



# SD HR FORUM LAW DAY: IMMIGRATION UPDATES

December 2019

FRAGOMEN



# WITH YOU TODAY



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# TIMELINE: TRUMP ADMINISTRATION BUSINESS IMMIGRATION ACTIONS



# 2019 – RECENT DEVELOPMENTS AND A LOOK AHEAD

## Q1 JAN FEB MAR

- January 28, 2019  
USCIS opens premium processing for pending FY 2019 H-1B cap cases
- January 31, 2019  
H-1B cap registration final rule published; online registration to take effect in 2020
- February 15, 2019  
Trump declares national emergency to fund border wall
- February 15, 2019  
USCIS resumes premium processing for H-1B cap cases filed on or before December 21, 2018
- February 20, 2019  
DHS initiates federal review process for proposed H-4 EAD rescission rule
- March 11, 2019  
USCIS resumes premium processing for all H-1B petitions

## Q2 APR MAY JUN

- April 1, 2019  
FY 2020 H-1B Cap Season begins, with the order of regular and advanced-degree lotteries reversed; premium processing available concurrent with change of status filings
- April 29, 2019  
USCIS extends the Canadian L-1 Pilot Program at Blaine, Washington through April 30, 2020
- April 29, 2019  
Trump directs DHS to develop stricter asylum policies
- May 20, 2019  
USCIS opens premium processing for all FY 2020 H-1B cap cases requesting a change of status
- June 10, 2019  
USCIS opens premium processing for FY 2020 H-1B cap petitions not requesting a change of status
- June 28, 2019  
The Supreme Court agrees to address the Trump Administration's termination of DACA in its October 2019 term

## Q3 JUL AUG SEP

- July 24, 2019  
DHS publishes EB-5 modernization final rule featuring increased investment amounts and greater federal authority over EB-5 program
- August 15, 2019  
DHS publishes final rule on public charge inadmissibility, subjecting adjustment applicants and nonimmigrants to higher scrutiny
- September 4, 2019  
DHS proposes rule introducing a \$10 H-1B registration fee

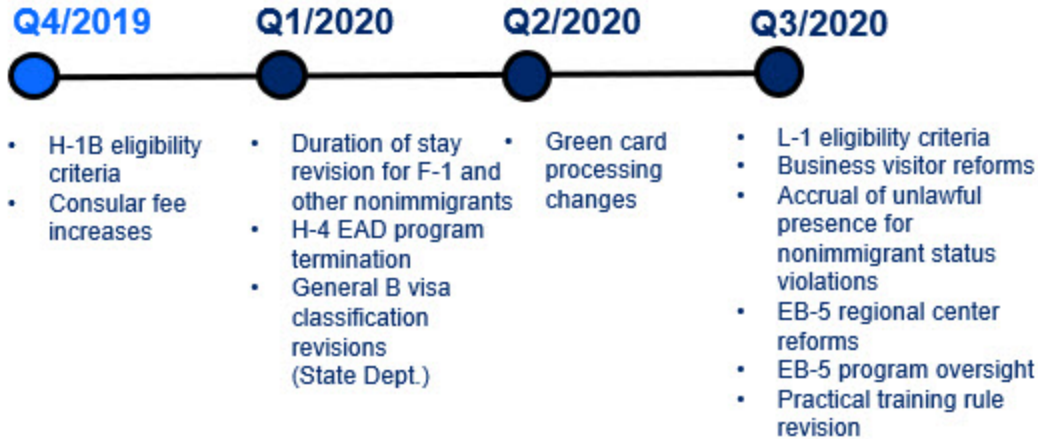
## Q4 OCT NOV DEC

- October 11, 2019  
Federal judges enjoin DHS from enforcing its new regulation on public charge inadmissibility
- November 2, 2019  
Federal judge enjoins DOS from implementing the Presidential Proclamation on health care
- November 8, 2019  
DHS finalizes rule introducing a \$10 H-1B registration fee
- November 8, 2019  
The Supreme Court reviews the Trump Administration's termination of DACA in its October 2019 term, with a decision likely coming in June 2020
- November 21, 2019  
EB-5 Modernization Rule takes effect



# 2019 – RECENT DEVELOPMENTS AND A LOOK AHEAD (Cont'd)

## Target Dates for Key Regulatory Actions



Unless otherwise indicated, regulatory items are proposals with an expected 30-60-day public comment period.

