



# Four Years of Profound Change

## Immigration Policy during the Trump Presidency

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U.S. IMMIGRATION POLICY PROGRAM

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**Migration Policy Institute**

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# 1 Introduction

The Trump administration set an unprecedented pace for executive action on immigration.<sup>1</sup> In four years, it completed 472 executive actions affecting U.S. immigration policy, with 39 more proposed but unimplemented when the administration ended. Some of these changes were sweeping—undoing the priorities of the entire interior enforcement apparatus, for example—while others were smaller, more technical adjustments—such as lengthening the amount of time an asylum seeker had to wait to receive a work permit, or requiring more extensive information on visa applications. Donald Trump was the only presidential candidate in modern U.S. history to run and win on an immigration-centered platform. And while his administration may not have delivered on his most extreme promises, such as deporting millions of unauthorized immigrants or building a wall along the entire, 2,000-mile U.S.-Mexico border, changes to the immigration system during his tenure—some of which are likely to remain on the books for years to come—successfully narrowed grants of humanitarian protection, increased enforcement, and made legal immigration more difficult. These actions were often carried out in the name of protecting U.S. national security and promoting economic advancement for U.S. workers.

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*The Trump administration set an unprecedented pace for executive action on immigration. In four years, it completed 472 executive actions affecting U.S. immigration policy.*

This transformation was made possible by the increasing power of the executive branch in immigration policymaking. Congress has failed for decades to update the country's immigration laws; at the same time, Americans and their elected officials of all political allegiances believe the immigration system is broken and want change. A vacuum has thus opened that the executive branch has filled in recent years, with little chance of Congress pushing back. Trump was the first president to take full advantage of this vacuum to advance an extensive policy agenda across the immigration system.

This report chronicles the immigration actions, large and small, that President Trump and his administration took throughout the four years of his presidency. It is a final update to work originally published in July 2020, which catalogued the administration's actions through its first three years.<sup>2</sup> This compendium covers the period from January 20, 2017, through January 20, 2021. It is a snapshot of the immigration system as it stood when Trump departed the White House, and thus it does not include any changes to Trump administration policies—imposed either by the courts or by subsequent administrations—that occurred beyond this period.

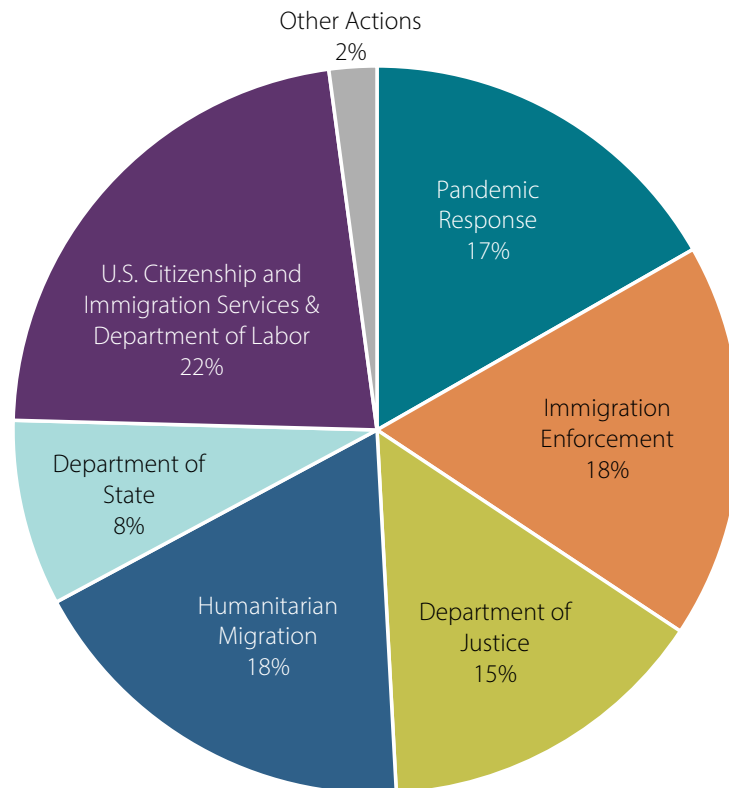
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- 1 This exercise of cataloging the many actions related to immigration taken by the Trump administration has benefited from the time and expertise of many colleagues. Sarah Pierce, one of this report's coauthors, is no longer an analyst at the Migration Policy Institute (MPI) and her work on this project occurred while she was still at the institute.
  - 2 Sarah Pierce and Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency* (Washington, DC: MPI, 2020).

## A. What Has Changed?

The Trump administration made changes across the immigration system, with a plurality relating to the agencies involved in granting immigration benefits—U.S. Citizenship and Immigration Services (USCIS) and the Department of Labor (see Figure 1). Indeed, Trump’s election brought into mainstream political discourse the previously fringe idea that legal immigration is a threat to the United States’ economy and security. USCIS was increasingly tasked with immigration enforcement duties: the number of charging documents it issued, which enter immigrants into removal proceedings, increased by 52 percent from fiscal year (FY) 2016 to FY 2019, from 92,000 to 140,000.<sup>3</sup> Chilling effects from increased enforcement and new barriers to applying for immigration benefits contributed to 17 percent fewer immigrants submitting applications for permanent residence in the United States in FY 2019, and 22 percent fewer in FY 2020, than in FY 2016. And changes made to the public-charge grounds on which a noncitizen could be considered inadmissible, implemented both at USCIS and the State Department, made it more difficult for lower-income immigrants to come to and stay in the United States, and likely had a disproportionate impact on women, the elderly, children, and migrants from Mexico and Central America.<sup>4</sup>

FIGURE 1

### Executive Actions on Immigration Taken during the Trump Presidency, by Category, 2017–21



Note: In this figure, “pandemic response” includes all pandemic-related actions, regardless of policy area. For other categories, actions that could be classified in multiple ways are counted in their primary policy area, so there is no double-counting.

Source: Author analysis of actions described in this report.

<sup>3</sup> Mike Guo, *Immigration Enforcement Actions: 2019* (Washington, DC: Department of Homeland Security, 2020).

<sup>4</sup> Jeanne Batalova, Michael Fix, and Mark Greenberg, “Millions Will Feel Chilling Effects of U.S. Public-Charge Rule That Is Also Likely to Reshape Legal Immigration” (commentary, MPI, Washington, DC, August 2019).

Perhaps Trump's strongest rhetoric was reserved for immigration enforcement, at U.S. borders and in the interior of the country. Even so, his presidency in FY 2019 witnessed the highest number of migrant apprehensions at the southwest border since FY 2007.<sup>5</sup> In response, the U.S. Department of Homeland Security (DHS) instituted a combination of interlocking policies that significantly limited asylum at the border, at the same time successfully pressuring Mexico to increase its own immigration enforcement.<sup>6</sup> These policies included a regulation making migrants ineligible for asylum if they failed to apply for it elsewhere en route to the United States, Asylum Cooperative Agreements with Central American countries allowing the United States to send asylum seekers abroad, and a ramping up of the Migrant Protection Protocols (MPP, also known as Remain in Mexico), requiring migrants, mainly asylum seekers, to wait in Mexico for their U.S. immigration court adjudications. Together, the policy regime blocked asylum access or eligibility for the vast majority of asylum seekers and contributed to a decrease in arrivals at the U.S.-Mexico border.

In 2020, the pandemic gave the administration the opportunity to further close off the border. Invoking the power given to the surgeon general in 1944 to block the entry of foreign nationals who pose a public-health risk, the director of the Centers for Disease Control and Prevention (CDC) issued an order on March 20, 2020, mandating that all foreign nationals without authorization to enter the United States be pushed back to Mexico (or Canada) or returned to their countries. Under the order, and as mobility restrictions spiked worldwide, encounters at the border initially dropped and asylum applications at the border plummeted, as the few who did arrive were expelled without the opportunity to seek refuge.<sup>7</sup> However, border encounters rose again through the summer and fall of 2020. While the Trump administration implemented some of the most restrictive border policies in U.S. history, with life-changing impacts on many migrants who arrived at the border, periodic and dramatic increases in arrivals at the border continued because the underlying factors that push migrants to leave Central America and Mexico and that draw them to the United States remained unaddressed.

In the U.S. interior, the administration's policies centered on enacting the maximum penalty for any removable noncitizen, with few exceptions. A January 2017 executive order effectively made every unauthorized immigrant a priority for arrest. However, with resources and policy focus drawn to the border, and pushback from some jurisdictions limiting the ability of U.S. Immigration and Customs Enforcement (ICE) to work with local law enforcement, interior immigration arrests and removals ultimately decreased in comparison to the prior four years under the Obama administration. ICE made 549,000 arrests from FY 2017 through FY 2020, compared to 640,000 from FY 2013 through FY 2016. Similarly, it removed 935,000 noncitizens from the country during Trump's term in office, compared to 1,160,000 in the prior four years.<sup>8</sup>

5 U.S. Border Patrol, "Southwest Border Sectors: Total Encounters by Fiscal Year," accessed October 8, 2021.

6 Muzaffar Chishti and Jessica Bolter, "Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum," *Migration Information Source*, February 27, 2020.

7 MPI analysis of U.S. Citizenship and Immigration Services (USCIS), "Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions," updated June 22, 2020.

8 U.S. Immigration and Customs Enforcement (ICE), *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.); *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.); ICE, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.); ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, n.d.); ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, 2016); Bryan Baker and Christopher Williams, *Immigration Enforcement Actions: 2015* (Washington, DC: DHS, 2017); Randy Capps et al., *Revvng Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, DC: MPI, 2018).



But even as the number of arrests and removals decreased, the broader net cast by the administration's enforcement efforts showed through. The noncriminal share of noncitizens arrested by ICE more than doubled over the course of the Trump administration: in FY 2020, 32 percent of those arrested had never been convicted of a crime compared to 14 percent in FY 2016.<sup>9</sup>

The backlog of more than 1 million cases in the immigration court system also haunted the administration's efforts to scale up removals. Yet, by placing a massive amount of pressure on the courts—to the point of raising concerns about due process implications—the administration started to increase the pace of adjudications.<sup>10</sup> Between FY 2016 and FY 2020, the total number of cases adjudicated per year rose 61 percent, from 143,000 to 232,000 (even with the intermittent closures of immigration courts in 2020 due to the COVID-19 pandemic), and the total number of deportation orders per year (including both removal orders and voluntary departures) rose by 102 percent, from 90,000 in FY 2016 to 181,000 in FY 2020.<sup>11</sup>

The administration's attempts to end Deferred Action for Childhood Arrivals (DACA), a program providing protection from deportation and work authorization to unauthorized immigrants brought to the United States as children, were thwarted by federal courts. In January 2018, a court mandate ordered USCIS to continue adjudications, though this applied only to existing DACA participants and left out new applicants. The Migration Policy Institute (MPI) estimates that between September 2017—when the administration stopped accepting new applicants—and July 2020, as many as 500,000 young foreign nationals who met eligibility criteria for DACA were unable to apply, including 66,000 who became eligible during that time.<sup>12</sup> The U.S. Supreme Court ruled in June 2020 that the administration's attempt to end DACA violated federal law, and in July 2020 a federal court ordered USCIS to consider applications from new applicants.<sup>13</sup> However, the administration in short order implemented a new approach to DACA as of July 28, 2020: deny all first-time applications, and grant renewals for one year rather than two-year periods, while undertaking a review of the program as a whole.<sup>14</sup> In December 2020, a federal court ordered the administration to restore DACA to its original form, once again allowing new applicants to request benefits.<sup>15</sup>

9 ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report*; ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report*.

10 Executive Office for Immigration Review (EOIR), "Pending Cases, New Cases, and Total Completions," updated October 19, 2021; Sarah Pierce, "As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound" (commentary, MPI, Washington, DC, July 2019).

11 MPI analysis of data from EOIR, "New Cases and Total Completions - Historical," updated October 19, 2021; Transactional Records Access Clearinghouse (TRAC) Immigration, "Outcomes of Deportation Proceedings in Immigration Court," accessed October 8, 2021.

12 Post by MPI on Twitter, June 18, 2020; MPI calculations based on Deferred Action for Childhood Arrivals (DACA) immediately eligible population, July 2020.

