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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - OCTOBER 10, 2022

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Headlines:

Fifth Circuit Rules DACA is Illegal, But Remands to Lower Court to Consider Final Rule – The current 594,000 Deferred Action for Childhood Arrival (DACA) recipients can maintain status while the lower court considers the effect of a DACA final rule issued by the Biden administration. New applications continue to be blocked.

Optional Practical Training, STEM Extension Upheld by Court – The court held that authorizing foreign students to engage in limited periods of employment for practical training as their schools recommend according to the terms set out in the rule is a valid exercise of the Department of Homeland Security's authority.

Labor Dept. Announces H-2A Final Rule – The Department of Labor announced the impending publication of a final rule to amend H-2A temporary labor certification regulations to strengthen agricultural worker protections and to update the H-2A application and temporary labor certification and prevailing wage determination processes.

EOIR Extends Automatic Acceptance of Documents Filed Late With Certain Florida Immigration Courts Due to Hurricane Ian – The Executive Office for Immigration Review will extend the automatic acceptance of documents filed late with the Miami, Krome, and Orlando Immigration Courts through November 25, 2022. The period applies to cases with filing deadlines starting September 28, 2022.

November Visa Bulletin Includes Information on Extension of Religious Workers Category, Visa Availability in Employment Second Category – The Department of State's Visa Bulletin for November 2022 includes information on the extension

of the religious workers category until December 15, 2022, and visa availability in the employment second category.

President Releasees Refugee Admissions Numbers for FY 2023 – President Biden issued a determination that up to 125,000 refugee admissions for fiscal year 2023 "is justified by humanitarian concerns or is otherwise in the national interest." The announcement includes regional allocations.

Details:

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Fifth Circuit Rules DACA is Illegal, But Remands to Lower Court to Consider Final Rule

The U.S. Court of Appeals for the Fifth Circuit ruled on October 5, 2022, that the Deferred Action for Childhood Arrivals (DACA) program is unlawful but remanded the case to the U.S. District Court for the Southern District of Texas, ruling that the current 594,000 DACA recipients can maintain status while the lower court considers the effect of a DACA final rule issued by the Biden administration in August 2022, effective October 31, 2022. New applications continue to be blocked.

A longer-term solution would require Congress to pass legislation, which is unlikely in the near term. Otherwise, DACA recipients could eventually lose their work authorization.

Details:

- Fifth Circuit decision. https://www.ca5.uscourts.gov/opinions/pub/21/21-40680-CV0.pdf
- S. Appeals Court Sends DACA Case Back to Lower Court to Consider New Rule," Reuters, Oct. 5, 2022. https://www.reuters.com/legal/us-appeals-court-sends-daca-case-back-lower-court-consider-new-rules-2022-10-05/
- "DHS Issues Regulation to Preserve and Fortify DACA," Dept. of Homeland Security, Aug. 24, 2022. https://www.dhs.gov/news/2022/08/24/dhs-issues-regulation-preserve-and-fortify-daca
- DHS final rule, 87 Fed. Reg. 53152 (Aug. 30, 2022). https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18401.pdf

- Statement from USCIS Director Ur M. Jaddou, https://www.uscis.gov/newsroom/news-releases/statement-from-uscis-director-ur-m-jaddou-on-daca-ruling

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Optional Practical Training, STEM Extension Upheld by Court

On October 4, 2022, the U.S. Court of Appeals for the District of Columbia affirmed the judgment of the district court sustaining the Department of Homeland Security's (DHS) current Optional Practical Training (OPT) rule's authorization of a limited period of post-coursework OPT, if recommended and overseen by the school and approved by DHS, for qualifying students on F-1 visas. OPT includes an extension for students in science, technology, engineering, or mathematics (STEM) fields of an additional 24 months beyond the OPT period of 12 months.

Among other things, the court held that authorizing foreign students to engage in limited periods of employment for practical training as their schools recommend according to the terms set out in the rule is a valid exercise of DHS's authority. The court also noted that "practical training not only enhances the educational worth of a degree program, but often is essential to students' ability to correctly use what they have learned when they return to their home countries. That is especially so in STEM fields, where hands-on work is critical for understanding fast-moving technological and scientific developments."