Source: Fall 2019 Regulatory Agenda: Office of Information and Regulatory Affairs/Office of Management and Budget.



# ENFORCEMENT AND COMPLIANCE TRENDS



# WORKSITE COMPLIANCE AND ENFORCEMENT

- ▶ USCIS Fraud Detection and National Security (FDNS) worksite inspections increase, with new focus on H-1B third-party placements, L-1A and L-1B employment
  - ▶ 12,542 total site inspections in FY 2019
    - ▶ 4031 inspections were standard compliance reviews
    - ▶ 8522 inspections were targeted inspections, focused on cases and scenarios where fraud is more likely, e.g. offsite placements
- ▶ F-1 STEM OPT site inspections program began in July 2019, after a 3-year delay
- ▶ Surge in ICE I-9 investigations
  - ▶ 5200 worksite audits from January to July 2018 – three times the number conducted in all of FY 2017
- ▶ Marked increase in DOL audits of H-1B wage rules and related back wage awards



# WORKSITE COMPLIANCE AND ENFORCEMENT, CONT'D

- ▶ Agencies actively encouraging members of the public to report suspected H-1B and B-1 abuse, and discrimination against U.S. workers
- ▶ Increased information-sharing and investigation/enforcement collaboration among DHS, DOL, DOS and DOJ
- ▶ New DOL guidelines on notice of labor condition application (LCA) filing
- ▶ Broader public disclosure of data about H-1B and L-1 petition approvals
  - ▶ Petitioner names
  - ▶ Number of approved petitions
  - ▶ For H-1B cases, average H-1B salary and degree levels of beneficiaries
  - ▶ End-clients of H-1B employers (as reflected on LCAs)



# WHAT CAN EMPLOYERS EXPECT AT A SITE VISIT?

- ▶ Unannounced site visits are possible
  - ▶ An officer may contact your organization by email or phone to request information and documents, possibly followed by an in-person visit
  - ▶ In other cases, the officer may arrive at the worksite unannounced
- ▶ How can you prepare for a site visit?
  - Review current internal protocols and have designated points of contact
  - Review with legal counsel your process and options – officers may allow attorneys to be physically present or present by phone
  - Notify immigration counsel immediately regarding any material changes to STEM training plans or nonimmigrant visa petitions
- ▶ Employers should prepare to answer questions about the visa holder's employment and job details
- ▶ ICE I-9 audits: importance of self-audit and corrections before a Notice of Inspection
  - ▶ AB450: Must notify employees before and after government inspection of I-9 form
- ▶ Preparation and advance review/internal audits can be a critical difference in mitigating fines



# EXECUTIVE AND REGULATORY INITIATIVES 2020



# VISA CRITERIA AND WAGE REQUIREMENT CHANGES 2020

## **H-1B Specialty Occupation Visas:**

- ▶ A proposed rule seeking a new definition of H-1B specialty occupation to “increase focus on obtaining the best and brightest foreign nationals” was slated for August 2019, but is now expected in Spring 2020
- ▶ New definitions of “employment” and “employer-employee relationship” would likely place new restrictions on third-party placements
- ▶ Possible changes to H-1B wage requirements
- ▶ Likely continuation of high scrutiny of any 3<sup>rd</sup> party worksite placement of an H-1B visa holder
- ▶ Implementation of new registration process for H-1B cap petitions (initial petitions requesting a number under the annual quota)

## **L-1 Intracompany Transferee Visas:**

- ▶ A new entry to the DHS regulatory agenda, planned for publication in September 2020, is a proposal to redefine L-1B specialized knowledge, as well as L-1 employment and employer-employee relationships, with a likely focus on further restrictions on offsite placement of L-1 employees
- ▶ impose new wage obligations on L-1 employers, though the regulatory agenda does not specify the nature of these obligations.



