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Business Immigration Law and Policy 2020 - Year In Review

Teodora D Purcell, Special Counsel
Duane Morris, LLP, San Diego



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Dec. 15, 2020 – San Diego HR Forum - Agenda

- ❑ 2020 - year of unprecedented restrictions on legal business immigration by the Trump Administration
- ❑ 2020 COVID-19 Related Immigration Changes and Immigration Agency Updates
- ❑ 2020 – Unprecedented global travel restrictions, border closures and quarantine rules
- ❑ Changes to the H-1B Visa and to F-1 Student Visa Rules
- ❑ Changes to Naturalization Test
- ❑ The fate of DACA/ Dreamers
- ❑ A Look into 2021- What to expect from the Biden Administration? (based on Biden Campaign's Immigration Plan)

2020 Immigration Trend Challenges

- Travel Bans and Consular Closures/Delays
- U.S. Canada & U.S. Mexico Land Borders Closed until Jan. 21, 2021 for Non- Essential Travel
- Assault on the H-1B Visa Program
 - Wage range increases
 - Ever narrowing of the definition of “Specialty Occupation”
 - Wage Based H-1B Lottery Proposal
- Delays in EAD Issuance, Adjustment of Status Application Adjudications, Receipts, Approvals
- Significant number of Requests for Evidence and Denials of immigration petitions

U.S. Immigration Agency Updates

- New Filing Fees – significant increases for I-485, N-400 and other applications - on hold due to litigation
- Premium Processing raised to \$2,500 for H-1B and I-140 immigrant petitions
- I-9 and E-Verify COVID-19 flexibility continues
- STEM OPT, H-1B and L-1 site visits continue
- *More customer-centered focus for USCIS during Biden Administration*
- *Some USCIS policies may be reversed by Biden (e.g. reverse the No deference to prior adjudication policy)*

Case Type	Processing Timeline	Premium Processing Fee
Most Form I-140 EB-1, EB-2 and EB-3 petitions	15 calendar days (current)	\$2,500
Form I-140 EB-1 Multinational Manager Form I-140 EB-2 National Interest Waiver Form I-140 EB-2 Physician	45 days	Not greater than \$2,500
Form I-129 Nonimmigrant Worker Petitions	15 calendar days (current)	\$2,500
Form I-539 Change/Extension of Status to F, J or M	30 days	Not greater than \$1,750
Form I-539 Change/Extension of Status for E, H, L, O, P and R Dependents	30 days	Not greater than \$1,750
Form I-765 Application for Employment Authorization	30 days	Not greater than \$1,500

COVID-19 and Immigration Agency Updates on Application Processing

- USCIS Service Centers operating. USCIS Field Offices operating at limited capacity
- US immigration agencies have offered some flexibility
 - Scanned (not electronic) signatures allowed on all applications
 - Additional 60 days to respond for all RFEs and NOIDs
 - Some biometrics appointments waiver
 - Employment based and some family based green cards being issued without in-person interview
- **U.S. Consulates abroad are operating only for mission critical services only emergency appointments. Very limited visa appointments available – trend to continue in 2021.**

COVID19 Travel Bans and Border Closures

- **US – Canada and US - Mexico borders closed for non essential travel until Jan. 21, 2021**
 - Applies only to land ports of entry. Restrictions do NOT apply to air travel. Certain exemptions
- **Travel Bans – remain place for travel from China, Iran, Ireland, the UK and the 25 countries of the European Schengen Area – until Dec. 31, 2020**
 - Exemptions for US citizens, lawful permanent residents and some immediate family members. Waivers available
 - *May be extended by Trump Administration*
 - *Biden plans to rescind these travel restrictions after consulting with public health officials*

April 22, 2020 - Presidential Proclamation I Restricting Some Immigrant Entry in Reaction to COVID-19 Pandemic

- Temporarily suspends entry to the U.S. of first time *immigrants*.
- Who does it apply to?
 - Individuals who are OUTSIDE the U.S.
 - Do not have a valid immigrant visa as of April 23, 2020, and
 - Do not have a valid official travel document as of April 23, 2020
- Effective as of April 23, 2020, through Dec. 31, 2020 – *may be extended*
- Does not apply to those seeking adjustment of status in the U.S. (I-485 applicants)
- Certain categories exempt, including national interest exemption
- *Biden expected to rescind these restrictions*

