Issues 2022 Adverse Effect Wage Rates for H-2A Range, Non-Range Occupations

The Department of Labor published notices with the 2022 Adverse Effect Wage Rates (AEWR) for the employment of temporary or seasonal workers to perform range (herding or production of livestock) and non-range agricultural labor or services.

- The AEWR for range occupations is effective January 1, 2022. The notice states that employers of range workers must pay each worker a wage that is at least the highest of the monthly AEWR of $1,807.23, the agreed-upon collective bargaining wage, or the applicable minimum wage.
- The AEWR for non-range occupations is effective December 29, 2021. A state-by-state chart shows non-range AEWRs by state, from a low of $11.99 in Alabama to a high of $17.51 in California.

Details:

- DOL notice (non-range), 86 Fed. Reg. 71282 (Dec. 15, 2021), https://bit.ly/3qbZNMn

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Justice Dept. Adjusts Certain Immigration-Related Penalties on Employers

The Department of Justice has adjusted for inflation the civil monetary penalties assessed after December 13, 2021, for violations occurring after November 2, 2015. The adjustments made by the final rule are based on the Bureau of Labor Statistics' Consumer Price Index for October 2020.

The final rule includes a table showing the old and new penalties. For example:

- In 2016, "unlawful employment of aliens, first order (per unauthorized alien)" the penalty was a minimum of $539 to a maximum of $4,313. Now the minimum is $590 and the maximum is $4,722.
- For a second such violation, the minimum in 2016 was $4,313 and the maximum was $10,781; now the minimum is $4,722 and the maximum is $11,803.

Details:

- DOJ final rule, 86 Fed. Reg. 70740 (Dec. 13, 2021), https://www.govinfo.gov/content/pkg/FR-2021-12-13/pdf/2021-26817.pdf

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