# FOREIGN STUDENTS AND EXCHANGE VISITOR PROPOSAL

- ▶ ICE is expected to propose modifying the period of authorized stay for F-1 students from an undefined “duration of status” (D/S) to a maximum period of authorized stay with options for extensions. The proposal is slated for February 2020
- ▶ Administration was expected to propose comprehensive revision of practical training rules for F-1 students by Spring 2020
  - ▶ Proposal expected to increase protections for U.S. workers and oversight of schools and students
  - ▶ Additional employer obligations likely
  - ▶ Possible restrictions on 12-month OPT, STEM OPT extensions and CPT
  - ▶ Regulations allowing CPT, OPT and STEM extensions of OPT remain in place until further notice
- ▶ Future rulemaking to restrict J-1 trainee/intern program will likely not be published before 2020



# ELIMINATION OF WORK PERMITS FOR H-4 SPOUSES

- ▶ Work permits (Employment Authorization Documents, or EADs), for spouses of H-1B visa holders implemented under Obama Administration
- ▶ Feb 2019: DHS initiated the mandatory federal review process to rescind the H-4 spousal work authorization regulation, but the process has since been delayed
  - ▶ DHS has stated that the earliest possible publication date is Spring 2020, but suggests the proposal might come even later
  - ▶ Meanwhile, DHS continues to defend *Save Jobs USA v DHS*, a lawsuit challenging the H-4 work authorization program. After a federal appeals court found that the plaintiffs had standing to sue, it sent the case back to the district court in November 2019 for consideration of the question whether DHS exceeded its authority when it created the H-4 work program
- ▶ H-4 EAD program remains in place until further notice



# VISITOR VISA REFORM

- ▶ The State Department plans to issue a rule concerning eligibility for B-1/B-2 business visitor and tourist visas, now slated for March 2020
- ▶ Proposed regulation currently under review at OMB
  - ▶ Possibility of stricter regulation of permissible activities for business visitors
  - ▶ Likely elimination of the use of B-1 in lieu of H-1B
- ▶ Some usages of the B-2 visitor visa, e.g., accommodations for unmarried domestic partners, could be restricted
- ▶ As of November 11, 2019, Polish nationals are eligible to apply for visa-free business or tourist visitor travel to the United States as B-1/B-2 visitors under the Visa Waiver Program



# THE END OF DEFERENCE

- ▶ Effective October 24, 2018, USCIS officers are no longer bound by previous petition approvals when reviewing nonimmigrant extension requests
- ▶ Officers are authorized to readjudicate a beneficiary's eligibility each time an extension of stay is requested, *even if there are no changes in circumstances*
- ▶ Guidance urges USCIS adjudicators not to “feel constrained in requesting additional documentation” when reviewing a nonimmigrant extension
- ▶ Guidance has prolonged adjudications and resulted in markedly higher rate of extension denials



# INADMISSIBILITY ON PUBLIC CHARGE GROUNDS

- ▶ August 2019: DHS published its final rule on the public charge ground of inadmissibility to the United States.
- ▶ The regulation would impose stricter standards for determining whether an applicant for a visa or permanent residence is likely to become a “public charge” – i.e., dependent on the government to meet their needs
- ▶ If implemented, adjustment applicants and nonimmigrants will undergo a closer review of their personal circumstances to determine whether they have used or are likely to need certain federal public benefits in the future
- ▶ The regulation was set to take effect on October 15, 2019, but has since been enjoined nationwide in three federal lawsuits. The cases are *State of New York v Department of Homeland Security*, *State of Washington v Department of Homeland Security*, and *City and County of San Francisco v USCIS*. Other courts have issued more limited injunctions against the rule
  - ▶ DHS has appealed the rulings



# PLANNING FOR INTERNATIONAL TRAVEL



# PLANNING FOR TRAVEL AND VISA STAMPING

## What to expect at U.S. Consulates and at the Ports of Entry?

- ▶ Visa Applicants should plan for the possibility of visa issuance delays at U.S. consulates.
  - Check consulate or embassy for specific timing information
  - Delays are common during the holiday season
- ▶ Plan for possible security clearance delays during the visa application process.
  - Often referred to by consulates as "administrative processing" or "221g" requests
  - Presidential Extreme Vetting Memorandum (March 6, 2017) directs the DHS, DOS, DOJ to implement **more stringent vetting** of applications and petitions for immigration benefits
- ▶ Visa Applicants now required to disclose social media use
  - Applicants must provide five years of social media history, email addresses and phone numbers
  - Recommend reviewing LinkedIn profile to ensure it is consistent with current role
- ▶ Plan for enhanced security screening procedures at US ports of entry
  - May be subject to more intensive questioning about immigration status, travel history, the purpose of your visit, background, employment and other issues. Could include a search of electronic devices (consider a company policy on search of devices)