June 22, 2020 Presidential Proclamation II Affecting Certain Nonimmigrants

- Suspends the entry of *H-1B, L-1, H-2B and certain J-1 nonimmigrants*, as well as their spouses and dependents, from June 24 through December 31, 2020, with limited exceptions. *May be extended*
- Does not affect foreign nationals holding valid U.S. visas or other travel documents, or those already present in the United States as of June 24th
 - The ban does not apply to Canadians (visa exempt)
 - The ban does not apply to J-1 research scholars
 - Certain categories exempt. National Interest Exemption.
- *Oct. 1, 2020 – NAM litigation – District Court enjoined the suspension for plaintiffs' organizations and their members – National Association of Manufacturers, US Chamber of Commerce, the National Retail Federation and Technet*
- *Biden plans on rescind the these restrictions - – will not block global talent coming to the U.S. during the pandemic*

H-1B Visas —Deeper Dive

- ❑ On Oct. 8, 2020, two Interim Final Rules were published by DHS and DOL – rules were challenged
- ❑ **DHS IR Rule – Strengthening the H-1B Nonimmigrant Visa Classification Program” – will take effect in 60 days, or on Dec. 7, 2020.** The rule:
 - Revises the definition of an H-1B specialty occupation to “**increase focus on obtaining the best and brightest foreign nationals.**”
 - Requires a **direct relationship** between the required degree field(s) and the duties of the position. Thus, a position will not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.
 - Limits H1B validity to one year for third party placements.
 - Addresses site visits at employer worksites for compliance
- ❑ **The DOL IR was published on 10/8/2020 and effective immediately – increased significantly the prevailing wage to be paid to H-1B/H-1B1/E-3 workers and for PERM prevailing wages.**

H-1B Visas Rules – Deeper Dive- Cont'd

- ❑ **DHS and DOL H-1B Visa Rules Set Aside by Court on Dec. 1, 2020**
 - ❑ The court found that the agencies did not have good cause to bypass notice and comment rulemaking procedures in violation of the Administrative Procedures Act.
 - ❑ This ruling immediately invalidates the rules but the government is expected to appeal. *U.S. Chamber of Commerce et al. v. DHS (20-cv-07331)*.
- ❑ **Nov. 2, 2020- DHS Proposes Rule to Create Wage-Based Selection System for H-1B Cap-Subject Petitions (not in effect yet)**
- ❑ *The Biden Harris Campaign has indicated its intent to reverse these rules but will ensure protection of US workers.*

Temporary and Permanent Work Visas – A Look into 2021- Biden Plans

❑ Reform the temporary visa system.

- Work with Congress to first reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages.
- Expand the number of high-skilled visas

❑ Reform the permanent visa system.

- Eliminate the limits on employment-based visas by country, which create unacceptably long backlogs.
- **Increase the number of visas offered for permanent, work-based immigration based on macroeconomic conditions.** Work with Congress to increase the number of visas for employment-based immigration—and promote mechanisms to temporarily reduce the number of visas during times of high U.S. unemployment.
- Exempt from any cap recent graduates of PhD programs in STEM fields in the U.S. who are poised to make some of the most important contributions to the world economy.

Changes to the Naturalization Process

- ❑ **New Naturalization Test Effective for applications filed on or after Dec. 1, 2020 – includes more questions.**
 - The civics test is administered to applicants who apply for U.S. citizenship and is one of the statutory requirements for naturalizing. The revised test includes more questions that test the applicant's understanding of U.S. history and civics, in line with the statutory requirements, and covers a variety of topics that provide the applicant with more opportunities to learn about the United States as part of the test preparation process.
 - **60 % passing score required – or 12 out of 20 questions to be answered correctly.**
 - USCIS will maintain the current guidelines for statutorily established special considerations for applicants who are 65 years old or older and have at least 20 years of lawful permanent resident status.
- ❑ **Proposed N-400 fee increase – from \$640 to \$1,170**
- ❑ ***Biden Plans to restore and defend the naturalization process for green card holders.***
 - *Address the application backlog by prioritizing the adjudication work stream to ensure applications are processed quickly*
 - *Reject the imposition of unreasonable fees.*

