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2021: Immigration Year in Review

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The immigration field has seen several significant changes this year, many temporary and in response to the ongoing COVID-19 pandemic, others as a result of hard-fought litigation, others in reversal of the prior presidential administration's policies, and a few in an attempt to fix some of the widespread problems that employers and foreign nationals face in the U.S.

Here the key changes of 2021, which will continue to impact the immigration and employment fields in the coming months and years.

Ongoing Temporary COVID-19 Flexibilities

As a result of the COVID-19 pandemic, standard operations across the world have become impacted and strained. In recognition of this, the Department of Homeland Security has implemented various temporary flexibilities to ease requirements during the pandemic emergency and enable ongoing processing to minimize impact to foreign nationals in the U.S.

Since March 2020, U.S. Immigration and Customs Enforcement has maintained flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, and has confirmed extension of this flexibility policy until Dec. 31, 2021. Per the flexibility, employers may obtain, remotely inspect, and

retain copies of the identity and employment eligibility documents to complete Section 2 of Form I-9. Further, as of April 2021, the requirement that employers inspect employees' Form I-9 documentation in-person applies only to those employees who physically report to work at a company location on any regular, consistent, or predictable basis. Employers must conduct in-person verification of identity and employment eligibility documents of all employees who were onboarded using remote verification once normal operations resume or the flexibility extensions terminate. However, based on the ongoing emergency and distancing restrictions, it is expected that the agency will further extend these flexibilities.

The U.S. Citizenship and Immigration Services (USCIS) also extended its temporary 60-day deadline extension policy to Jan. 15, 2022. The flexibility is available to those responding to or filing the following: Requests for Evidence; Notices of Intent to Deny; Notices of Intent to Revoke or Rescind; Notices of Intent to Terminate EB-5 Regional Investment Centers; Form I-290B, Notice of Appeal or Motion; and Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings. This flexibility applies if the issuance date listed on the request, notice, or decision is between March 1, 2020, and Jan. 15, 2022, inclusive.

Since May 2021, USCIS has also suspended the biometrics submission requirement for applicants filing Form I-539, Application to Extend/Change Nonimmigrant Status, if requesting an extension of stay or change of status to H-4, L-2, and E nonimmigrant status. USCIS is permitting adjudication of these cases based on biographic information and related background checks, without capturing fingerprints and a photograph. This suspension will apply through May 17, 2023, subject to affirmative extension or revocation by the USCIS director.

Additionally, USCIS recently announced that it is waiving the requirement that the civil surgeon sign Form I-693, Report of Medical Examination and Vaccination Record, no more than 60 days before an applicant files an application for the underlying immigration benefit (including Form I-485, Application to Register Permanent Residence or Adjust Status). Accordingly, individuals may file applications for an immigration benefit with a completed Form I-693, even if the civil surgeon signed more than 60 days prior. This waiver will be valid until Sept. 30, 2022.

New Policies and Requirements

Pursuant to legislation passed in late 2020, USCIS expanded premium processing service to petitioners filing a request to change to or extend E-3 classification status. Accordingly, employers can request 15-day processing of E-3 petitions for a fee of $2,500, easing significant adjudication delays for the visa category. USCIS has also indicated that it will seek to further expand the premium processing service through a new regulation.

As of October, all applicants subject to the immigration medical examination, including those applying to become lawful permanent residents, must complete the COVID-19 vaccine series before the civil surgeon can complete an immigration medical examination and sign the Form I-693, Report of Medical Examination and Vaccination Record. Limited waivers are available where the COVID-19 vaccine is: not age appropriate; contraindicated due to a medical condition; not routinely available where the civil surgeon practices; or limited in supply and would cause significant delay for the applicant to receive the vaccination. Individuals may also apply for waivers based on religious beliefs or moral convictions.

In April, USCIS issued policy guidance instructing officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts unless there was a material error, material change, or new material facts. The policy is a return to prior long-standing guidance that was in effect from 2004 to 2017, and is in accordance with President Biden's executive order, Restoring Faith in

Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans. The change coincides with a marked drop in RFE rates, which dropped to 10% for the H-1B category for the first time since 2016 and an increased post-RFE approval rate of 86%.