# APPENDIX

- ▶ ADJUDICATION POLICIES AND TRENDS
- ▶ LEGISLATIVE OUTLOOK
- ▶ HUMANITARIAN IMMIGRATION PROGRAMS

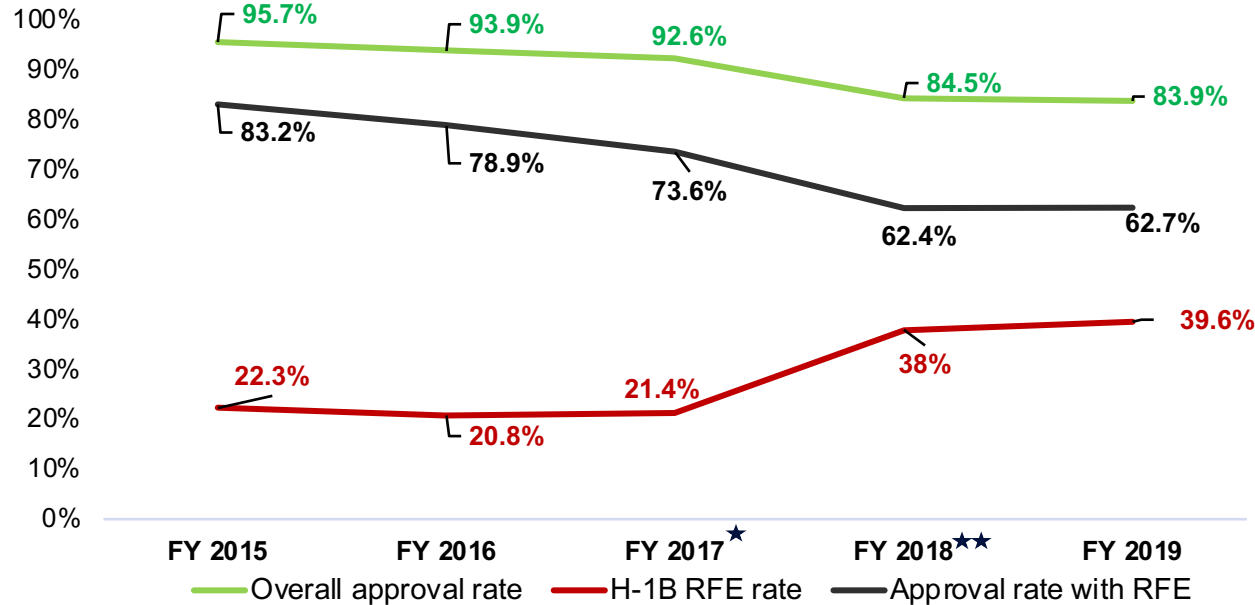


# ADJUDICATION POLICIES AND TRENDS



# SIGNIFICANT INCREASE IN RFES AND DENIALS

## H-1B RFE and Approval Rates



**\*March 2017:** USCIS policy memorandum takes position that computer programmer jobs are not presumed to be eligible for the H-1B program.

**\*October 2017:** USCIS officers no longer bound by previous petition approvals when reviewing nonimmigrant extension requests, including H-1B and L-1 extensions.

**\*\*February 2018:** USCIS increases scrutiny of end-client contracts and itineraries in H-1B third-party placements.

**\*\*September 2018:** USCIS gives adjudicators more authority to deny immigration benefits filings without giving employers the opportunity to provide additional evidence.