13 *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (Supreme Court of the United States, June 18, 2020); *Casa de Maryland v. Department of Homeland Security*, No. PWG-17-2942 (U.S. District Court for the District of Maryland, July 17, 2020).

14 The administration also decided to deny DACA recipients' requests for advance authorization to travel (i.e., advance parole), except in exceptional circumstances. Memorandum from Chad Wolf, Acting Secretary of Homeland Security, to Mark Morgan, Senior Official Performing the Duties of Commissioner, U.S. Customs and Border Protection (CBP); Matthew Albence, Senior Official Performing the Duties of Director, ICE; and Joseph Edlow, Deputy Director of Policy, USCIS, *Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"*, July 28, 2020.

15 *Batalla Vidal, et al., v. Wolf, et al. and State of New York, et al., v. Trump, et al.*, Nos. 16-CV-4756 (NGG) (VMS) and 17-CV-5228 (NGG) (VMS) (U.S. District Court for the Eastern District of New York, December 4, 2020).

Finally, humanitarian forms of admission were the target of some of the administration's most focused efforts to curtail immigration. Refugee admissions dropped to 11,814 in FY 2020, down from 84,994 in FY 2016, reaching the lowest level since the modern U.S. refugee resettlement program began in 1980.<sup>16</sup> The low level of admissions in FY 2020 was partly due to the pandemic, but two years prior, in FY 2018, the Trump administration had set the same record; the 22,560 refugee admissions that year represented the lowest number since 1980 up to that point. While refugees are selected to receive protection in the United States while they wait in third countries, migrants who arrive in the United States with another immigration status or without any status can seek asylum if they fear persecution on certain grounds in their origin country. Under the Trump administration, the share of asylum applications approved in immigration courts decreased from 43 percent in FY 2016 to 26 percent in FY 2020.<sup>17</sup>

## *B. Driving Reform through Layered Changes*

The Trump administration delivered on its aims by maintaining a rapid-fire pace and layering each initiative with a series of regulatory, policy, and programmatic changes. For example, beginning with a single measure, a 2019 regulation from USCIS barring foreign nationals who receive or are deemed likely to receive public benefits from becoming legal permanent residents, the administration may have significantly changed the face of U.S. immigration. MPI analysis found that the "public-charge" regulation put a large share of green-card applicants at risk of denial: among recent green-card recipients, 69 percent had at least one of the characteristics weighed negatively under the regulation.<sup>18</sup>

But despite the concentrated power of this one regulation, it was only one among a broad set of policies introduced with the aim of discouraging public benefits use, with a disproportionate impact on lower-income immigrants. Others included:

- ▶ A 2018 change to guidance for State Department consular officers, which went into effect before the later public-charge regulation was issued, encouraging them to consider a broader range of criteria to determine whether a visa applicant is likely to become a public charge (see Section 6).
- ▶ A separate 2019 public-charge regulation published by the State Department that mirrors USCIS's, but that is to be applied to all would-be immigrants outside of the United States (see Section 6).
- ▶ The 2019 elimination of proof of receipt of a means-tested benefit as a way to qualify for a fee waiver for an immigration benefits application or for biometric services (see Section 7).
- ▶ A 2019 presidential memorandum ordering the administration to begin enforcing the financial commitments of immigrant sponsors, who pledge to reimburse the government should the immigrants they sponsor receive means-tested public benefits. The Centers for Medicare and Medicaid Services and the U.S. Department of Agriculture subsequently issued guidance encouraging state agencies to seek such reimbursements (see Section 7).

16 MPI analysis of data from Refugee Processing Center, "Admissions and Arrivals—Refugee Admissions Report," accessed October 8, 2021.

17 MPI analysis of data from EOIR, "Asylum Decision Rates," updated July 8, 2021.

18 Batalova, Fix, and Greenberg, "Millions Will Feel Chilling Effects."



- ▶ A 2019 presidential proclamation stating that all new immigrants could be denied entry into the country unless they prove that they can obtain eligible health insurance within 30 days or that they will have sufficient resources to pay for foreseeable medical costs (see Section 6).
- ▶ A 2020 regulation by the Social Security Administration that removed lack of English proficiency as a factor that can help make someone eligible for Social Security disability insurance (see Section 8).
- ▶ A regulation proposed by the Department of Housing and Urban Development in 2019 that, had it been enacted, would have prevented unauthorized immigrants from living in subsidized housing, even if they were in mixed-status families where other members were eligible (see Section 8).

This layered approach helped insulate the administration's goals from court injunctions. For example, while the president's proclamation requiring proof of health insurance before admission was enjoined, the State Department's public-charge guidance and regulation as well as another policy change attempting to prevent "birth tourism" ensured that consular officers would continue to look at applicants' health conditions and confirm they had the means to pay for treatment before granting them a visa.

This multifaceted strategy and brisk pace also made it difficult for opponents of the administration's policies to keep up and counter each measure. While immigrant advocacy organizations were quick to challenge the USCIS public-charge regulation in court, they had fewer resources available to track and oppose measures with a smaller impact, such as changes in the factors weighed in Social Security Administration disability insurance determinations.

While many of the administration's changes appear small and technical, in combination they had much larger impacts on the U.S. immigration system. For example, in January 2018 the State Department quietly revised its consular manual to empower officers to limit the period for which nonimmigrant visas are valid.

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Previously, officers were encouraged to issue visas for the full available validity period, typically ten years. This meant that nonimmigrants, such as students and tourists, had visa stamps that expired more quickly and had to apply for renewals more often. As such, foreign nationals were subject more frequently to other Trump

administration changes that increased vetting, including requirements that they disclose more information about themselves (e.g., social media usernames and previous email addresses), public-charge review, and expanded consideration of whether they ever violated the terms of their nonimmigrant status.

The technical nature of many of these changes reflected the administration's knowledge of and willingness to enforce the many immigration laws and regulations in place that have rarely if ever been put into practice, but that have the potential to greatly restrict immigration and increase enforcement. For example, the administration put into force provisions from the 1996 *Illegal Immigration Reform and Immigrant Responsibility Act* that previously had not been implemented. Under statutory authority created by that law, DHS created and began implementing Remain in Mexico. Also under a provision of the 1996 law, ICE began levying fines of up to \$813 per day for unauthorized immigrants who remained in the country

in violation of a removal order. The administration also stretched the application of laws prohibiting the harboring of unauthorized immigrants in an attempt to withhold federal grants from jurisdictions that limit their cooperation with federal immigration enforcement agencies. And it consistently argued that, out of a responsibility to enforce the law to the fullest extent, ICE should not apply prosecutorial discretion to protect certain noncitizens—such as those awaiting the adjudication of immigration benefits applications—from removal, and that U.S. attorneys should prosecute as many migrants who cross the border illegally as possible.

The administration also ventured into uncharted territory in immigration policymaking, testing the outer bounds of what the executive branch can do on immigration unilaterally. At first, the courts regularly slowed or blocked the administration's efforts. But as time went on, and especially in 2019 as cases reached higher courts, the Justice Department's legal arguments began to gain traction, and judges increasingly showed deference to the executive's authority in immigration matters. In 2019, the Supreme Court overruled injunctions against the transit-country asylum ban, MPP, the use of billions of dollars in diverted Pentagon funding for a border wall, and USCIS's public-charge regulation. An appeals court also lifted an injunction preventing the Justice Department from limiting federal grant funding for sanctuary cities. And in 2020, while the Supreme Court did not allow the administration's attempt to terminate DACA to go into effect, it made clear that the administration did have the authority to end DACA—it just had to follow proper procedures to do so.

Not hesitating to employ the full breadth of the executive's powers to further its immigration agenda, the administration also took advantage of a wide range of foreign policy tools. It banned travel from certain countries to push them to make changes to their internal security and identity-management measures, and it denied visas to nationals of other countries to pressure their governments to accept their citizens when ordered removed from the United States. Under the threat of tariffs, the president convinced Mexico to increase its own enforcement of immigration laws and participate in MPP. And over the course of 2019, DHS got three of the top five origin countries for those seeking asylum in the United States—El Salvador, Guatemala, and Honduras—to agree to allow the U.S. government to send some asylum seekers to these countries to seek protection there.

### C. *Pushback and the Search for Alternatives*

As the administration pushed ahead with its immigration agenda, resistance seemed in some ways to lose steam. The first two years of the Trump administration saw widespread protests, including against the travel ban in 2017 and family separations at the U.S.-Mexico border in 2018. But despite implementing a policy regime in 2019 and 2020 that effectively ended asylum at the southern border, public pushback was more limited. Still, some civil-society groups continued to expand "Know Your Rights" education and legal assistance, at times backed by local government funds. Employees at a handful of large technology companies also protested their employers' contracts with federal immigration agencies, though few of these efforts succeeded in changing the companies' decisions.<sup>19</sup>

19 Muzaffar Chishti and Jessica Bolter, "Cubicle Activism: Companies Face Growing Demands from Workers to Cut Ties with ICE and Others in Immigration Arena," *Migration Information Source*, October 30, 2019.

While congressional inaction and resistance thwarted some of Trump’s legislative goals, his administration often found ways around these obstacles. After Congress repeatedly refused the president’s outsized spending asks, the administration procured money for enforcement, including immigrant detention and the border wall, through an emergency declaration, fees on legal immigrants, and transfers of otherwise appropriated funds. Congress did come together to formally rebuke the president on three immigration policies: (1) it twice passed legislation to block the president’s emergency declaration for wall funding, which the president vetoed both times; (2) it restricted ICE from using information on sponsors of unaccompanied children for immigration enforcement; and (3) it reversed a USCIS policy that made it more difficult for about two dozen children born to U.S. military members serving abroad to receive citizenship. Congress also passed a bill, which the president signed, that made several thousand Liberian immigrants with temporary protection from deportation eligible for legal permanent residence. But on the hundreds of other policy changes documented in this report, Congress was effectively silent.

Some states and localities continued to resist the administration’s immigration agenda, particularly its enforcement efforts. For example, New York State implemented a law in December 2019 that, in addition to making unauthorized immigrants eligible to receive driver’s licenses, cuts off federal immigration enforcement agencies’ access to the state Department of Motor Vehicles (DMV) database (though it was later amended to allow for limited information sharing). A May 2019 law in Washington State prohibited state and local law enforcement from conducting enforcement solely to determine immigration status and limited information sharing with federal authorities. The administration worked to undermine such efforts to help unauthorized immigrants feel safe by increasing at-large operations in sanctuary communities—arresting noncitizens outside of the criminal justice system, including at home, at work, or out in the community. Still, the lack of cooperation from some major state and local governments significantly disrupted the administration’s interior enforcement efforts, contributing to its inability to reach prior arrest and removal levels.

## *D. Cataloging a Period of Intense Change*

In an attempt to chronicle both the transformation of the U.S. immigration system and how it was achieved during this historic period, this report documents the 472 immigration-related policy changes the Trump administration made during its four years in office, the last of which included the onset of the COVID-19 pandemic.<sup>20</sup>

The sections that follow break these many changes down by issue area, starting with the administration’s coronavirus response, followed by border and interior enforcement; actions involving the Department of Justice and the immigration court system; the admission of refugees, asylum seekers, and other humanitarian migrants; and changes to vetting and visa processes, which involve the State Department, USCIS, and the Department of Labor.

<sup>20</sup> The other major effort to track immigration actions during the Trump administration counted 1,059 total changes; see Lucas Guttentag, “[Immigration Policy Tracking Project](#),” accessed January 15, 2022. Because MPI’s methodology sometimes groups together multiple smaller changes under a thematic umbrella, this report’s total number is smaller. For example, the USCIS policy instructing officers to increase issuances of notices to appear, or NTAs, is counted as one action by MPI (see Section 7) but three by the Immigration Policy Tracking Project: once when the policy memorandum was issued, once when USCIS announced it would continue implementing the policy, and once when the policy was expanded to include applicants for certain humanitarian immigration benefits.

## 2 Pandemic Response

As the COVID-19 pandemic spread across the globe in early 2020, the Trump administration put in place a sweeping response in the immigration sphere. While many measures were necessary and proportionate to this crisis, others introduced dramatic changes that may have done more to advance the administration's longstanding immigration goals than to halt the spread of the virus. The pandemic response touched each part of the U.S. immigration system and included some of the administration's boldest actions on immigration: a ban on travel from 31 countries, a suspension of immigration for most family- and employment-based visa categories and four temporary worker programs, and the invocation of a 1944 public-health statute allowing the U.S. government to expel migrants at the border without providing access to the asylum system. The White House also negotiated agreements with Mexico and Canada to limit travel across shared borders to essential traffic.