DACA - Dreamers

- ❑ Fed. District Court recently rules to restore the DACA program to its original form as created in 2012. The cases are *Batalla Vidal v. Wolf* and *State of New York v. Trump*.
- ❑ **Under the court order, DHS must accept initial DACA applications as well as renewals, grant advance parole travel documents, and issue two-year renewals (instead of one-year) to DACA beneficiaries.**
 - The court also certified a class of foreign nationals who can benefit from the ruling, including those who were issued limited DACA benefits and those who may have been eligible to apply for DACA protection but were prevented from doing so under the Trump Administration's policies.
 - Current DACA beneficiaries may continue to work pursuant to their valid employment authorization documents and should apply to renew their benefits as soon as they are eligible to do so.
- ❑ **Biden plans to restore the DACA program and protect DREAMERS. Biden to support path to US citizenship for DACA recipients.**

International Students

- ❑ September 24, 2020, DHS proposed a regulation that would subject international students (F visa), exchange visitors (J visa) and representatives of foreign information media (I visa) to fixed periods of stay, eliminating the longstanding “duration of status” policy.
 - ❑ Comment period ended. May become effective before Jan. 20, 2021

- ❑ On Dec. 1, 2020, Federal Court Upheld the OPT and STEM OPT Work Authorization Programs for F-1 Foreign Graduates

- ❑ *President Elect Biden is expected to support international students - Biden believes that foreign graduates of a U.S. doctoral program should be given a green card with their degree and that losing these highly trained workers to foreign economies is a disservice to our own economic competitiveness.*

What to Expect in 2021- Biden Immigration Plan

- ❑ **Biden to reverse the most damaging Trump’s immigration policy(as announced during campaign)**
 - Some will require executive action, others – regulatory action. Cannot happen overnight
- ❑ **The Biden Commitment to a Fair and Humane Immigration System**
 - *Will uphold our laws humanely and preserve the dignity of immigrant families, refugees, and asylum-seekers. Will supports bipartisan comprehensive immigration solution, DACA, DAPA, TPS*
- ❑ **Take urgent action to undo Trump’s damage and reclaim America’s values**
 - **Immediately reverse the Trump Administration’s cruel policies that separate parents from their children at our border** and prioritize the reunification of children still separated from their families.
 - **End Trump’s detrimental asylum policies** drastically restrict access to asylum in the U.S., including imposing additional restrictions on anyone traveling through Mexico or Guatemala; attempting to prevent victims of gang and domestic violence from receiving asylum; eliminate Trump’s Migrant Protection Protocols.
 - **Reverse Trump’s Public Charge Rule**, allowing immigration officials to make an individual’s ability to receive a visa or gain permanent residency contingent on their use of government services such as SNAP benefits or Medicaid, their household income, and other discriminatory criteria undermines America’s character as land of opportunity that is open and welcoming to all, not just the wealthy.

What to Expect in 2021- President Elect Biden Immigration Plan – Cont'd

- Reverse Muslim/ Anti-American Travel Bans
- Modernize America's immigration system
- Preserve the Diversity Visa lottery
- Welcome immigrants in our communities
- Reassert America's commitment to asylum-seekers and refugees
- Tackle the root causes of irregular migration and implement effective border screening
- Additional Funding for USCIS/ DOL/ DHS
- Support family based immigration – create a temporary visa allowing family members to remain in the US while waiting for their permanent immigrant visa
- Reverse the Ban on Certain Students from China
- EB-5 Reforms
- 2021 – expected to be an interesting year, with more changes to U.S. immigration law and policy.

QUESTIONS AND ANSWERS



Teodora (Teo) D. Purcell

Special Counsel, ELBI – Immigration Law

Phone 619-744-2266

Email TPurcell@duanemorris.com

THANK YOU