

Editor's Comments

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Barnes and Thornburg in Chicago and also a former chair of the Section Council.

In this issue of *The Globe* Scott Pollock provided, "Recent Developments With Immigration Law and Practice 2019-2020 Summary" from his material for the CLE program. This issue also includes Cindy Buys' "Immigration Cases to Watch on the Supreme Court's Docket 2019-20."

We have presented in issues of *The Globe* short biographies on current and past members of the Section Council to introduce the readers to the members who do the work of providing material for *The Globe*, organizing and presenting the CLE programs, drafting and commenting on legislation, and participating in other activities of the Section. Included in this issue is the biography of Scott D. Pollock, a former chair of the Section Council and a participant in the recent CLE panel.

For over ten years, Florian S. Jörg, partner in the Zurich office of Bratschi, Ltd., has provided us articles concerning Swiss laws and regulations. He has introduced us to Mirco Ceregato, partner and member of the Board of Directors of Bratschi, Ltd. He serves as co-head of the Compliance and Investigation and Litigation and Debt Collection Divisions and is located in St. Gallen. We have included in this issue his article "Execution of U.S. Pre-Trial Discovery Orders in Switzerland."

As always, thank you to all of our authors and contributors. ■

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Recent Developments With Immigration Law and Practice 2019-2020

BY SCOTT D. POLLOCK

Overview

2019 has been a non-stop year of dizzying activity and changes in the immigration field, from local agency office procedures, to sweeping policy changes, to Supreme Court involvement, that shows no signs of letting up. As of the deadline for these materials on November 21, 2019, Law 360 reports that the Trump administration plans to enact new policies before year's end that will make it harder for immigrants to qualify for asylum and corporations to hire and retain foreign born employees. Its latest biannual unified regulatory agenda, released last Wednesday is, according to one observer "a

restrictionist wish list." Anticipated changes include proposals to change the definitions of "specialized knowledge", "employment" and "employer-employee relationship" and "specialty occupation" that will affect high-level L-1 and H-1B workers; changes to, or possible elimination of Optional Practical Training (OPT) for F-1 students; possible new restrictions on federal regional centers authorized to accept EB-5 job-creation investors; and additional restrictions on asylum applicants, including eliminating their ability to support themselves in the U.S. while waiting on decisions on their applications, at least for a year after they

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submit their application.

Encapsulating the Trump administration's approach to immigration, Stuart Anderson, executive director of the National Foundation for American Policy and former Immigration and Naturalization Service employee, said "Can you name any regulation the administration has put in place that has made it easier for any foreign individual to do anything in the United States?"

Focus on Restricting Asylum Seekers

Asylum Cooperative Agreements

11/19/19-UNHCR issues statement that new U.S. policy to enter into agreements with Guatemala, Honduras, and El Salvador for return of asylum seekers is "at variance with international law that could result in the transfer of highly vulnerable individuals to countries where they may face life-threatening dangers." Source: UNHCR USA press release

Migrant Protection Protocols (MPP) or Remain in Mexico

Policy requiring asylum seekers to await interviews from Mexico rather than being detained in the U.S. As of October, 42,000 asylum seekers were stranded in Mexico, many of whom have been unable to pursue claims for asylum.

Asylum Ban 1.0- Denying asylum to persons arriving at other than a port of entry

Enjoined by court in *East Bay sanctuary Covenant v. Trump*, but on May 7, 2019, the 9th Circuit limited the injunction to applicants in the 9th Circuit.

"Asylum Ban 2.0" barring asylum for virtually all non-Mexicans arriving at the southern border if they cannot show they applied for, and were denied asylum in a 3rd country they passed through. On 9/11/19, the Supreme Court said the administration may enforce this rule while litigation in lower courts proceeds.

11/19 Asylum work authorization changes- proposal to increase the bar on employment authorization to asylum applicants from current 6 months to 12 months, and to eliminate any time frame on when USCIS may issue an EAD.

Credible/Reasonable Fear standards

and procedures will likely be redefined and restricted in an upcoming proposed regulation. This will no doubt screen out the vast majority of persons arriving in the U.S. and requesting protection from return to their countries.

Reduction in Number of Refugees Allowed Into the Country

18,000 announced in September for FY20, the lowest number authorized in U.S. history.