Three particular actions allowed the administration to accomplish goals it was working toward prior to the pandemic. After two years of the administration making it more difficult to apply for asylum and narrowing the eligibility criteria for the few who were able to apply, the March 2020 order to expel unauthorized arrivals, issued by the director of the CDC, effectively ended asylum at the U.S.

southern border. The president's April proclamation suspending certain categories of immigration mirrored earlier attempts by the administration to convince Congress to limit family migration, as 80 percent of the blocked immigrants came from family-based categories.<sup>21</sup> It also effectively ended the Diversity Visa Lottery, another program the administration had pushed Congress to quash. The June proclamation suspending some temporary work programs included visas—such as the H-1B—that the administration had spent years scrutinizing for fraud. The pandemic thus presented opportunities, in the name of public health, to unilaterally restrict entry.

Inside the United States, meanwhile, the administration's management of response policies affecting immigrants and their communities was uneven at best. ICE narrowed its enforcement priorities, focusing on arresting and detaining noncitizens who posed a public safety risk or had serious criminal records. From April through December 2020, ICE booked into detention an average of 6,000 immigrants monthly, compared to a monthly average of 11,000 during the same period in 2019.<sup>22</sup> However, COVID-19 still spread quickly in detention facilities: on average, between April and August 2020, ICE detainees were 13 times more likely to contract the virus than the U.S. general population.<sup>23</sup> U.S. immigration courts also continued their operations during the pandemic. Despite repeated calls from immigration judges, attorneys, and even

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*While many measures were necessary and proportionate to this crisis, others introduced dramatic changes that may have done more to advance the administration's longstanding immigration goals than to halt the spread of the virus.*

21 MPI analysis of data from U.S. Department of Homeland Security (DHS), "Table 7. Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2018," updated January 16, 2020.

22 MPI analysis of data from ICE, "Detention Management—Detention Statistics, FY 2019-2021," updated December 29, 2021.

23 Parsa Erfani et al., "COVID-19 Testing and Cases in Immigration Detention Centers, April-August 2020," *Journal of the American Medical Association* 325, no. 2 (2021): 182–84.

ICE prosecutors to completely shut down the courts, the Executive Office for Immigration Review (EOIR) refrained from doing so, instead limiting hearings to foreign nationals who were detained. Finally, closures of USCIS offices and Application Support Centers caused a significant slowdown in legal immigration processes. The USCIS backlog grew 11 percent between December 2019 and December 2020, when it reached 6.4 million cases.<sup>24</sup> In comparison, it had grown 2 percent and 4 percent during the same period in each of the prior two years.<sup>25</sup>

## A. *Travel Bans and Visa Processing*

The U.S. Department of State, which is responsible for the adjudication of visa applications and dissemination of visa stamps to foreign nationals seeking to enter the United States, suspended routine visa services on March 18, 2020. While this step protected consulate and embassy staff and visitors from contracting COVID-19, it also sharply curtailed visa issuance. U.S. immigrant visa issuance abroad decreased 35 percent between February and March 2020, as global travel started to slow, and then dropped 94 percent between March and April following the consular closures.<sup>26</sup> Even though the State Department permitted consulates and embassies to start reopening in July, they were not able to reach full capacity; by January 2021, one-third of diplomatic posts still had not scheduled a single immigrant visa interview.<sup>27</sup>

The State Department is also responsible for enforcing coronavirus-related travel and immigration restrictions. Under the Trump administration, this included the president's ban on foreign nationals traveling from 31 countries (exempting U.S. permanent residents), most employment- and family-based immigration, and nonimmigrants on certain temporary work visas. The consular closures coupled with these bans made FY 2020 one of the lowest years of in-migration in recent history. The number of immigrant visas issued abroad in FY 2020 dipped 48 percent from a year earlier, and the number of temporary (nonimmigrant) visas issued decreased 54 percent.<sup>28</sup> While those waiting for immigrant visas had to wait a little longer to be able to immigrate permanently to the United States, it is likely that many of those who were unable to receive temporary visas were fully blocked from coming to the country as offers for temporary employment could have expired.

- ▶ **Geographical COVID-19 Travel Bans—2020**—Trump issued proclamations banning entries of foreign nationals from areas with high rates of COVID-19 transmission.
  - **Ban on Travel from China—January 31, 2020**—Trump issued a proclamation banning the entry of foreign nationals, with significant exceptions, who were in mainland China during the 14

24 USCIS, "Number of Service-Wide Forms by Quarter, Form Status, and Processing Time. Fiscal Year 2021, Quarter 1," accessed October 10, 2021; USCIS, "Number of Service-Wide Forms Fiscal Year to Date by Quarter and Form Status, Fiscal Year 2020," accessed October 10, 2021.

25 USCIS, "Number of Service-Wide Forms Fiscal Year to Date by Quarter and Form Status, Fiscal Year 2020"; USCIS, "Number of Service-Wide Forms by Fiscal Year to Date, Quarter, and Form Status. 2019," accessed October 10, 2021; USCIS, "Number of Service-Wide Forms by Fiscal Year to Date, Quarter, and Form Status. 2018," accessed October 10, 2021.

26 Muzaffar Chishti and Jessica Bolter, "The 'Trump Effect' on Legal Immigration Levels: More Perception than Reality?" *Migration Information Source*, November 20, 2020.

27 Bob Ortega, "Huge Trump-Era and Pandemic Immigrant Visa Backlog Poses Challenge for Biden," CNN, April 12, 2021.

28 MPI analysis of U.S. Department of State, "Monthly Nonimmigrant Visa Issuance Statistics," accessed September 29, 2021; MPI analysis of U.S. Department of State, "Monthly Immigrant Visa Issuance Statistics," accessed September 29, 2021.



days preceding their intended entry to the United States.<sup>29</sup> Foreign nationals subject to the ban are prevented from being granted visas, boarding airplanes destined for the United States, and entering at U.S. ports of entry.

- Ban on Travel from Iran—February 29, 2020—The president issued a proclamation banning the entry of foreign nationals, with significant exceptions, who were in Iran during the 14 days preceding their intended entry to the United States.<sup>30</sup>
- Ban on Travel from the Schengen Area of Europe—March 1, 2020—In one proclamation, the president banned the entry of foreign nationals, with significant exceptions, who were in one of the 26 European countries comprising the Schengen Area during the 14 days preceding their intended entry to the United States.<sup>31</sup> The State Department exempted people with student visas from this ban on July 16, 2020.<sup>32</sup>
- Ban on Travel from the United Kingdom and Ireland—March 14, 2020—Trump issued a proclamation banning the entry of foreign nationals, with significant exceptions, who were in the United Kingdom or Ireland during the 14 days preceding their intended entry to the United States.<sup>33</sup> The State Department exempted people with student visas from this ban on July 16, 2020.<sup>34</sup>
- Ban Exemption for Professional Athletes—May 23, 2020—Acting Secretary of DHS Chad Wolf issued a statement declaring that professional athletes are exempt from the president’s bans on travel from countries with high rates of COVID-19 transmission, citing the “national interest exemption.”<sup>35</sup>
- Ban on Travel from Brazil—May 24, 2020—The president issued a proclamation banning the entry of foreign nationals, with significant exceptions, who were in Brazil during the 14 days

29 White House, “Proclamation 9984 of January 31, 2020: Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk,” *Federal Register* 85, no. 24 (February 5, 2020): 6709–12.

30 White House, “Proclamation 9992 of February 29, 2020: Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” *Federal Register* 85, no. 43 (March 4, 2020): 12855–58. The administration also restricted all flights carrying travelers from the banned countries to landing at 11 designated airports. See CBP and Transportation Security Administration (TSA), “Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present within the People’s Republic of China or the Islamic Republic of Iran,” *Federal Register* 85, no. 43 (March 4, 2020): 12731–33.

31 White House, “Proclamation 9993 of March 11, 2020: Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” *Federal Register* 85, no. 51 (March 16, 2020): 15045–48. The administration also restricted all flights carrying travelers from the banned countries to landing at 13 designated airports. See CBP and TSA, “Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present within the Countries of the Schengen Area,” *Federal Register* 85, no. 52 (March 17, 2020): 15059–60.

32 U.S. Department of State, Bureau of Consular Affairs, “National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom, and Ireland,” updated July 16, 2020.

33 White House, “Proclamation 9996 of March 14, 2020: Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” *Federal Register* 85, no. 53 (March 18, 2020): 15341–44. The administration also restricted all flights carrying travelers from the banned countries to landing at 13 designated airports. See CBP and TSA, “Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present within the United Kingdom or the Republic of Ireland,” *Federal Register* 85, no. 54 (March 19, 2020): 15714–15.

34 U.S. Department of State, Bureau of Consular Affairs, “National Interest Exceptions for Certain Travelers.”

35 DHS, “National Interest Exemption from Presidential Proclamations 9984, 9992, 9993, and 9996 Regarding Novel Coronavirus for Certain Professional Athletes and Their Essential Staff and Dependents” (guidance document, May 23, 2020).



preceding their intended entry to the United States.<sup>36</sup> One day later, without explanation, the president issued an amendment, moving the effective date of the ban from May 28 to May 26.<sup>37</sup>

- **Requirement Not to Prohibit Diversity Visa Issuance—September 14, 2020**—A federal district judge ruled that the State Department could not require diversity visa grantees living in the banned countries to quarantine outside those countries for 14 days before issuing them their visas.<sup>38</sup>
- **Termination of Three Bans—January 18, 2021**—Trump issued a proclamation terminating the bans on entry of foreign nationals who were in the Schengen Area, the United Kingdom or Ireland, or Brazil in the 14 days preceding their U.S. entry, effective January 26, 2021.<sup>39</sup>
- ▶ **Refugee Resettlement Interviews Curtailed and Cancelled—March 2020**—Overseas trips by USCIS officers to interview refugees for resettlement (called “circuit rides”) that were in progress in mid-March were cut short, and the rest of the scheduled circuit rides for the fiscal year were cancelled.<sup>40</sup>
- ▶ **Exclusion of Students in Online-Only Programs—2020–21**—On March 9, 2020, ICE, which manages the Student and Exchange Visitor Program (SEVP), announced flexibility with online courses, advising that nonimmigrant students could maintain their status even if all of their courses were online, but that this did not apply to new students.<sup>41</sup> On July 24, 2020, ICE further clarified that new students would not be able to enter the United States to pursue a full course of study that is 100 percent online.<sup>42</sup> (For more information, see Section 2.C.)
- ▶ **Pause on International Exchange Programs—March 12, 2020**—The State Department suspended any exchange program funded by the department’s Bureau of Educational and Cultural Affairs, including the Fulbright Program and International Visitor Leadership Program, that involves travel to and from countries with heightened coronavirus-related advisories from the CDC or State Department.<sup>43</sup>

36 White House, “Proclamation 10041 of May 24, 2020: Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” *Federal Register* 85, no. 103 (May 28, 2020): 31933–36. The administration also restricted all flights carrying travelers from the banned countries to landing at 15 designated airports. See CBP and TSA, “Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present within the Federative Republic of Brazil,” *Federal Register* 85, no. 103 (May 28, 2020): 31957–58.

37 White House, “Proclamation 10042 of May 25, 2020: Amendment to Proclamation of May 24, 2020, Suspending Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus,” *Federal Register* 85, no. 103 (May 28, 2020): 32291–92.

38 *Arreguin Gomez, et al. v. Trump, et al.*, No. 20-cv-01419 (APM) (U.S. District Court for the District of Columbia, amended order, September 14, 2020).

39 White House, “Proclamation 10138 of January 18, 2021: Terminating Suspensions of Entry into the United States of Aliens Who Have Been Physically Present in the Schengen Area, the United Kingdom, the Republic of Ireland, and the Federative Republic of Brazil,” *Federal Register* 86, no. 13 (January 22, 2021): 6799–801.