The court noted that more than 100,000 of the roughly 1 million international students who come to the United States complete a period of practical training.

Details:

- Washington Alliance of Technology Workers v. U.S. Dept. of Homeland Security, https://go.bal.com/e/851003/-5028-D-C--Cir--Oct--4-202-pdf/455g2k/346719091?h=17TzdAIkUvrpA8ZRp9G6svCxHnshAA0HZ5nXLVdhelI

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Labor Dept. Announces H-2A Final Rule

The Department of Labor announced the impending publication of a final rule

to amend H-2A temporary labor certification regulations to strengthen agricultural worker protections and to update the H-2A application and temporary labor certification as well as prevailing wage determination processes. The final rule will be published on October 12, 2022.

The Office of Foreign Labor Certification said it will post additional announcements regarding the official publication and implementation of the 2022 H-2A Final Rule.

Details:

- Final rule (unpublished). https://public-inspection.federalregister.gov/2022-20506.pdf

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EOIR Extends Automatic Acceptance of Documents Filed Late With Certain Florida Immigration Courts Due to Hurricane Ian

Following President Biden's amended disaster declaration due to the impact of Hurricane Ian, the Executive Office for Immigration Review (EOIR) said in a stakeholder update that it will extend the automatic acceptance of documents filed late with the Miami, Krome, and Orlando Immigration Courts through November 25, 2022. The period now lasts 60 calendar days, and applies to cases with filing deadlines starting September 28, 2022. The Board of Immigration Appeals (BIA) will also exercise its discretionary authority to automatically accept late-filed appeals, motions to reopen or reconsider, or accept late-filed briefs, in cases arising from these immigration courts for the same period.

EOIR said these immigration courts will not send notices or other correspondence to respondents or counsel with addresses in the areas affected by Hurricane Ian until after the 60-day period lapses, and the BIA will not process cases arising from these courts during this period unless the parties ask the BIA to do so.

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November Visa Bulletin Includes Information on Extension of Religious Workers Category, Visa Availability in Employment Second Category

The Department of State's Visa Bulletin for November 2022 includes the

following information:

EMPLOYMENT FOURTH PREFERENCE (SR) RELIGIOUS WORKERS CATEGORY EXTENDED

H.R. 6833, enacted on September 30, 2022, extended the Employment Fourth Preference Certain Religious Workers (SR) category until December 16, 2022. No SR visas may be issued overseas, or final action taken on adjustment of status cases, after midnight December 15, 2022. Visas issued prior to that date will be valid only until December 15, 2022, and all individuals seeking admission in the non-minister special immigrant category must be admitted (repeat admitted) into the United States no later than midnight December 15, 2022.

The SR category is subject to the same final action dates as the other Employment Fourth Preference categories per applicable foreign state of chargeability.

VISA AVAILABILITY IN THE EMPLOYMENT SECOND CATEGORY

Increased demand in the Employment Second category may necessitate the establishment of a worldwide final action date in the coming months to hold number use within the maximum allowed under the Fiscal Year 2023 annual limit. This situation will be continually monitored, and any necessary adjustments will be made accordingly.

Details:

- November 2022 Visa Bulletin, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-november-2022.html

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President Releasees Refugee Admissions Numbers for FY 2023

President Biden issued a determination that up to 125,000 refugee admissions for fiscal year (FY) 2023 "is justified by humanitarian concerns or is otherwise in the national interest." Regional allocations include Africa (40,000), East Asia (15,000), Europe and Central Asia (15,000), Latin America/Caribbean (15,000), Near East/South Asia (35,000), and Unallocated Reserve (5,000). The latter will be allocated to regional ceilings as needed. Also, unused admissions allocated to a particular region can be allocated to other regions.

President Biden also announced that for FY 2023, persons from the following countries and areas may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence: Cuba; Eurasia and the Baltics; Iraq; El Salvador, Guatemala, and Honduras; and, in certain circumstances, persons identified by a U.S. embassy in any location.

Details:

- Presidential Determination No. 2022-25, Sept. 27, 2022. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/27/memorandum-on-presidential-determination-on-refugee-admissions-for-fiscal-year-2023/

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