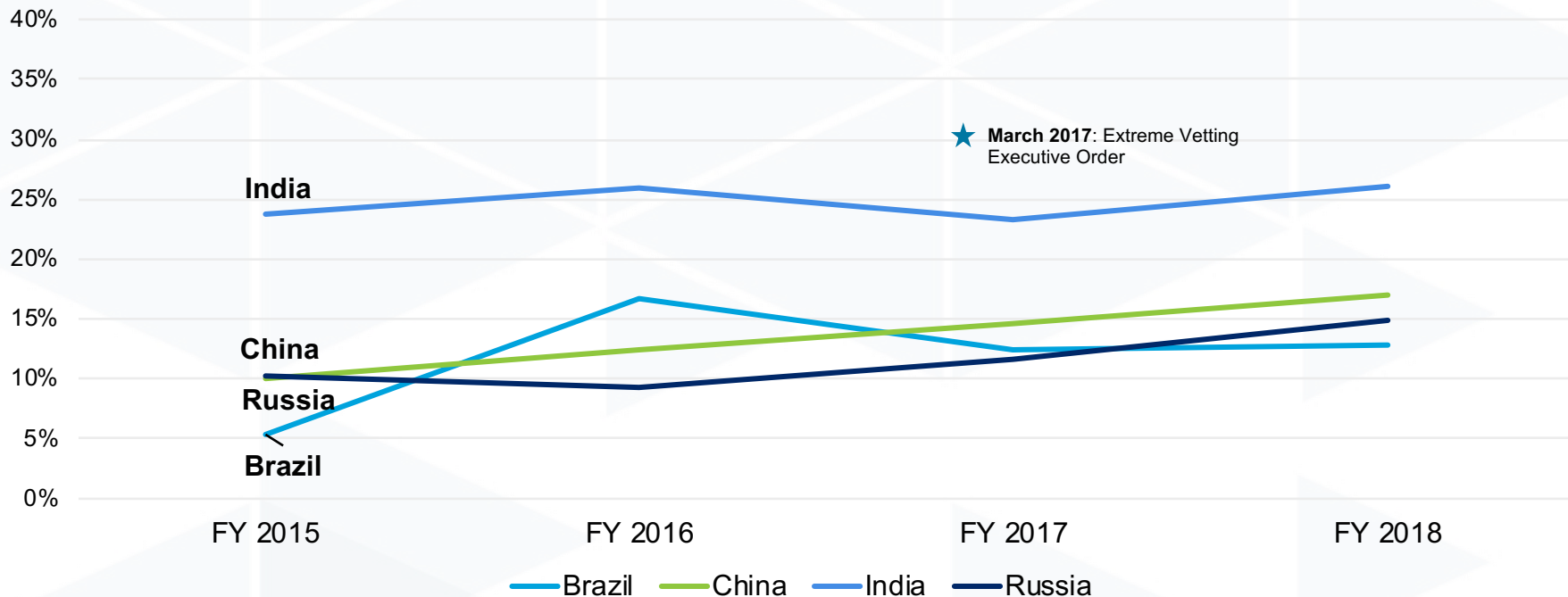
Source: USCIS H-1B ([cap and non-cap](#)) adjudications, FY15-FY19.

- Across all industries, since FY 2015, overall H-1B approval rates have dropped as the rate of RFE issuance has increased
- The odds of overcoming a USCIS RFE fell markedly from FY 2017 to FY 2019, as the Trump Administration implemented new restrictive H-1B policies



# TRENDS IN VISA ISSUANCE

## B Visa Refusal Rate by Nationality





# LEGISLATIVE/EXECUTIVE OUTLOOK



# 116<sup>TH</sup> CONGRESS

## Fairness for High-Skilled Immigrants Act of 2019, H.R. 1044

- ▶ Sponsors: Rep. Zoe Lofgren (D-CA) and 116 co-sponsors
- ▶ The bill aims to equalize the waiting periods for employment-based (EB) permanent residence and spur significant advancement in EB green card availability for India and China, but would increase waiting periods for some other countries
  - ▶ Eliminates the per-country numerical limitation for employment-based immigrants, creating a single queue for each category
  - ▶ Increases the per-country numerical limitation for family-sponsored immigrants from 7 percent to 15 percent
- ▶ Passed the House 365 to 65 on July 10, 2019
- ▶ Companion bill: S. 386, sponsored by Sen. Mike Lee
  - ▶ Includes additional H-1B compliance and enforcement provisions via Grassley amendment
    - ▶ Job posting requirements
    - ▶ LCA fee
    - ▶ Greater DOL scrutiny of LCAs
    - ▶ More investigative authority for DOL
    - ▶ Annual LCA compliance audits
    - ▶ Higher penalties for LCA violations
  - ▶ Currently on hold in the Senate