40 Letter from Tracy L. Renaud, Senior Official Performing the Duties of Director of USCIS, to Representative Gerald E. Connolly, Chairman of the Subcommittee on Government Operations, U.S. House of Representatives, “U.S. Citizenship and Immigration Services’ Response to Chairman Connolly’s October 27, 2020 Letter,” March 2, 2021.

41 Message from Student and Exchange Visitor Program (SEVP) to all Student and Exchange Visitor Information System (SEVIS) users, “Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations for F and M Nonimmigrant Students,” March 9, 2020.

42 Message to all SEVIS users, “Follow-Up: ICE Continues March Guidance for Fall School Term,” July 24, 2020.

43 U.S. Department of State, “Temporary Pause of International Exchange Programs due to COVID-19” (news release, March 12, 2020).

- *May 12, 2020*—The Bureau of Educational and Cultural Affairs suspended all remaining international exchange programs.<sup>44</sup>
- ▶ **Automatic Extension for Exchange Visitors**—*March 14, 2020*—The State Department, which manages the J-1 exchange visitor temporary visa program, issued an automatic two-month extension for any exchange visitors with a program end date between April 1 and May 31, 2020, providing them the opportunity to complete either their educational or training programs or finalize travel plans to return home.<sup>45</sup>
- ▶ **Suspension of Routine Visa Services**—*March 18, 2020*—On March 18, the State Department suspended routine visa services in most countries and, two days later, expanded this to all countries.<sup>46</sup> The suspension meant that, subject to limited exceptions, foreign nationals abroad were unable to apply for or receive the new or renewed visa stamps needed to enter the United States.
  - Exception for H-2 Visas—*March 26, 2020*—Acknowledging H-2 visa holders as essential to the U.S. economy and food security, the State Department announced that despite the suspension of visa services, consulates and embassies would try to continue processing H-2A visas for agricultural workers and H-2B visas for nonagricultural workers.<sup>47</sup>
  - Exception for Medical Professionals—*March 26, 2020*—The State Department announced U.S. embassies and consulates would continue to provide visa services to the extent possible to medical professionals seeking nonimmigrant or immigrant visas to enter the United States.<sup>48</sup>
  - Phased Reopening—*July 13, 2020*—The State Department announced a phased resumption of routine visa services.<sup>49</sup> However, two-thirds of consular posts had not scheduled any immigrant visa interviews by August 2020, and by January 2021, one-third still had not scheduled any.<sup>50</sup>
  - Priority Given to K Visa Applicants—*August 28, 2020*—The State Department authorized consular posts to prioritize applications for K visas (visas for fiancé(e)s of U.S. citizens) as they began to reopen.<sup>51</sup>
  - Prioritization of Additional Visa Categories—*November 12, 2020*—In addition to K visas, the State Department announced that posts processing immigrant visa applications would prioritize those of immediate relatives of U.S. citizens and certain Special Immigrant Visa applicants.<sup>52</sup> Posts processing nonimmigrant visa applications would prioritize those needing

44 U.S. Department of State, Bureau of Educational and Cultural Affairs, “Due to State Department Global Level 4 Health Advisory, All ECA Funded In-Person Programs Will Remain Paused until Further Notice” (news release, May 12, 2020).

45 Letter from the Office of Private Sector Exchange to J-1 Program Sponsors, *Two-Month Extension of Certain Program End Dates*, March 14, 2020.

46 U.S. Department of State, “Suspension of Routine Visa Services” (news release, March 20, 2020).

47 U.S. Department of State, “Important Announcement on H2 Visas” (news release, March 26, 2020).

48 U.S. Department of State, “Update on H and J Visas for Medical Professionals” (news release, March 26, 2020).

49 Post by the State Department on Twitter, June 13, 2020.

50 Ortega, “Huge Trump-Era and Pandemic Immigrant Visa Backlog.”

51 U.S. Department of State, Bureau of Consular Affairs, “Important Notice for K Visa Applicants Affected by COVID-19” (news release, August 31, 2020).

52 U.S. Department of State, “Phased Resumption of Routine Visa Services,” updated November 12, 2020.

to travel urgently or traveling to aid the U.S. pandemic response and diplomats, followed by students and temporary workers.

- **Fee Extension—2020**—At some point in 2020, the State Department extended the validity of visa application fee payments through December 31, 2021, so that applicants who could not schedule an appointment due to the suspension of routine visa services would not have to pay the fee a second time.<sup>53</sup> On December 30, 2020, validity was further extended through September 30, 2022.<sup>54</sup>
- ▶ **Suspension of Refugee Resettlement—March 19, 2020**—The State Department paused refugee arrivals.<sup>55</sup> The pause came after the International Organization for Migration, which is in charge of booking refugees on their travel, and the United Nations High Commissioner for Refugees announced a temporary suspension of resettlement travel.<sup>56</sup> On July 29, 2020, Secretary of State Michael Pompeo approved the resumption of refugee admissions.<sup>57</sup> Due to the suspension of resettlement and other pandemic-related issues, almost 7,000 of the 18,000 allotted slots for refugee admissions in FY 2020 were unused.<sup>58</sup>
- ▶ **Ban on Certain Types of Permanent Immigrants—April 22, 2020**—After promising to “temporarily suspend immigration into the United States,” Trump signed a proclamation suspending, for 60 days, the issuance of visas to persons outside the United States who are parents, adult children, and siblings of U.S. citizens; spouses and children of permanent residents; Diversity Visa Lottery winners; and nearly all types of employment-based immigrants.<sup>59</sup> On June 22, the president issued a proclamation suspending the entry of certain types of nonimmigrants that also extended the April 22 ban on permanent immigrants through December 31, 2020, and on December 31, Trump extended the April ban through March 31, 2021.<sup>60</sup> On September 4, 2020, a federal district judge ruled that the administration could not prohibit the adjudication of diversity visa applications or the issuance of diversity visas for FY 2020 under the ban.<sup>61</sup> On December 11, 2020, a federal district judge ruled that the State Department could not apply the ban to the family members abroad of 181 U.S. citizens and green-card holders who sued the government.<sup>62</sup>

53 U.S. Department of State, “Department of State/AILA Liaison Committee Meeting,” December 11, 2020.

54 U.S. Department of State, Bureau of Consular Affairs, “Phased Resumption of Routine Visa Services” (news release, December 30, 2020).

55 Priscilla Alvarez, “Refugee Admissions to the US Temporarily Suspended,” CNN, March 18, 2020.

56 United Nations High Commissioner for Refugees (UNHCR), “IOM, UNHCR Announce Temporary Suspension of Resettlement Travel for Refugees” (news release, March 17, 2020).

57 Priscilla Alvarez, “Refugee Admissions to the US Resume after Being on Pause due to Coronavirus,” CNN, August 12, 2020.

58 U.S. Department of State, “Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021,” accessed June 30, 2021.

59 Post by Donald Trump, President of the United States, on Twitter, April 20, 2020; White House, “Presidential Proclamation 10014 of April 22, 2020: Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market during the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” *Federal Register* 85, no. 81 (April 27, 2020): 23441–44.

60 White House, “Proclamation 10052 of June 22, 2020: Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” *Federal Register* 85, no. 123 (June 25, 2020): 38263–67; White House, “Proclamation 10131 of December 31, 2020: Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” *Federal Register* 86, no. 3 (January 6, 2021): 417–19.

61 *Arreguin Gomez, et al. v. Trump, et al.*, No. 20-cv-01419 (APM) (U.S. District Court for the District of Columbia, September 4, 2020).

62 *Young, et al. v. Trump, et al.*, No. 20-cv-07183-EMC (U.S. District Court for the Northern District of California, amended order granting plaintiffs’ motion for preliminary injunction and denying defendants’ motion to transfer, December 11, 2020).

- ▶ **Ban on Certain Types of Nonimmigrants**—*June 22, 2020*—Trump issued a proclamation suspending the issuance of certain types of temporary work visas through December 31, 2020.<sup>63</sup> The suspension included H-1B visas, for professionals in certain high-skilled occupations; H-2B visas, for temporary nonagricultural workers; certain categories of J visas, for summer work travel program participants and au pairs, among others; L visas, for intracompany transferees; as well as visas issued to dependents of nonimmigrants in these categories (i.e., holders of H-4, L-2, and J-2 visas). The proclamation was limited to foreign nationals who were outside the United States and did not have valid visas in the affected categories on June 24, 2020.<sup>64</sup> On July 16, 2020, the State Department exempted several categories of visa holders from this ban, including spouses and children of nonimmigrant visa holders already in the United States, some au pairs, and some health-care and public-health professionals and medical researchers with H-1B or L-1 visas.<sup>65</sup> On August 12, the State Department further spelled out who may qualify for exceptions, including H-1B and L visa applicants traveling to resume ongoing employment and H-1B and H-2B workers who were needed to support the U.S. economic recovery, among others.<sup>66</sup> On October 1, a federal district judge found that the president’s proclamation was unlawful, and blocked its use against the plaintiffs who brought the legal challenge: the U.S. Chamber of Commerce, the largest manufacturing and retail trade associations in the United States, a cultural exchange company, and a network of technology CEOs including those of Amazon, Apple, and Google.<sup>67</sup> On December 31, Trump issued a new proclamation extending the June proclamation through March 31, 2021.<sup>68</sup>
  - **Grants to Train U.S. Workers**—*September 24, 2020*—Following the suspension of H-1B visa issuances, the Department of Labor announced \$150 million in grant funds to U.S. businesses and organizations to upskill unemployed and underemployed U.S. workers in order to qualify for middle- to high-skilled H-1B occupations, such as information technology and advanced manufacturing.<sup>69</sup> The program will be financed by the user fees collected from employers participating in the H-1B visa program.<sup>70</sup>
- ▶ **Allowing Refugee Offices to Serve Fewer People**—*Summer 2020*—The State Department lowered its requirement that local refugee resettlement organizations must serve at least 100 refugees to 50 refugees to be eligible to resettle new arrivals since, due to the pandemic, fewer refugees were entering the country.<sup>71</sup>

63 White House, “Proclamation 10052 of June 22, 2020.”

64 White House, “Proclamation 10052 of June 22, 2020.”

65 U.S. Department of State, Bureau of Consular Affairs, “Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market during the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” updated July 17, 2020.

66 U.S. Department of State, Bureau of Consular Affairs, “National Interest Exceptions to Presidential Proclamations (10014 & 10052) Suspending the Entry of Immigrants and Nonimmigrants Presenting a Risk to the United States Labor Market during the Economic Recovery Following the 2019 Novel Coronavirus Outbreak,” updated August 12, 2020.

67 *National Association of Manufacturers, et al. v. DHS, et al.*, No. 20-cv-04887-JSW (U.S. District Court for the Northern District of California, order granting plaintiffs’ motion for a preliminary injunction, October 1, 2020).

68 White House, “Proclamation 10131 of December 31, 2020.”

69 U.S. Department of Labor, “U.S. Department of Labor Announces Availability of \$150 Million to Invest in Workforce Training for Key U.S. Employment Sectors” (news release, September 24, 2020).

70 U.S. Department of Labor, “H-1B One Workforce Grant Program Frequently Asked Questions (FAQs),” updated November 9, 2020.

71 National Conference on Citizenship and the Penn Biden Center for Diplomacy and Global Engagement, *A Roadmap to Rebuilding the U.S. Refugee Admissions Program* (N.p.: National Conference on Citizenship and the Penn Biden Center for Diplomacy and Global Engagement, 2020), 18.