9/26/19 executive order-permitting States and localities to refuse consent to have refugees settle there. Seeking to overturn 7th Circuit decision in *Exodus Refugee Immigration, Inc. v. Pence*, after then Indiana Gov. Mike Pence refused to allow Syrian refugees into Indiana due to the threat they pose to the safety of residents of Indiana. *** But that's the equivalent of his saying (not that he does say) that he wants to forbid black people to settle in Indiana not because their black but because he's afraid of them, and since race is therefore not his motive he isn't discriminating. But that of course would be racial discrimination, just as his targeting Syrian refugees is discrimination on the basis of nationality." (J. Richard Posner)

Attorney General Certifying Asylum Decisions to Himself

Matter of A-B-, redefining "particular social group" to severely restrict asylum for victims of domestic violence and gang brutality.

Matter of L-E-A, also redefining PSG to exclude most claims based on family membership unless demonstrating the family is socially distinct/visible/prominent.

Reports at southern border is Asylum Officers are rejecting nationality based claims for people harmed in Mexico on account of being non-Mexicans.

The 3rd country asylum ban, together with restrictions on what kinds of claims of protection qualify as persons in a particular social group (PSG) ensure that most claims are being denied during initial screening and asylum seekers are denied hearings on their claims.

Congressional response by Democrats: Refugee Protection Act of 2019 introduced by Sen. Leahy and Rep. Lofgren cosponsored

by over 2 dozen members of Congress. This would reverse *Matter of A-B-*, end the Asylum Ban 2.0, allow persons found subject to MPP to reopen their cases; eliminate "metering" at the border that restricts the number of asylum seekers from requesting asylum each day; prohibit criminal prosecution of asylum seekers and prohibit punitive detention; and guarantee access to counsel for asylum-seeking children.

DACA Termination

11/12/19 Supreme Court heard oral argument in 3 consolidated cases in which lower courts ruled the termination violated the APA. Decision anticipated by June 2020.

Temporary Protected Status (TPS) termination- Ramos v. Nielsen (N.D. CA) blocked rescission of TPS on 10/3/18 for Sudan, Nicaragua, Haiti and El Salvador while litigation remained pending. On 11/1/19, a Federal Register notice automatically extended TPS through 1/4/21.

Initiatives to Limit Legal Immigration in Addition to Illegal Immigration

Public charge inadmissibility rule- 8/14/19- would penalize prospective immigrants who used certain government programs, even non-cash assistance, for 12 months of a 36 month period, or whom DHS or DOS officials deem are "likely to become a public charge in the future."

New forms debacle. The rule, due to take effect Monday October 15, required use of revised forms that were not made available until only days before (the prior Wednesday). Rule temporarily restrained by courts in NY, CA, WA, IL, and MD as violating the APA and INA's own terms defining public charge.

10/4/19 Presidential proclamation -requiring intending immigrants and nonimmigrants seeking extension to show they will have acceptable insurance, anticipated to reduce legal immigration numbers by 2/3. Sought to use the same INA 212(f) authority invoked for the travel bans to restrict entry to groups deemed by the President as detrimental to U.S. interests, in this case immigrants threatening the U.S. health care system. Enjoined by a number of district courts around the U.S. before it could take effect as violating the INA and APA.

DHS Fee Increases

Announced Nov. 2019 with an effective date of 12/2/19. Weighted average increase of 21%. Citizenship applications 83% increase from \$ 640 to \$ 1,170. New \$ 50 fee to apply for asylum, which will make the U.S. one of four countries in the world to charge to apply for asylum.

Appeal from a USCIS decision from \$ 675 to \$ 705; Adjustment of Status from \$ 1,140 to \$ 1,610; application to remove conditions on resident status from \$595 to \$760

Elimination of fee waivers for N-400, I-90, I-765, I-485, and I-751.

Travel (Muslim) Bans

After Supreme Court upheld Travel Ban 3.0, cases are percolating over failure by State Department to adjudicate waivers.

Restrictive Agency Practices

H-1B visas- many lawsuits filed to challenge record high numbers of denials. An April 2019 analysis of USCIS data by the National Foundation for American Policy shows denial rates rose from 6% in 2015 to a 10 year high of 32% in the first quarter of 2019. This includes 18% of all H-1B extension requests which, in 2015, had a 3% denial rate. The report cites President Trump's "Buy American Hire American" executive order from April 2017 as responsible for rescinding prior guidance to adjudicators to defer to prior findings, and set goals to reduce illegal immigration, detect and prevent fraud, and increase employment of U.S. workers and their wages.