# 116<sup>TH</sup> CONGRESS

## The Resolving Extended Limbo for Immigrant Employees and Families (RELIEF) Act of 2019, S. 2603

- ▶ In October 2019, Senators Dick Durbin (D-IL) and Patrick Leahy (D-VT) introduced a bill that seeks to address the family and employment immigrant visa backlogs
- ▶ Unlike Rep. Zoe Lofgren's (D-CA) Fairness for High-Skilled Immigrants Act (H.R. 1044), which contains no change in the total number of green cards, the RELIEF Act would increase the total number of green cards
- ▶ The Act would:
  - ▶ Phase out country limits for employment-based green cards over a period of five years and increase the limits for family-based categories
  - ▶ Classify spouses and children of green card holders as immediate relatives
  - ▶ Exempt derivative beneficiaries of employment-based petitions from annual green card limits
  - ▶ Protect "aging out" children who qualify for LPR status based on a parent's immigration petition
  - ▶ Extend the "hold harmless" clause from H.R. 1044 that exempts immigrant visa petitions approved prior to enactment from the lifting of country caps to petitions also approved for five years after enactment



# WHITE HOUSE IMMIGRATION BILL

- ▶ The White House is working on a merit-based immigration bill focusing on permanent residence, expected to be released in 2020
- ▶ The bill would not increase the overall permanent residence quota. Family and humanitarian numbers would be reduced, while more green cards would be allocated to the merit system
- ▶ The bill might also include the following:
  - ▶ A U.S. job offer would be required to access the merit-based system
  - ▶ Prior U.S. job experience will likely be a points criterion
  - ▶ Still under discussion whether wages will be a points criterion
  - ▶ OPT may be eliminated -- White House seeks “better bridge” from F-1 to employment status
- ▶ The bill does not address DACA or undocumented immigrants
  - ▶ The Supreme Court’s forthcoming decision on DACA could put pressure on Congress to devise solutions for DACA-eligible and similar populations



# NAFTA RENEGOTIATION

- ▶ On September 30, 2018, a trilateral agreement to replace NAFTA with the United States-Mexico-Canada Agreement (USMCA) was reached
  - ▶ The leaders of Canada, Mexico, and the U.S. signed the USMCA on November 30, 2018. The agreement must now be ratified by legislatures of the three countries before it can take effect
  - ▶ On June 19, 2019, Mexico became the first country to ratify the agreement. Meanwhile, Canada's executive branch has formally begun the process of asking its legislature to ratify the deal
  - ▶ President Trump has urged Congress to ratify the agreement as soon as possible
  - ▶ Congressional Democrats have called for greater protections for American workers, which could stall U.S. ratification
- ▶ Labor mobility provisions of new pact are largely the same as those of NAFTA
  - ▶ Each country continues to have authority to interpret the agreement with respect to the cross-border movement of businesspersons, professionals, intracompany transferees, traders and investors
    - ▶ USCIS restrictions on TN Economist classification issued December 2017
    - ▶ New petition requirement for returning Canadian L-1s
- ▶ Until the new agreement takes effect, the NAFTA mobility provisions are expected to remain in place without interruption



# HUMANITARIAN IMMIGRATION PROGRAMS



# DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

- ▶ On November 12, 2019, the Supreme Court heard oral argument on three federal court rulings that enjoin the Trump Administration from terminating the DACA program
  - ▶ A decision could come as late as Spring or Summer 2020, and could put pressure on Congress to devise solutions for DACA-eligible and similar populations
- ▶ Current DACA beneficiaries continue to be authorized to remain in the U.S. and can apply for renewal of their benefits and work authorization
- ▶ However, DHS is not currently required to accept applications from those who have not previously received DACA benefits



# DACA, CONT'D

The Supreme Court is hearing a consolidated appeal of the following cases:

- ▶ *Regents of the University of California et al. v. USDHS*
  - ▶ November 8, 2018: the Ninth Circuit Court of Appeals upheld a nationwide injunction requiring DHS to continue accepting DACA renewals
- ▶ *Texas v. United States*
  - ▶ Lawsuit charges that DHS failed to follow proper procedure when it implemented the DACA program in 2012
  - ▶ August 31, 2018: a federal judge denied the State of Texas's motion for a preliminary injunction against the DACA program but stayed his decision to allow the parties time to pursue an appeal of the denial. The decision allowed DACA recipients to continue to apply for the program while being protected from immediate deportation. An appeal against this decision proceeds in the meantime
- ▶ *NAACP v. Trump*
  - ▶ August 6, 2018: Judge John D Bates of the U.S. District Court for DC ordered DHS to fully reinstate the DACA program, reaffirming his April 24 decision that the administration's rescission of the program was unlawful
  - ▶ Judge Bates' order would require DHS to consider new applications from those who had never obtained DACA benefits, in addition to DACA renewals
  - ▶ The order is currently on hold while an appeal and related litigation proceed



# RESTRICTIONS ON ASYLUM

- ▶ On September 9, 2019, DHS proposed eliminating requirements that USCIS adjudicate employment authorization applications from asylum seekers within 30 days. The proposed rule comes as DHS further plans to eliminate asylum seekers' rights to work authorization altogether. As the law currently stands, asylum seekers are eligible to apply for work authorization once their asylum applications have been pending for 150 days
- ▶ On July 16, 2019, DHS published an interim final rule preventing foreign nationals from applying for asylum if they passed through another country in which they did not apply for asylum on their way to the U.S. The rule would effectively exclude almost all Central American asylum seekers that travel through Mexico
  - ▶ On September 11, 2019, the Supreme Court overruled a federal judge's injunction, allowing DHS to begin implementing the regulation
- ▶ On April 29, 2019, President Trump sent a [memo](#) to DHS and DOJ directing the agencies to develop new restrictions on asylum seekers within 90 days. The proposed changes include the following:
  - ▶ No asylum seekers would be granted work authorization until after they are granted asylum. Under current rules, asylum seekers can apply for work permit 150 days after filing their asylum application
  - ▶ Cases must be settled within 180 days
  - ▶ As part of the proposed USCIS fee schedule, DHS has proposed introducing a \$50 fee for asylum applications
- ▶ Since January, the Trump Administration has been implementing the Migration Protection Protocols, which force asylum seekers to stay in Mexico while their cases are being adjudicated



# STATUS OF TPS DESIGNATIONS

- ▶ Temporary Protected Status (TPS) allows foreign nationals from certain designated countries with conditions that prevent a safe return (such as due to ongoing armed conflict, natural disasters, or other extraordinary circumstances) to temporarily remain in the U.S. and the option to apply for work and travel authorization
- ▶ Trump Administration continues to curtail the Temporary Protected Status program
- ▶ In October 2018, a federal district court judge issued an injunction that blocked the administration from terminating TPS for Sudan, Nicaragua, Haiti, and El Salvador, temporarily preserving the status of TPS holders from these countries
- ▶ In the meantime, the agency is appealing the injunction to a higher court
  - ▶ TPS EADs and related benefits have been automatically extended through January 2, 2020 for TPS beneficiaries from Sudan, Nicaragua, and Haiti. TPS is status quo for Honduras and Nepal until the appeal is decided.
  - ▶ In April 2019, another judge blocked the administration from terminating TPS for Haiti
  - ▶ Separately, the governments of El Salvador and the United States reached a deal in October 2019 to extend Salvadoran TPS beneficiaries' work authorization through January 4, 2021, with an additional year possible after conclusion of the lawsuit
- ▶ Current TPS termination dates:
  - ▶ Sudan effective January 4, 2021
  - ▶ South Sudan effective November 2, 2020
  - ▶ Nicaragua effective November 4, 2021
  - ▶ Nepal effective January 4, 2021
  - ▶ Haiti effective January 4, 2021
  - ▶ El Salvador effective January 4, 2021
  - ▶ Honduras effective January 4, 2021
  - ▶ Syria effective March 31, 2021
  - ▶ Yemen effective March 3, 2020
  - ▶ Somalia effective March 17, 2020