- ▶ **Expansion of In-Person Interview Waiver Eligibility**—*August 25, 2020*—The State Department made additional nonimmigrants applying for a visa in the same classification as an expired visa eligible for waivers of the in-person interview requirement.<sup>72</sup> Previously, they were only eligible if their prior visa had expired within 12 months, but this change made them eligible if their visa had expired within 24 months. This policy was initially in effect through December 31, 2020, then extended through March 31, 2021.<sup>73</sup>
- ▶ **Requirement of Negative COVID-19 Test for UK Travelers**—*December 27, 2020*—The CDC requires airline passengers arriving in the United States from the United Kingdom to have tested negative for COVID-19 in the three days prior to their flight's departure.<sup>74</sup>

## B. *Border Security and Asylum Processing at the U.S.-Mexico Border*

When the pandemic set in, U.S. border agencies were tasked with managing new travel regulations, including the prohibition on nonessential travel across U.S. land borders and routing of flights from certain countries to limited airports. However, the pandemic did not sway the Trump administration's steady focus on illegal immigration at the southern border and asylum. In one of its most sweeping actions since the start of the public-health crisis, the administration relied on a 1944 public-health statute under Section 265 of Title 42 of the *U.S. Code* to issue an order barring the entry of asylum seekers and other unauthorized arrivals at the United States' northern and southern land borders. Through December 2020, U.S. Customs and Border Protection (CBP) carried out more than 390,000 expulsions under this order.<sup>75</sup> While migration at the U.S.-Mexico border initially slowed due to COVID-19 mobility restrictions along common migration routes and in migrants' origin countries, and possibly due to a deterrent effect of expulsions at the U.S. southern border, it picked up from May 2020 onwards. Border Patrol agents encountered migrants at the border in December 2020 more times than they had in any previous December since 1999.<sup>76</sup>

The vast majority—88 percent—of encounters of migrants crossing the border illegally from April through December 2020 were of single adults, rather than unaccompanied children or families.<sup>77</sup> In the same period in 2019, unaccompanied children and families made up 61 percent of such encounters. Ironically, the Title 42 order, as it came to be known, incentivized more single adults to attempt to cross the border more times. Before the implementation of Title 42, families and children apprehended at the border had some pathways—if narrow ones—into the United States, but almost all single adults faced formal consequences. This could include criminal prosecution and conviction, ICE detention, and formal removal from the country. Those with convictions and removal orders on their records faced higher-level consequences if they were apprehended trying to cross illegally again. So, for families and children, the Title 42 order cut off access

72 U.S. Department of State, Bureau of Consular Affairs, "Expansion of Interview Waiver Eligibility" (news release, August 25, 2020).

73 U.S. Department of State, Bureau of Consular Affairs, "Expansion of Interview Waiver Eligibility" (news release, December 29, 2020).

74 Centers for Disease Control and Prevention (CDC), "Requirement for Negative Pre-Departure COVID-19 Test Result for All Airline Passengers Arriving into the United States From the United Kingdom," *Federal Register* 85, no. 251 (December 31, 2020): 86933–36.

75 CBP, "Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions," updated August 12, 2021; CBP, "FY2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions," updated November 20, 2020.

76 U.S. Border Patrol, "Total Illegal Alien Apprehensions by Month," accessed October 8, 2021; CBP, "Southwest Land Border Encounters," updated September 15, 2021.

77 MPI analysis based on data from CBP, "Southwest Land Border Encounters."



to existing pathways into the United States. But for single adults, it eliminated the consequences they previously faced. Instead of undergoing criminal or immigration proceedings, they were simply turned around to Mexico, with no formal mark on their record. Thus, it became easier for them to attempt to cross the border multiple times, until they could get through without getting caught.

- ▶ **Limits on Airports Receiving Flights from Banned Countries**—*February 2, 2020*—The Acting Secretary of DHS, Chad Wolf, issued implementing instructions for the president’s January 31, 2020, ban on foreign nationals traveling from mainland China, instructing flights from China to route through one of eight specified U.S. airports.<sup>78</sup> Seven additional airports were later added, and the restrictions were extended to flights coming from Iran, the Schengen Area of Europe, the United Kingdom, Ireland, and Brazil. On September 14, these airport restrictions were terminated.<sup>79</sup> (For additional details on the bans and arrival limits placed on flights from various countries, see Section 2.A.)
- ▶ **Cancellation of Visa Waiver Program Participants in Violation of Presidential Proclamation**—*March 16, 2020*—In the wake of a presidential ban on travel from the United Kingdom and Ireland, two countries that participate in the Visa Waiver Program, CBP announced that foreign nationals participating in the program who attempt to travel to the United States in violation of the ban would have their visa-free travel authorization cancelled.<sup>80</sup>
- ▶ **Restrictions on Nonessential Travel across Land Borders**—*March 20, 2020*—After the White House negotiated agreements with Mexico and Canada, CBP published temporary travel restrictions that limited nonessential travel across land borders.<sup>81</sup> Travel deemed essential—and thus exempt from the restrictions—included returning U.S. citizens, legal permanent residents, and members of the U.S. armed forces, as well as travel for medical or public-health purposes, work, trade, and military-related purposes. Initially, the restrictions were to be in place until April 20, but they were renewed monthly, with the last renewal of the Trump administration extending through February 21, 2021.<sup>82</sup>
  - **Further Scrutiny of Nonessential Travelers**—In August 2020, CBP said it would increase secondary inspection referrals at the U.S.-Mexico border to try to discourage nonessential travel by those who were exempt from the March order, such as U.S. citizens and lawful permanent residents.<sup>83</sup>
- ▶ **Expulsion of Unauthorized Arrivals**—*March 20, 2020*—The CDC and Department of Health and Human Services (HHS) published an interim final rule creating a procedure under the 1944 *Public Health Services Act* for the CDC director to suspend the introduction into the United States of persons

78 DHS, “DHS Issues Supplemental Instructions for Inbound Flights with Individuals Who Have Been In China” (news release, February 2, 2020).

79 CBP, “Notification of Termination of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present within Certain Countries,” *Federal Register* 85, no. 179 (September 15, 2020): 57108–09.

80 CBP, “Frequently Asked Questions,” accessed July 16, 2021.

81 CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Mexico,” *Federal Register* 85, no. 57 (March 24, 2020): 16547–48.

82 CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Mexico,” *Federal Register* 86, no. 11 (January 19, 2021): 4967–69; CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada,” *Federal Register* 86, no. 11 (January 19, 2021): 4969–70.

83 Lauren Villagran, “CBP: Nonessential Travelers Will Face Greater Scrutiny at US-Mexico Border,” *El Paso Times*, August 21, 2020.



from designated countries or places in the interest of public health.<sup>84</sup> The same day, the CDC director issued an order requiring the expulsion of unauthorized arrivals at the U.S. southern and northern borders—whether the migrants arrived at or between ports of entry—citing a “danger to the public health that results from the introduction of such persons into congregate settings at or near the borders.”<sup>85</sup> The order was originally effective for 30 days but was extended indefinitely on May 21, 2020.<sup>86</sup> A final rule was issued on September 11, 2020.<sup>87</sup> On October 13, the CDC issued a new order that was mostly the same as the March order, but exempted migrants whose countries of origin required them to test negative for COVID-19 before being returned.<sup>88</sup>

- Expulsion of Arriving Unaccompanied Minors—Unaccompanied child migrants were among those being turned away at the border under the CDC’s order, despite federal law requiring the United States to accept such children.<sup>89</sup> As of August 2020, ICE was reportedly testing most, if not all, unaccompanied minors for COVID-19 before expelling them, which was not done for adults.<sup>90</sup> On November 18, 2020, a federal district judge issued a preliminary injunction blocking the government from expelling unaccompanied minors; by that time, more than 15,000 unaccompanied children had been expelled.<sup>91</sup> After the injunction was issued, 66 children were expelled in violation of the court’s order.<sup>92</sup>
- Use of Hotels for Detention—In late March, ICE started housing some unaccompanied children and families in hotels, under the supervision of a contracted private transportation company, for periods of four to five days on average while they waited for expulsion flights.<sup>93</sup> They generally did not have access to recreation, education, or mental health care. Between March and July, at least 660 minors—577 unaccompanied and 83 with family members—

84 CDC and Department of Health and Human Services (HHS), “Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes,” *Federal Register* 85, no. 57 (March 24, 2020): 16559–67.

85 CDC and HHS, “Notice of Order under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists,” *Federal Register* 85, no. 59 (March 26, 2020): 17060–88.

86 CDC and HHS, “Extension of Order under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists,” *Federal Register* 85, no. 78 (April 22, 2020): 22424–27; CDC and HHS, “Amendment and Extension of Order under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists,” *Federal Register* 85, no. 101 (May 26, 2020): 31503–09.

87 CDC and HHS, “Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,” *Federal Register* 85, no. 177 (September 11, 2020): 56424–60.

88 CDC, “Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists,” *Federal Register* 85, no. 201 (October 15, 2020): 65806–12.

89 Arelis Hernández and Nick Miroff, “Facing Coronavirus Pandemic, Trump Suspends Immigration Laws and Showcases Vision for Locked-Down Border,” *Washington Post*, April 3, 2020; Dara Lind, “Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law,” ProPublica, April 2, 2020.

90 Dara Lind and Lomi Kriel, “ICE Is Making Sure Migrant Kids Don’t Have COVID-19 — Then Expelling Them to ‘Prevent the Spread’ of COVID-19,” ProPublica, August 10, 2020.

91 *P.J.E.S. v. Wolf*, No. 20-2245 (EGS) (U.S. District Court for the District of Columbia, November 18, 2020); MPI calculation based on CBP, “Southwest Land Border Encounters,” updated April 23, 2021.

92 *P.J.E.S. v. Wolf*, No. 1:20-cv-02245-EGS (U.S. District Court for the District of Columbia, declaration of Jeffrey D. Lynch, December 2, 2020); *P.J.E.S. v. Wolf*, No. 1:20-cv-02245-EGS (U.S. District Court for the District of Columbia, defendants’ notice to the court, December 12, 2020).

93 *Jenny Lisette Flores, et al. v. William P. Barr, et al.*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, interim report on the use of temporary housing for minors and families under Title 42 by independent monitor, July 22, 2020).

were held in hotels.<sup>94</sup> On September 4, 2020, a federal district judge blocked ICE from holding children in hotels for more than one to two nights.<sup>95</sup>

- **U.S.-Citizen and Central American Children Expelled to Mexico**—In violation of U.S. and Mexican policy, a handful of unaccompanied children from Central America, as well as at least 11 U.S.-citizen newborns, were expelled to Mexico in 2020.<sup>96</sup>
- ▶ **Suspension of Trusted Traveler Programs**—*March 20, 2020*—CBP suspended enrollment in trusted traveler programs, which allow pre-vetted travelers expedited entry into the United States.<sup>97</sup> Enrollment centers were closed until September 8, 2020.<sup>98</sup>
- ▶ **Active-Duty Military Deployment to the Southern Border**—*April 2020*—The Defense Department deployed 500 active-duty personnel to the U.S.-Mexico border, joining 5,000 troops already there.<sup>99</sup> These troops helped CBP enforce the March 20 CDC order, bolstering their ranks as border agents grappled with possible exposure to COVID-19. (For more on the deployment of troops to the border, see Section 3.A.)
- ▶ **Extensions on Visa Waiver Program Participants' Period of Stay**—*April 17, 2020*—CBP announced that Visa Waiver Program participants who apply for and receive a 30-day extension on their stay in the United States (called “satisfactory departure”) could apply for an additional 30-day stay if they were unable to depart because of the pandemic.<sup>100</sup>
- ▶ **Expansion of Interior Repatriation Initiative**—*May 19, 2020*—CBP and ICE began deporting Mexican nationals on flights to the interior of Mexico from San Diego through the Interior Repatriation Initiative, which had previously been in effect only in the Tucson sector.<sup>101</sup> The agencies stated that one of the reasons for the expansion was to prevent COVID-19 from spreading in the United States. (For more on this program, see Section 3.A.)
- ▶ **Communicable Disease Bar to Asylum Eligibility**—*December 23, 2020*—DHS and the Justice Department issued the final version of a rule that would bar migrants from eligibility for asylum and withholding of removal if they were coming from a place where a contagious or infectious disease is prevalent by classifying them as a danger to the security of the United States.<sup>102</sup> The rule was set to take effect January 22, 2021.

94 Camilo Montoya-Galvez, “ICE Held 660 Migrant Kids Set for Expulsion in Hotels, Independent Monitor Reveals,” CBS News, August 27, 2020.

95 *Jenny L. Flores, et al. v. William P. Barr, et al.*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, in chambers—order re plaintiffs’ motion to enforce settlement as to “Title 42” class members [920], September 4, 2020).

96 Caitlin Dickerson, “U.S. Expels Migrant Children from Other Countries to Mexico,” *New York Times*, October 30, 2020; Tanvi Misra, “Revealed: US Citizen Newborns Sent to Mexico Under Trump-Era Border Ban,” *The Guardian*, February 5, 2021.

