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US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - FEBRUARY 27, 2023

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Headlines:

Biden Administration Proposes Controversial Rule on 'Temporary' Measures to Limit Asylum at Southwest Border – The Biden administration issued a new proposed rule that it called "temporary," which introduces a "rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel."

USCIS Issues Clarifying Guidance for Individuals Authorized to Work Under Special Student Relief Provisions – U.S. Citizenship and Immigration Services has released policy guidance to clarify the validity period of employment authorization for F-1 nonimmigrant students experiencing severe economic hardship due to emergent circumstances (also known as special student relief (SSR)) who are authorized to work under the SSR provisions.

F and M Student Visas Can Be Issued Up To a Year in Advance, State Dept. Says – F and M student visas for new students now can be issued up to 365 days before the start date for a course of study. However, the student cannot enter the United States on a student visa more than 30 days before the start date.

DHS Extends Comment Period for Fee Rule; USCIS Releases Fact Sheet on Fee Waivers for Naturalization Applications – The Department of Homeland Security has extended by five days, to March 13, 2023, the comment period for a rule proposing to change the fee schedule for certain immigration benefits.

USCIS Requests Comments on Proposed Revision of Nonimmigrant Petition Based on a Blanket L Petition – U.S. Citizenship and Immigration Services seeks comments on a proposed revision of the nonimmigrant petition based on a blanket L intracompany transferee petition.

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Biden Administration Proposes Controversial Rule on 'Temporary' Measures to Limit Asylum at Southwest Border

The Biden administration issued a new proposed rule that it called "temporary," which introduces a "rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which they travel." The administration said the rule would deter migrants from relying on human smuggling networks, protect against extreme overcrowding in border facilities, and help to ensure that the processing of migrants seeking protection in the United States "is done in an effective, humane, and efficient manner."

The administration said the proposed rule was being issued in advance of the expected termination of the Centers for Disease Control and Prevention's (CDC) Title 42 public health order related to the COVID-19 pandemic and a consequent potential surge of migration into the United States via the southwest border. The CDC is expected to terminate its public health order on May 11, 2023, and the administration anticipates returning at that time to processing all noncitizens under Title 8 immigration authorities once Title 42 is terminated.

The proposed rule's executive summary notes that U.S. officials' encounters with noncitizens attempting to cross the southwest border into the United States without authorization "have reached an all-time high" even with the Title 42 public health order in place, "driven in large part by an unprecedented exodus of migrants from countries such as Colombia, Cuba, Ecuador, Nicaragua, Peru, and Venezuela." The summary provides as an example that during a 30-day period ending December 24, 2022, the total daily encounters along the southwest border "consistently fluctuated between approximately 7,100 and 9,700 per day, averaging approximately 8,500 per day, with encounters exceeding 9,000 per day on 12 different occasions during this 30-day stretch."

A Biden administration official reportedly said the new regulation constituted "temporary measures" and was done "out of necessity." An administration

statement from the Departments of Homeland Security and Justice lamented "the absence of congressional action to update a very broken, outdated immigration system."

Reaction. Advocates objected to the new regulation. The American Immigration Lawyers Association (AILA) said the "transit ban" is "unworkable and a violation of U.S. asylum law. In a letter to President Biden last month, AILA President Jeremy McKinney and Executive Director Benjamin Johnson urged him to reconsider. They pointed to President Biden's promise made during his presidential campaign to safeguard America's commitment to asylum protection. Among other things, Mr. McKinney noted that "the countries through which people are fleeing are not 'safe third countries' by any stretch of the imagination, according to the U.S. State Department's own reporting." Mr. Johnson said, "This regulation is a clear violation of the rights of migrants under U.S. law to seek protection from persecution, regardless of how they enter the United States. The Biden Administration claims asylum will still be available under this regulation, but the so-called 'rebuttable presumptions' they propose will not provide sufficient opportunity for people in dire need to apply. It is absurd to expect asylum applicants who rarely have legal assistance to be able to rebut the presumptive bar set by this new rule and qualify for asylum protection."

Comments on the proposed rule must be submitted by March 27, 2023.