Finally, in accordance with the settlement reached in *Shergill v. Mayorkas*, in November, USCIS issued policy guidance which marks a significant shift in policy, and which should help to ease the obtainment and maintenance of employment authorization for dependent spouses. The new policy implemented an automatic extension of employment authorization to E, H-4, and L-2 spouses who have timely filed an application to extend an employment authorization document (EAD) and have a valid, unexpired I-94 for E, H-4, or L-2 status. The automatic extension of the EAD will continue until the earlier of the end date on Form I-94, the approval or denial of the EAD renewal application, or 180 days from the date of expiration of the previous EAD.

Individuals seeking to avail themselves of this new policy will need to present the following documents for I-9 purposes: Form I-94 indicating the unexpired E, H-4, or L-2 status; Form I-797C Filing Receipt for a timely-filed EAD renewal application requesting work authorization under class (a)(17), (a)(18), or (c)(26); and the facially expired EAD issued under the same category. Additionally, the new policy confirmed that it will return to its pre-2002 policies, which held that E and L dependent spouses are work authorized incident to their valid nonimmigrant status, and do not require any additional application or documentation to evidence such status, so long as they hold an I-94 which notes their E/L spousal status.

Although the policy was made effective immediately, practically speaking, the policy requires that the Form I-94 be amended to distinguish between E/L spouse dependents and child dependents. As part of the litigation settlement, USCIS has committed to implementing the new spouse notation within 120 days of the settlement. Once the E/L spouse notation is indicated on an individual's I-94 (s)he will no longer be required to request employment authorization by filing Form I-765, but instead will be able to use their Form I-94 as a qualifying employment authorization document for Form I-9 purposes. These are welcome policy shifts for dependent spouses who have faced extensive backlogs, more recently of over 14 months at some service centers, in processing of renewal EAD applications and have been regularly facing disruptions in employment authorization due to the long processing timelines.

Entry Restrictions and Requirements

As of November, there is one presidential proclamation remaining which, with limited exception, imposes an entry ban for travelers who have been physically present in Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, and Zimbabwe within 14 days of travel to the U.S.

Prior regional COVID-19 travel bans and entry restrictions were rescinded in favor of stricter vaccination and testing requirements. In particular, nonimmigrant travelers to the U.S. must show proof that they have completed COVID-19 vaccination protocols by providing digital or paper documentation that includes biographical information, the name of the official source issuing the record, the vaccine manufacturer, and the date(s) of vaccination. Limited exceptions to the vaccination requirement are available for children under the age of 18; nationals from countries with less than a 10% vaccination rate or otherwise determined by the Center for Disease Control (CDC) to qualify as having limited vaccine availability; medical contraindication; humanitarian/emergencies as defined by the CDC; those who participated in certain COVID-19 vaccine clinical trials; certain air and sea crew members, U.S. armed forces and immediate family and certain diplomatic or UN travel; and those whose entry would be in the "national interest" as determined by the State Department, Transportation Department, or Department of Homeland Security.

Further, all inbound international airline passengers over the age of two, and regardless of citizenship or vaccination status, must submit a negative COVID-19 test taken within one calendar day of travel in order to board a flight to the U.S.

Consular Operations and Processing

Although there has been a significant relaxation in entry restrictions, consular operations abroad are still limited, and foreign nationals continue to experience delays in consular processing. Consular reopening and operations must be in compliance with both U.S. and local requirements, and because of stringent safety requirements, the consular posts cannot yet return to pre-COVID staffing or hours. Accordingly, delays, backlogs, reschedules, and cancellations of consular appointments will continue to be the norm for the foreseeable future.

Conclusion

This year has brought many new policies, reversal of policies, and implementation of new and temporary policies to the immigration field. Immigration updates are announced frequently and can be nuanced. Continuing regular communication with immigration counsel during this time will ease navigating these near constant changes.

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