97 DHS, “Trusted Traveler Programs,” accessed June 29, 2020.

98 CBP, “CBP to Reopen Trusted Traveler Programs Enrollment Centers September 8” (news release, September 4, 2020).

99 Ellen Mitchell, “Pentagon to Send 540 More Troops to Southern Border amid Coronavirus Concerns,” *The Hill*, April 1, 2020.

100 CBP, “CBP Offers Flexibility to Departing Visa Waiver Program Travelers” (news release, April 17, 2020).

101 CBP, “USBP & ICE Ramping up Repatriation Flights; Effort Aimed at Reducing COVID-19 Exposure in U.S.” (press release, May 19, 2020).

102 DHS and Justice Department, “Security Bars and Processing,” *Federal Register* 85, no. 247 (December 23, 2020): 84160–98.

## C. Interior Enforcement

While ICE slightly adjusted and limited immigration enforcement in the interior of the country following the onset of the pandemic, it continued to detain tens of thousands of immigrants in settings where social distancing and quarantine were often impossible. ICE did not make any moves to release immigrants from detention until a series of lawsuits were filed in March 2020 demanding that individual vulnerable immigrants be released. After that, ICE reduced its detained population from an average of 39,000 in February 2020 to an average of 16,000 in December 2020.<sup>103</sup> Among those released as of January 20, 2021, were about 2,700 people freed due to judicial orders, as courts around the country found that detention facilities did not adequately protect detainees from the virus.<sup>104</sup>

ICE guidance for detention facilities was slow to catch up to developments on the ground, and it was not always fully implemented in practice. Despite ample evidence that transfers of migrants between detention centers contributed to the spread of the virus,<sup>105</sup> ICE guidance did not limit such transfers until September 2020 and did not require new arrivals at detention centers to be tested for COVID-19 until October 2020—a requirement with which not all facilities complied.<sup>106</sup>

ICE also only minimally adjusted its deportation procedures in light of the pandemic. Except when foreign governments protested significantly, removals continued apace, contributing to the spread of the coronavirus in other countries, many of which were less equipped to manage the virus than the United States.

- ▶ **Flexibility for International Students**—*March 9, 2020*—The Student and Exchange Visitor Program (SEVP), a component of ICE, advised that nonimmigrant students could maintain their status as long as they continued to make progress on a full course of study, even if courses took place online or at alternate physical locations.<sup>107</sup> On July 6, SEVP notified participating schools that it would reduce this flexibility for the Fall 2020 semester in several ways, most notably by not allowing nonimmigrant students attending schools holding classes entirely online to be issued a visa or permitted to enter or remain in the United States.<sup>108</sup> In response to a lawsuit filed by Harvard and the Massachusetts Institute of Technology (MIT) challenging the policy, DHS on July 14, 2020, agreed to rescind it, reverting to the policy issued in March.<sup>109</sup> However, the March 9 guidance provides flexibility only for currently enrolled

103 ICE, “Detention Management—Detention Statistics,” updated September 16, 2021.

104 ICE, “ICE Guidance on COVID-19—Judicial Releases,” updated January 21, 2021; *Zepeda Rivas, et al. v. Jennings, et al.*, No. 20-cv-02731-VC (U.S. District Court for the Northern District of California, order granting motion for second preliminary injunction, December 3, 2020); Aditi Shah, “The Role of Federal Courts in Coronavirus-Related Immigration Detention Litigation,” *Lawfare*, June 29, 2020.

105 Hamed Aleaziz, “ICE Moved Dozens of Detainees across the Country during the Coronavirus Pandemic. Now Many Have COVID-19,” *BuzzFeed News*, April 29, 2020; Lisa Riordan Seville and Hannah Rappleye, “ICE Keeps Transferring Detainees around the Country, Leading to COVID-19 Outbreaks,” *NBC News*, May 31, 2020; Mica Rosenberg, Kristina Cooke, Reade Levinson, “U.S. Immigration Officials Spread Coronavirus with Detainee Transfers,” *Reuters*, July 17, 2020.

106 ICE Enforcement and Removal Operations (ERO), *COVID-19 Pandemic Response Requirements*, Version 4 (Washington, DC: ICE, 2020); ICE, ERO, *COVID-19 Pandemic Response Requirements*, Version 5 (Washington, DC: ICE, 2020); DHS Office of Inspector General (OIG), *ICE’s Management of COVID-19 in Its Detention Facilities Provides Lessons Learned for Future Pandemic Responses* (Washington, DC: DHS, 2021).

107 Message from SEVP to all SEVIS users, “Coronavirus Disease 2019 (COVID-19) and Potential Procedural Adaptations.”

108 Message to all SEVIS Users, “COVID-19 and Fall 2020,” July 6, 2020.

109 *President and Fellows of Harvard College and Massachusetts Institute of Technology v. U.S. Department of Homeland Security*, No. 1:20-cv-11283 (U.S. District Court for the District of Massachusetts, electronic clerk’s notes for proceedings, July 14, 2020).

students, meaning that despite the reversion, new students could not enter the United States in Fall 2020 if they had an online course load of more than one class or three credits.<sup>110</sup> New international student enrollment decreased 72 percent in calendar year 2020, compared to 2019.<sup>111</sup>

- ▶ **Social Visits Suspended in Detention Centers**—*March 13, 2020*—ICE stated that it was suspending social visitation at all detention facilities.<sup>112</sup> Legal visitation continued.
- ▶ **Revised Procedures for ICE In-Person Check-Ins**—*March 16 and 17, 2020*—ICE stated that it would suspend in-person check-ins, typically required for immigrants who have final orders of removal but have been allowed to stay in the United States temporarily because they are not priorities for deportation.<sup>113</sup> Specific procedures varied by field office. The Boston field office, for example, shifted to conduct check-ins by phone.<sup>114</sup>
- ▶ **Limits on ICE Enforcement Operations**—*March 18, 2020*—ICE shifted to focus enforcement actions on people it considered public-safety risks and those with criminal histories,<sup>115</sup> a significant narrowing of the priorities ICE had employed throughout the Trump administration. The agency said that for other removable immigrants, it would either delay enforcement or make use of alternatives to detention.
  - *September 25, 2020 to January 12, 2021*—ICE updated the agency’s guidance on COVID-19, indicating that it would resume regular enforcement operations.<sup>116</sup> The agency cited precautionary measures implemented among staff to mitigate the spread of the virus. On January 12, the updated guidance was removed and replaced with the March 18 guidance once more.<sup>117</sup>
- ▶ **Acceptance of Stay of Removal Requests by Mail**—*March 18, 2020*—ICE announced it would temporarily accept applications for stays of removal sent by mail, along with the associated payment or request for a fee waiver, rather than requiring them to be filed in person.<sup>118</sup>
- ▶ **ICE Check-ins for Migrants Released at the Southwest Border**—*March 18, 2020*—ICE announced check-ins for migrants apprehended and released at the southwest border would be scheduled for 60 days later, rather than the previous practice of scheduling them in 30 days or fewer.<sup>119</sup>
- ▶ **Custody Reassessment**—*March 18 and April 4, 2020*—ICE instructed staff to evaluate whether detainees with characteristics that make them particularly vulnerable to COVID-19 should be

110 Message to all SEVIS users, “Follow-Up: ICE Continues March Guidance for Fall School Term.”

111 ICE, “ICE Report on International Students in US Details Impact of COVID” (news release, March 19, 2021).

112 American Immigration Lawyers Association (AILA), “3/13/2020 Updated ICE Statement on COVID-19,” updated March 13, 2020.

113 Camila DeChalus and Tanvi Misra, “Immigration Authorities Hit Pause amid Coronavirus Concerns,” CQ Roll Call, March 18, 2020.

114 Steph Solis, “Coronavirus Response: Ice Boston to Start Conducting Scheduled Immigration Check-Ins by Phone,” MassLive.com, March 16, 2020.

115 AILA, “ICE Guidance on COVID-19,” updated September 25, 2020.

116 AILA, “ICE Guidance on COVID-19.”

117 ICE, “ICE Guidance on COVID-19,” updated January 12, 2021.

118 ICE, “ICE Guidance on COVID-19.”

119 ICE, “ICE Guidance on COVID-19.”

released.<sup>120</sup> On March 18, staff received instructions to assess whether detainees over age 70 and pregnant detainees should be released. On April 4, ICE expanded the populations to be considered for release; the new list included detainees who are pregnant, those who gave birth in the past two weeks, those over age 60, and those who are immunocompromised.

- ▶ **Suspensions of Removals—March and April 2020**—Deportations to a handful of countries were paused.
  - *March 18, 2020*—ICE suspended removal flights to China, Italy, and South Korea.<sup>121</sup>
  - *April 6, 2020*—Guatemala’s Foreign Ministry said that deportation flights from the United States would be suspended for one week.<sup>122</sup>
  - *April 17, 2020*—Guatemala again suspended deportation flights from the United States after finding that 44 out of 73 migrants arriving on a prior deportation flight had COVID-19.<sup>123</sup> Flights resumed in early May, when the United States promised to test all Guatemalans for the virus before they were returned.<sup>124</sup> Absent a specific agreement with a foreign government to test all detainees before deportation, ICE does not routinely test deportees for COVID-19, but rather asks about their symptoms and takes their temperature.<sup>125</sup>
- ▶ **Suspension of Physical Presence Requirement for New Hires—March 20 to December 23, 2020**—ICE announced that if employers were unable to inspect a new hire’s identity and employment authorization documents in person due to COVID-19 restrictions on physical proximity, they could temporarily do so remotely, such as over video conferencing or email.<sup>126</sup> Once normal operations resume, they would be required to inspect the previously remotely inspected documents again, in person. These exceptions were renewed seven times, through January 31, 2021.<sup>127</sup>
- ▶ **Personal Protective Equipment Required for Detention Visitors—March 21, 2020**—ICE requires those still permitted to visit detention facilities (legal visitors, and members of Congress and congressional staff conducting oversight) to wear personal protective equipment while visiting.<sup>128</sup>
- ▶ **Initial COVID-19 Guidance Issued to Detention Facility Staff—March 27, 2020**—ICE updated several of its policies for ICE-dedicated facilities (those that hold only immigration detainees) in response to COVID-19.<sup>129</sup> It suspended inspections of ICE detention facilities scheduled to be conducted by an outside contractor between March 27 and April 27, 2020. ICE directed enhanced health screenings

120 ICE, “Updated ICE Statement on COVID-19” (news release, March 18, 2020); memorandum from Peter B. Berg, Assistant Director, Field Operations, ERO, ICE, to Field Office Directors and Deputy Field Office Directors, *COVID-19 Detained Docket Review*, April 4, 2020.

121 Priscilla Alvarez, “Trump Administration Has Made Sweeping Changes to the US Immigration System during the Coronavirus Pandemic,” CNN, April 21, 2020.

122 Sofia Menchu, “U.S. Flights Returning Guatemalan Deportees Halted One Week: Guatemala,” Reuters, April 6, 2020.

123 Al Jazeera, “Guatemala: Many Migrants on US Deportation Flight Had Coronavirus,” Al Jazeera, April 18, 2020.

124 Associated Press, “Guatemala Says It Will Receive 3 US Deportation Flights,” Associated Press, May 4, 2020.

125 Suzanne Monyak, “ICE Tells Senate It Lacks Testing Policy for Deportations,” Law360, June 2, 2020.

126 ICE, “DHS Announces Flexibility in Requirements Related to Form I-9 Compliance” (news release, March 20, 2020).

127 ICE, “ICE Announces Extension to I-9 Compliance Flexibility” (news release, December 23, 2020).

128 AILA, “ICE Issues Guidance on COVID-19,” updated June 2, 2020.

129 Memorandum from Enrique M. Lucero, Executive Associate Director, ERO, ICE, to detention wardens and superintendents, *Memorandum on Coronavirus Disease 2019 (COVID-19) Action Plan, Revision 1*, March 27, 2020.



of staff in areas with “sustained community transmission.”<sup>130</sup> These screenings include verbal self-reporting of symptoms and temperature checks. ICE also instructed facility administrators and wardens to implement social distancing as much as practicable, for example by staggering meals and recreation times.