Details:

- "Circumvention of Lawful Pathways," DHS/DOJ Proposed Rule, 88 Fed. Reg. 11704 (Feb. 23, 2023). https://www.govinfo.gov/content/pkg/FR-2023-02-23/pdf/2023-03718.pdf
- "DHS and DOJ Propose Rule to Incentivize Lawful Migration Processes," DHS, Feb. 21, 2023. https://www.dhs.gov/news/2023/02/21/dhs-and-doj-propose-rule-incentivize-lawful-migration-processes
- "Biden Administration Rolls Out New Asylum Restrictions Mirroring Trump-Era Policy," CNN, Feb. 21, 2023. https://www.cnn.com/2023/02/21/politics/asylum-policy-biden-administration/index.html
- "AILA Condemns Biden Administration's Push to Use 'Transit Ban' Against Vulnerable Asylum Seekers," Press Release, American Immigration

Lawyers Association, Feb. 21, 2023. https://www.aila.org/advo-media/press-releases/2023/aila-condemns-biden-administrations-push
- AILA letter to President Biden, Jan. 17, 2023. https://www.aila.org/advo-media/aila-correspondence/2023/letter-to-president-biden-regarding-the-proposed

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USCIS Issues Clarifying Guidance for Individuals Authorized to Work Under Special Student Relief Provisions

U.S. Citizenship and Immigration Services (USCIS) has released policy guidance to clarify the validity period of employment authorization for F-1 nonimmigrant students experiencing severe economic hardship due to emergent circumstances (also known as special student relief (SSR)) who are authorized to work under the SSR provisions. The guidance applies to all pending and future applications for SSR employment authorization as of February 22, 2023, the date the guidance was published.

The update clarifies that in cases of severe economic hardship due to emergent circumstances, USCIS may grant off-campus SSR employment authorization to an F-1 nonimmigrant student for the duration of the Federal Register notice validity period, which is typically 18 months. The employment authorization may not extend past the student's academic program end date.

USCIS said that emergent circumstances are "events that affect F-1 nonimmigrant students from a particular region and create severe economic hardship. These events may include, but are not limited to, natural disasters, financial crises, and military conflicts."

Details:

- "Special Student Relief for F-1 Nonimmigrant Students," USCIS Policy Alert (PA-2023-03), Feb. 22, 2023. https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230222-SpecialStudentRelief.pdf
- USCIS notice, Feb. 22, 2023. https://www.uscis.gov/newsroom/alerts/uscis-issues-clarifying-guidance-for-individuals-authorized-to-work-under-special-student-relief

- USCIS Policy Manual. https://www.uscis.gov/policy-manual

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F and M Student Visas Can Be Issued Up To a Year in Advance, State Dept. Says

The Department of State (DOS) announced that F and M student visas for new students now can be issued up to 365 days before the start date for a course of study. However, the student cannot enter the United States on a student visa more than 30 days before the start date.

F and M student visas for continuing students may be issued at any time, DOS said, as long as the student is currently enrolled at a Student and Exchange Visitor Program-approved school or institution and in the Student and Exchange Visitor Information System. Continuing students may enter the United States at any time before classes start.

Details:

- Student Visa page, DOS. https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html
- DOS tweet, Feb. 21, 2023. https://twitter.com/TravelGov/status/1628095602931138564

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DHS Extends Comment Period for Fee Rule; USCIS Releases Fact Sheet on Fee Waivers for Naturalization Applications

The Department of Homeland Security (DHS) has extended by five days, to March 13, 2023, the comment period for a rule published on January 4, 2023, proposing to change the fee schedule for certain immigration benefits. DHS said the extension was due to technical problems on the General Services Administration's eRulemaking Portal that prevented some commenters from submitting their comments and supporting documentation.

Separately, U.S. Citizenship and Immigration Services (USCIS) released a fact sheet on requests for fee waivers for Form N-400, Application for Naturalization. The fact sheet includes a checklist of grounds that may be used as a basis for the fee waiver, and information about qualifying for a reduced fee if the applicant does not qualify for a waiver.

Details:

- DHS extension of comment period, 88 Fed. Reg. 11825 (Feb. 24, 2023). https://www.govinfo.gov/content/pkg/FR-2023-02-24/pdf/2023-03906.pdf
- Proposed Fee Rule Frequently Asked Questions, DHS, updated Feb. 23, 2023. https://www.uscis.gov/proposed-fee-rule-frequently-asked-questions
- Fact Sheet: Request for Fee Waiver for Form N-400, USCIS (n.d.). https://www.uscis.gov/sites/default/files/document/fact-sheets/FactSheetI-912RequestforFeeWaiverForFormN-400.pdf

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USCIS Requests Comments on Proposed Revision of Nonimmigrant Petition Based on a Blanket L Petition

U.S. Citizenship and Immigration Services (USCIS) seeks comments on a proposed revision of the nonimmigrant petition based on a blanket L intracompany transferee petition.

USCIS explained that employers seeking to classify employees outside the United States as executives, managers, or specialized knowledge professionals, as nonimmigrant intra-company transferees pursuant to a previously approved blanket petition, may file this form. USCIS uses the information provided through the form to assess whether the employee meets the requirements for L-1 classification under blanket L petition approval.

Comments are due by April 24, 2023.

Details:

- USCIS notice and request for comments, 88 Fed. Reg. 10531 (Feb. 21, 2023). https://www.govinfo.gov/content/pkg/FR-2023-02-21/pdf/2023-03528.pdf

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