ITServe Alliance v. USCIS consolidates several cases challenging cases where USCIS denied or approved petitions with short validity periods.

Virtually all liaison functions with DHS entities have ceased

Attorneys and applicants must use USCIS call-center ("1-800-USE-LESS")- obtaining InfoPass appointments to speak with a USCIS officer is discretionary and more difficult.

Lawsuits Filed

A.I.L.L. v. Sessions seeks damages on behalf of thousands of traumatized children and parents in the aftermath of AG Sessions' disastrous "zero-tolerance" policy that

separated children from parents by deciding to bring misdemeanor charges for entry without inspection in all cases.

Make the Road New York v. McAleenan successfully challenged a proposed expansion of expedited removal procedures to persons suspected of being unlawfully present anywhere in the U.S., who cannot establish to the satisfaction of a DHS officer that they have been present in the U.S. for 2+ years.

East Bay v. Barr (lawsuit on asylum regulation that Supreme Court said could stay in place while litigation proceeded in the lower courts, thus upholding implementation of MPP or Remain in Mexico in an order without opinion, and over dissent from Justice Sotomayor joined by Justice Ginsburg).

Processing Delays at USCIS

According to a Law360 article and the National Foundation for American policy analysis of USCIS data from April 2019, average wait times for employment based adjustments of status grew this fiscal year to 12.2 months compared to 11 months for the previous year and 8.1 months in 2017. Also, non-premium processed nonimmigrant petitions wait an average of 5.4 months this fiscal year, up from 3.4 months last year and 4 months in 2017.

State and Local Immigration Enforcement

Kansas v. Garcia, 10/16/19 Supreme court heard arguments on case where Supreme Court of Kansas held employees can't be prosecuted for identity theft based on I-9 fraud of persons who lack employment authorization. Decision expected by June 2020.

Sanctuary cities non-cooperation with DHS law enforcement upheld by 9th Circuit 4/18/19. Several courts, including courts in the 7th Circuit, also have held the administration cannot withhold law enforcement grant funds to localities based on non-cooperation policies.

The Wall

Congress appropriated \$ 1.8 billion, but the Administration sought to divert military funds for construction of border fencing. On

10/11/19, a court in El Paso ruled this was a violation of appropriation laws.

Other Immigration Developments

Flores settlement- the Administration published a final regulation dealing with the detention of immigrant children. The rule would expand the amount of time children can be held in detention from 20 to 60 days. The federal court overseeing compliance of the *Flores* settlement blocked it in late September 2019, ruling that it violated the settlement's fundamental tenets.

Impacts on International Education

Numbers are down for international students, many of whom are opting to avoid the U.S. for more welcoming places in Europe and Canada. According to 11/19/19 CNN article "The US Economy is losing billions of dollars because foreign students aren't enrolling," the decline has cost the economy \$ 11.8 billion and more than 65,000 jobs, according to NAFSA estimates. The State Department's Open Doors report shows a first time ever three-year decline in new enrollments.

July 2019 announcement of intention to target immigrants with final deportation orders- President Trump publicly vowed to deport millions in the U.S. and ordered ICE to start mass arrests. The real list had 2,100 families on it, and ICE actually arrested 18 persons.

I-9 audits rose in FY 18 to 5,981 from 1,360 the previous year. Worksite raids have increased.

11/21/19- EB-5 job creation minimum investment levels rose from \$ 500,000 to \$ 900,000 for low employment areas, and \$ 1 million to \$ 1.8 million in other areas.

Immigration Court backlogs are at all-time highs. Wait times for cases in the Chicago immigration court can be up to 4 or more years. The Justice Department is expected to issue an interim rule in December that aims to speed up case processing and eliminate remands from the Board of Immigration Appeals to immigration judges. In October, the DOJ issued guidance and stringent case decision timeframes of 8-11 months for cases at the BIA.

Moves by DOJ to decertify the Immigration Judge's union- DOJ has argued that IJ's are "policy makers" who are exempt from union eligibility. The head of the IJ union has said: "The administration cares nothing but for numbers...."