► **Pandemic Response Requirements (PRR) for Detention Facilities**—*April 10 to October 27, 2020*—ICE issued five versions of its pandemic-related policies for detention operations during the Trump administration.

- *April 10, 2020*—The first version of the policy set out both requirements and best practices for detention operators.<sup>131</sup> Mandatory responses included reporting confirmed and suspected COVID-19 cases, ensuring that symptomatic staff stayed home, reducing staff to minimum levels, providing unlimited hand-washing supplies, and conducting temperature checks and a verbal check for symptoms for all staff and new detainees before they enter the facility. The document also recommended reducing the detained population to 75 percent capacity, having detainees sleep “head to foot,” keeping a distance of at least six feet when possible, quarantining cohorts of new arrivals for 14 days, and isolating individuals with confirmed cases individually or in cohorts if necessary. Finally, the document identified characteristics of high-risk detainees who should be reported to the ICE field office, including those over age 65; those with underlying conditions, such as heart, lung, kidney, or liver disease; and immunocompromised individuals.
- *June 20, 2020*—The updated document expanded the definition of high-risk detainees to include those age 55 and over, pregnant people, those with high blood pressure, people with cancer, and anyone with a physical or mental health condition that substantially limits at least one major life activity, among others.<sup>132</sup> It also required that all new detainees be evaluated within five days to determine whether they are included in this population so that their cases can be reviewed for potential release, pursuant to litigation.<sup>133</sup> The revised document directed all facility staff to wear personal protective equipment when interacting with detainees within six feet or when detainees are symptomatic.
- *July 28, 2020*—The revised requirements expanded the population considered high risk and for the first time required that cloth face masks be provided to detainees for free.<sup>134</sup> It also suggested that facility operators consider testing new detainees for COVID-19 before they mix with other detainees.
- *September 4, 2020*—The new version suspended transfers of ICE detainees between detention facilities, except when necessary for medical evaluation, medical isolation, clinical care,

130 Lucero, *Memorandum on Coronavirus Disease 2019*.

131 ICE ERO, *COVID-19 Pandemic Response Requirements*, Version 1 (Washington, DC: ICE, 2020).

132 ICE ERO, *COVID-19 Pandemic Response Requirements*, Version 2 (Washington, DC: ICE, 2020).

133 *Faour Abdallah Fraihat, et al. v. ICE, et al.*, No. EDCV 19-1546 JGB (SHKx) (U.S. District Court for the Central District of California, order (1) granting motions to file amicus briefs (Dkt. Nos. 117, 119); (2) granting plaintiffs’ emergency motion to certify subclass (Dkt. No. 83); (3) granting plaintiffs’ motion for preliminary injunction (Dkt. No. 81); and denying as moot plaintiffs’ ex parte application to file supplement (Dkt. No. 127) (in chambers), April 20, 2020); *Faour Abdallah Fraihat, et al. v. ICE, et al.*, No. EDCV 19-1546 JGB (SHKx) (U.S. District Court for the Central District of California, order on plaintiffs’ emergency motion for provisional class certification, April 20, 2020).

134 ICE ERO, *COVID-19 Pandemic Response Requirements*, Version 3 (Washington, DC: ICE, 2020).



security concerns, to allow for release or removal, or to prevent overcrowding.<sup>135</sup> It noted that critical infrastructure workers, including those in the corrections and detention industry, could return to work after possible exposure to COVID-19 if they remained asymptomatic.

- *October 27, 2020*—The final update during the Trump administration required all new arrivals to be tested for COVID-19 within 12 to 24 hours.<sup>136</sup> It also clarified that medical isolation must be different from disciplinary segregation, for example by allowing isolated detainees access to books, phone calls, and recreation as much as possible.
- ▶ **Penalties for Recalcitrant Countries**—*April 10, 2020*—Trump issued a memorandum directing the State Department to issue visa sanctions on countries not accepting deportations of their nationals, saying that delays in executing deportations risk the health of Americans.<sup>137</sup> (For more on policies aimed at recalcitrant countries, see Sections 3.B. and 6.)
- ▶ **Medical Screening of Deportees**—*April 17, 2020*—ICE announced that any individual who has a temperature of 99°F or above prior to boarding a deportation flight will be referred for further evaluation.<sup>138</sup> Since March 15, the temperature threshold at which immigrants being removed would be referred for further evaluation had been above 100.4°F.<sup>139</sup>
- ▶ **Suspension of In-Person Check-Ins for Alternative to Detention (ATD) Programs**—*April 17, 2020*—ICE suspended the requirement that participants in ATD programs, such as electronic ankle bracelet monitoring, report for in-person check-ins.<sup>140</sup> It also suspended home visits.
- ▶ **Testing Detainees**—*June 2020*—On June 2, ICE began voluntary COVID-19 testing for all detainees at the Northwest ICE Processing Center in Tacoma, Washington State. On June 9, it did the same at the Aurora Contract Detention Facility in Aurora, Colorado, with plans to expand the practice to other facilities.<sup>141</sup> ICE began offering tests to new admissions at its three family detention centers in June.<sup>142</sup> The agency also began providing voluntary tests to all those in custody at family detention centers in late June, after reports emerged of infections in those facilities.<sup>143</sup>

## D. *The Immigration Court System*

Hearings at U.S. immigration courts, which are managed by the Justice Department, are frequently crowded events, with attorneys, foreign nationals, their children, and other family members sharing benches as they wait for their turn before the judge. Despite the high risk of virus transmission in such environments, immigration court hearings continued long past the first detection of COVID-19 in the United States. On March 15, 2020, the National Association of Immigration Judges, the American Immigration

135 ICE ERO, *COVID-19 Pandemic Response Requirements*, Version 4 (Washington, DC: ICE, 2020).

136 ICE ERO, *COVID-19 Pandemic Response Requirements*, Version 5 (Washington, DC: ICE, 2020).

137 Memorandum from President Donald Trump to the Secretary of State and the Secretary of Homeland Security, *Visa Sanctions*, April 10, 2020.

138 ICE, "ICE Guidance on COVID-19."

139 ICE, "ICE Guidance on COVID-19," updated March 30, 2020.

140 ICE, "ICE Guidance on COVID-19," updated January 12, 2021.

141 ICE, "ICE Offers Voluntary COVID-19 Testing to All Detainees at 2 Facilities" (news release, June 9, 2020).

142 ICE, "ICE Expands Voluntary COVID-19 Testing to All at Family Residential Centers" (news release, July 2, 2020).

143 ICE, "ICE Expands Voluntary COVID-19 Testing."

Lawyers Association, and a union representing immigration court prosecutors (the American Federation of Government Employees Local 511) called for a complete, temporary closure of all immigration courts nationwide.<sup>144</sup> Two days later, EOIR agreed to postpone all hearings for nondetained immigrants, effective March 18. Hearings for detainees continued without pause. EOIR also paused hearings for those enrolled in the Migrant Protection Protocols (MPP) program, leaving them indefinitely stranded in Mexico with no access to the U.S. courts where they had cases pending.

- ▶ **Suspension of Nondetained Hearings**—*March 15, 2020*—After initially deferring only preliminary hearings for migrants not in detention, EOIR postponed all hearings for nondetained migrants.<sup>145</sup> EOIR began resuming nondetained hearings in June 2020 with updated procedures, including mandatory masks and a policy of encouraging immigration judges to resolve as many cases as practicable without the need for a hearing.<sup>146</sup> Hearings for foreign nationals in immigration detention were never postponed, but courts that conducted hearings for detainees frequently closed temporarily when court employees tested positive for the virus.<sup>147</sup>
- ▶ **Suspension of Hearings for Migrant Protection Protocols (MPP) Participants**—*March 23, 2020*—After suspending hearings for MPP participants several times starting in March, EOIR and DHS announced on June 16 a plan to resume hearings on July 20.<sup>148</sup> After the initial suspension of hearings in March, DHS required MPP participants to arrive at ports of entry on the day of their originally scheduled hearing in order to receive notices with their new hearing date. However, on May 10, DHS began suspending this in-person documentation service.<sup>149</sup> Because DHS had limited avenues for direct communication with MPP participants, who are forced to wait in Mexican communities along the U.S. border, frequently in precarious living conditions, many participants continued to show up at ports of entry on their hearing dates, only to be turned away empty handed.<sup>150</sup> On July 17, DHS and the Justice Department said hearings would remain suspended, and they would notify the public 15 days before their resumption.<sup>151</sup> Criteria for resumption included evaluating public-health conditions on both sides of the border. (For further discussion of the MPP program, see Section 3.A.)
- ▶ **Filing by Email**—*March 31 to June 2020*—Both EOIR and the Board of Immigration Appeals (BIA) established guidelines to allow foreign nationals to submit court filings by email.<sup>152</sup> As individual courts began to resume hearings for nondetailed migrants in June 2020, the Justice Department

144 National Association of Immigration Judges, “Immigration Judges, Prosecutors and Attorneys Call for the Nationwide Closure of All Immigration Courts” (news release, March 15, 2020).

145 Post by EOIR on Twitter, March 15, 2020; memorandum from James McHenry, Director of EOIR, Justice Department, to all of EOIR, *Immigration Court Practices during the Declared National Emergency Concerning the COVID-19 Outbreak*, March 18, 2020; EOIR, “EOIR Operational Status during the Coronavirus Pandemic,” updated June 26, 2020.

146 AILA, “AILA Tracks EOIR’s Historical Operational Status During Coronavirus Pandemic,” updated March 5, 2021; memorandum from James McHenry, Director of EOIR, to all of EOIR, *EOIR Practices Related to the COVID-19 Outbreak*, June 11, 2020.

147 Camila DeChalus, “Coronavirus Cases Prompt DOJ to Close More Immigration Courts,” CQ Roll Call, March 24, 2020.

148 DHS, “Joint DHS/EOIR Statement on MPP Rescheduling” (news release, March 23, 2020); DHS, “Joint DHS/EOIR Statement on MPP Rescheduling” (news release, April 1, 2020); DHS, “Joint DHS/EOIR Statement on MPP Rescheduling” (news release, April 30, 2020); DHS, “Joint DHS/EOIR Statement on the Rescheduling of MPP Hearings” (news release, May 10, 2020); DHS, “Joint DHS/EOIR Statement on MPP Rescheduling” (news release, June 16, 2020).

149 DHS, “Joint DHS/EOIR Statement on the Rescheduling of MPP Hearings” (news release, May 10, 2020).

150 Suzanne Monyak, “Remain in Mexico’ Changes Spark Confusion at the Border,” Law360, May 12, 2020.

151 Justice Department, “Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings” (press release, July 17, 2020).

152 EOIR, “Filing by Email - Immigration Courts,” updated June 25, 2020.

announced that each court's account for emailed filings would be shut down as nondetained hearings resumed.<sup>153</sup>

- ▶ **Permitting Copies**—*April 3, 2020*—EOIR made a permanent change to its policies, accepting digital or electronic signatures and copies of original documents.<sup>154</sup>

## E. *Immigration Benefits*

USCIS, which is tasked with immigration benefits adjudication, temporarily closed its offices to all in-person services due to the pandemic. This decision prevented USCIS employees and immigrants from engaging in interviews and other services in close contact that would have left them vulnerable to virus transmission—a halt in core operations that had significant long-term effects on foreign nationals in the United States. Without in-person services, processing of green-card applications (which require interviews) was suspended, and for several months, no foreign nationals were able to receive U.S. citizenship (which requires an interview and, as a final step, an oath ceremony).