Immigrant detention and Private Prisons will continue to be a hot topic. The average number of immigrants detained is set to increase from more than 44,000 last year to up to 60,000 in the near future. ICE has contracts with CoreCivic totaling \$ 280 million and with GEO Group for \$ 475 million. There have been several lawsuits filed and are under consideration in which these and other private prison companies have required detainees to work for less than the federal minimum wage, reportedly as low as less than \$ 2.00 per day. These immigration prisons also are self-perpetuating job creation centers for distressed communities, offering salaries of up to \$ 60,000. Source: *Migrating to Prison*, a new book by law professor and scholar Cesar Cuauhtemoc Garcia Hernandez. As quoted in the book from a former mayor of Raymondville Texas: "We need everyone to be employed. We need those prisoners."

Civil Liberties at the Border and Ports of Entry

Border privacy issues

Alasad v. McAleenan, (November 12, 2019) federal district court in Boston rejected CBP and ICE asserted authority to seize travelers' electronic devices without demonstrating individualized suspicion of illegal contraband. The number of electronic device searches by CBP last year was more than 33,000, almost 4 times the number from 3 years prior. One plaintiff Zainab Merchant had a border agent rifle through privileged attorney-client communications. In another related incident a Harvard freshman was sent back to his country and reprimanded for friends' social media postings expressing views critical of the U.S. government. Source: NYT 11/12/19 "U.S. Judge Rules Suspicionless Searches of Travelers' Digital Devices Unconstitutional"; Electronic Frontier Foundation, www.eff.org.

Significant 7th Circuit Immigration Cases

Ortiz-Santiago v. Barr, Court refused to find, post-Pereira, that IJ lacks jurisdiction but, under case processing rules, a defective NTA may result in dismissal of removal proceedings where the defect resulted in

prejudice to the respondent.

Najera-Rodriguez v. Barr, Court ruled that a conviction under Illinois law for possession of cocaine was categorically not a "controlled substance offense" under federal law because the Illinois statute was broader than the federal CSA and not divisible.

Odei and Spirit of Grace Outreach v. DHS, Court ruled that it had no jurisdiction to review CBP's inadmissibility determination for a Christian minister, because of the bar on reviewing expedited removal orders (even though the minister was not ordered removed but allowed to withdraw his application for admission), and the Religious Freedom Restoration Act (RFRA) did not create an exception to allow for judicial review.

Northern District of Illinois

Cook County and ICIRR v. McAleenan (October 14, 2019) (J. Feinerman) enjoining the public charge rule. ■

Scott D. Pollock, former chair of the ISBA's Section Council on International and Immigration Law, is the founder and principal attorney with Scott D. Pollock & Associates, P.C. in Chicago, a full-service immigration law firm serving clients around the U.S. and abroad. He can be reached at 312-444-1940 or by email at spollock@lawfirm1.com.

Immigration Cases to Watch on the U.S. Supreme Court's Docket 2019-20

BY CINDY G. BUYS

Barton v. Barr (Granted April 22, 2019; Argued Nov. 4, 2019)

Andre Martello Barton came to the U.S. from Jamaica as a teenager in 1989 and became a lawful permanent resident (LPR) in 1992. He was convicted in 1996 of assault and possession of a firearm in an incident where a friend fired a gun at a house from a car Barton was driving. In 2008, he was twice convicted of drug possession. DHS sought to deport Barton because of his criminal convictions. Barton applied for a cancellation of removal under 8 U.S.C. § 1229b(a) which requires that he establish, inter alia, he had been a resident of the United States for at

least seven years after being admitted to the country. This requirement is subject to the "stop-time rule" of 8 U.S.C. § 1229b(d)(1) which stops the accrual of time in residence status due to the commission of certain crimes during those seven years that make the LPR either "inadmissible" or "removable". The Immigration Judge (IJ) denied Barton's application, holding that he was inadmissible due to his 1996 criminal convictions, which engaged the stop-time rule and prevented him from reaching the seven-year mark. Barton argued that he could not be "inadmissible" because he had already been admitted to the U.S. in LPR status. However,

both the Board of Immigration Appeals (BIA) and the Eleventh Circuit Court of Appeals affirmed the IJ's decision. There is currently a split in the federal circuits with respect to this issue. Accordingly, the Supreme Court will now decide whether an LPR who is not seeking admission to the United States can be rendered "inadmissible" for the purposes of the stop-time rule.

Department of Homeland Security v. Thuraissigiam (Granted October 19, 2019)

Respondent is a native and citizen of Sri Lanka and a Tamil, an ethnic minority group in Sri Lanka. He was apprehended illegally crossing the southern U.S. border