The suspension of services, in addition to the worldwide travel shutdown, significantly decreased the number of applications—and thus fees—the agency received in this period. However, USCIS had predicted a budget shortfall even before the pandemic began, due in part to decreasing petitions and also to its increased spending on operations aiming to detect immigration-benefit fraud. Thus, in Spring 2020 USCIS requested emergency funding from Congress to prevent a furlough of more than half of its staff; though it did not receive the funding, it managed to avoid furloughs.<sup>155</sup>

- ▶ **Temporary Closure of Offices in China**—*February 5, 2020*—USCIS temporarily closed its international field offices in Beijing and Guangzhou, China.<sup>156</sup>
- ▶ **Clarified Relevance of COVID-19 Testing and Treatment for Public Charge**—*March 13, 2020*—USCIS clarified that seeking treatment or preventive services for COVID-19 will not negatively affect foreign nationals in a future public-charge analysis.<sup>157</sup> (For a more thorough discussion of the agency's public-charge policies, see Section 7.)
- ▶ **Temporary Closure of USCIS Offices in the United States**—*March 17 to June 4, 2020*—After initially advising individuals potentially exposed to COVID-19 to cancel or reschedule interviews and services, USCIS closed its offices to the public, ending naturalization ceremonies, interviews, and biometric services.<sup>158</sup> As a result of the closure, most eligible foreign nationals were unable to become U.S. citizens and applications that required interviews—including all applications for permanent residence and citizenship—could not move forward. Between March and June, 280,000 biometrics appointments were cancelled due to the closure of USCIS Application Support Centers (ASCs).<sup>159</sup> USCIS

153 McHenry, *EOIR Practices Related to the COVID-19 Outbreak*.

154 Memorandum from James R. McHenry III, Director of EOIR, Justice Department, to all EOIR, *Filings and Signatures*, April 3, 2020.

155 USCIS, "USCIS Averts Furlough of Nearly 70% of Workforce" (press release, August 25, 2020).

156 Email from USCIS, *USCIS Response to the 2019 Coronavirus*, February 5, 2020.

157 USCIS, "Public Charge," updated March 27, 2020.

158 USCIS, "If You Feel Sick, Please Consider Canceling and Rescheduling Your USCIS Appointment" (news release, June 5, 2020);

USCIS, "USCIS Temporarily Closing Offices to the Public March 18-April 1" (news release, March 17, 2020).

159 AILA, "USCIS Provides Updates on Application Support Centers," updated December 29, 2020.

extended the closure twice, before beginning to reopen some domestic offices on June 4.<sup>160</sup> ASCs were still functioning at only 65 percent of their pre-COVID-19 capacity by late October, and as of December 2020, some applicants whose ASC appointments were cancelled at the beginning of the pandemic still had not had them rescheduled.<sup>161</sup>

- ▶ **Assistance for Agricultural Worker Employers**—*March 19, 2020*—The U.S. Departments of Agriculture and Labor announced a partnership to assist employers in the agricultural sector who may have difficulty bringing in foreign labor amid the worldwide travel shutdown.<sup>162</sup> The departments identified nearly 20,000 positions held by temporary agricultural workers (H-2A holders) and nonagricultural workers (H-2B holders) with expiring contracts in the coming weeks, giving employers the opportunity to fill their openings with temporary workers already in the country.
- ▶ **Increased Flexibility on Signatures**—*March 20, 2020*—USCIS announced increased flexibility in its signature requirements, allowing applicants to submit documents with reproduced original signatures.<sup>163</sup>
- ▶ **Suspension of Premium Processing**—*March 20 to June 2020*—Due to the pandemic, USCIS announced the suspension of expedited, “premium processing” for all qualifying nonimmigrant and immigrant petitions.<sup>164</sup> On May 29, USCIS announced it would resume premium processing for all affected petitions in June.<sup>165</sup>
- ▶ **Temporary Closure of Offices in Italy and Kenya**—*March 25, 2020*—USCIS temporarily closed its international field offices in Nairobi and Rome to the public.<sup>166</sup> USCIS later updated the notice to announce the Rome office’s permanent closure. (For further discussion of USCIS’s closure of international offices, see Section 7.)
- ▶ **Flexibility for Late Responses**—*March 27, 2020*—USCIS announced an extension of 60 days for any requests for additional information or responses to notices of intent to deny that were due between March 1 and May 1, 2020.<sup>167</sup> USCIS announced four additional 60-day extensions, covering responses due between March 1 and January 31, 2021.<sup>168</sup>

160 USCIS, “USCIS Temporary Office Closure Extended until at least May 3” (news release, April 1, 2020); USCIS, “USCIS Offices Preparing to Reopen on June 4” (news release, April 24, 2020); USCIS, “USCIS Preparing to Resume Public Services on June 4” (news release, March 27, 2020).

161 USCIS Public Engagement Division, “Stakeholder Message: USCIS Application Support Centers Updates,” updated December 29, 2020.

162 U.S. Department of Agriculture, “USDA and DOL Announce Information Sharing to Assist H-2A Employers” (news release, March 19, 2020).

163 USCIS, “USCIS Announces Flexibility in Submitting Required Signatures During COVID-19 National Emergency” (news release, March 20, 2020).

164 USCIS, “USCIS Announces Temporary Suspension of Premium Processing for All I-129 and I-140 Petitions Due to the Coronavirus Pandemic” (news release, March 20, 2020).

165 USCIS, “USCIS Resumes Premium Processing for Certain Petitions” (news release, May 29, 2020).

166 USCIS, “USCIS Temporarily Closes Rome (June 5, 2020 UPDATE: Closed Permanently) and Nairobi Offices to the Public” (news release, June 5, 2020).

167 USCIS, “USCIS Announces Flexibility for Requests for Evidence, Notices of Intent to Deny” (news release, March 27, 2020). Three days later, USCIS expanded this to include other types of responses, such as responses to the agency’s notices of intent to revoke. See USCIS, “USCIS Expands Flexibility for Responding to USCIS Requests” (news release, March 30, 2020).

168 USCIS, “USCIS Extends Flexibility for Responding to Agency Requests” (news release, May 1, 2020); USCIS, “USCIS Extends Flexibility for Responding to Agency Requests” (news release, July 1, 2020); USCIS, “USCIS Extends Flexibility for Responding to Agency Requests” (news release, September 11, 2020); USCIS, “USCIS Extends Flexibility for Responding to Agency Requests” (news release, December 18, 2020).

- ▶ **Continued Processing of Work Authorization Extensions**—*March 30, 2020*—USCIS announced it would reuse previously submitted fingerprints in order to process applications to extend work authorization.<sup>169</sup> Without this change, foreign nationals who must file separate applications for work authorization, such as Deferred Action for Childhood Arrivals (DACA) recipients, would have been unable to receive an extension while in-person services—including fingerprinting—were closed.
- ▶ **Pause on the Planned Expansion of the H-2B Visa Program**—*April 2, 2020*—DHS announced that it had placed on hold its plan to increase the H-2B cap by 35,000 additional visas.<sup>170</sup>
- ▶ **Flexibility for Late Applications**—*April 13, 2020*—Rather than automatically extend the status of temporary visitors, USCIS issued a press release detailing established processes for filing extensions and stating that the agency can be flexible when applications are filed late due to extraordinary circumstances beyond applicants' control, such as a pandemic.<sup>171</sup>
- ▶ **Maximizing the Use of Already Present Agricultural Workers**—*April 20, 2020 to June 16, 2021*—USCIS published a temporary final rule, effective through August 18, 2020, that aimed to make it easier for employers in the agricultural sector to quickly hire temporary workers already in the United States, including temporarily allowing H-2A agricultural workers to stay in the United States beyond the normal three-year maximum.<sup>172</sup> The parts of the rule that made it easier to quickly hire already present H-2A workers were later extended through June 16, 2021, but the provision allowing for stays longer than three years was not.<sup>173</sup>
- ▶ **Flexibility for Foreign Physicians**—*May 11, 2020*—USCIS announced flexibility for foreign physicians participating in the Conrad 30 program and similar public-interest programs, which allow them to serve populations in need for three years in exchange for a waiver on a provision of U.S. immigration law that would otherwise require them to return to their home countries for two years before receiving a U.S. visa.<sup>174</sup> Under the new guidance, USCIS will still consider foreign physicians as fulfilling the waiver requirements, even if they practice telehealth or, as a consequence of the pandemic, are not able to work full time.
- ▶ **Maximizing the Use of Already Present Temporary Workers**—*May 14, 2020 to May 15, 2023*—USCIS published a temporary final rule making it easier for employers to hire or extend the status of H-2B nonimmigrants already in the United States if their work is essential to the U.S. food supply chain.<sup>175</sup>

169 USCIS, "USCIS to Continue Processing Applications for Employment Authorization Extension Requests Despite Application Support Center Closures" (news release, March 30, 2020).

170 Post by DHS on Twitter, April 2, 2020.

171 USCIS, "COVID-19 Delays in Extension/Change of Status Filings" (news release, April 13, 2020).

172 USCIS, "Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency," *Federal Register* 85, no. 76 (April 20, 2020): 21739–45.

173 USCIS, "Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities," *Federal Register*, 85, no. 162 (August 20, 2020): 51304–12; USCIS, "Temporary Changes to Requirements Affecting H-2A Nonimmigrants due to the COVID-19 National Emergency: Extension of Certain Flexibilities," *Federal Register* 85, no. 244 (December 18, 2020): 82291–99.

174 USCIS, "Temporary Policy Changes for Certain Foreign Medical Graduates during the COVID-19 National Emergency" (policy memorandum, May 11, 2020).

175 USCIS, "Temporary Changes to Requirements Affecting H-2B Nonimmigrants due to the COVID-19 National Emergency," *Federal Register* 85, no. 94 (May 14, 2020): 28843–51.



- ▶ **Smaller Naturalization Ceremonies**—*June 2020*—As USCIS reopened in-person services, it began to hold naturalization ceremonies again but limited them to small groups, rather than the hundreds that would typically gather.<sup>176</sup>
- ▶ **Unauthorized Immigrants Ineligible for Emergency Aid**—*June 17, 2020*—The Department of Education issued an interim final rule restricting disbursement of emergency student financial aid funds to students who qualify for federal financial aid.<sup>177</sup> Unauthorized immigrant students, international students, as well as students with DACA or Temporary Protected Status (TPS), were thus ineligible for funds set aside through the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act). Federal courts blocked the rule from being applied to community colleges in California and all higher education institutions in Massachusetts and Washington State.<sup>178</sup>
- ▶ **Allowing Use of Alternate Documents to Verify Work Authorization**—*August 19, 2020*—Because of delays in issuing employment authorization documents due to COVID-19, employees were permitted to demonstrate employment eligibility by showing employers the notice that their employment authorization had been approved.<sup>179</sup> The notice had to have been issued between December 1, 2019, and August 20, 2020, and it was valid as proof of employment eligibility through February 1, 2021. By then, employees who took advantage of this option had to present new evidence of employment authorization.
- ▶ **CW-1 Visa Departure Requirements**—*August 25, 2020*—USCIS announced changes to the CW-1 visa, for foreign workers in the Commonwealth of the Northern Mariana Islands. In response to pandemic-related disruptions to the program, USCIS would now only consider applications approved on or after June 18, 2020, when considering whether CW-1 visa holders must depart the United States temporarily before a renewal of their visa.<sup>180</sup>
- ▶ **No Longer Requiring In-Person Interpreters for Asylum Interviews**—*September 23, 2020*—DHS issued a temporary final rule ending the requirement for asylum seekers to bring a personal interpreter to their interviews, with the aim of limiting the spread of COVID-19 in USCIS offices.<sup>181</sup> Instead, applicants speaking one of 47 listed languages would be required to use a telephonic, government-provided interpreter. Speakers of other languages could still bring an interpreter.

176 Miriam Jordan, “Trump Administration Faces Bipartisan Calls to End Citizenship Delays,” *New York Times*, June 17, 2020.

177 U.S. Department of Education, “Eligibility of Students at Institutions of Higher Education for Funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act,” *Federal Register* 85, no. 117 (June 17, 2020): 36494–504.

178 *Eloy Ortiz Oakley, et al. v. Betsy DeVos, et al.*, No. 20-cv-03215-YGR (U.S. District Court for the Northern District of California, order granting plaintiffs’ motion for preliminary injunction; motions for leave to file amicus briefs, June 17, 2020); *State of Washington v. Betsy DeVos*, No. 2:20-CV-0182-TOR (U.S. District Court for the Eastern District of Washington, order granting plaintiff’s motion for preliminary injunction, June 12, 2020); *Commonwealth of Massachusetts v. U.S. Department of Education*, No. 1:20-11600-LTS (U.S. District Court for the District of Massachusetts, order on plaintiff’s motion for a preliminary injunction (Doc. No. 3), September 3, 2020).

179 USCIS, “Form I-9 Verification During EAD Production Delays due to COVID-19” (news release, August 19, 2020); USCIS, “Extension of Validity of Certain Forms I-797 due to Continued Employment Authorization Document (EAD) Delays” (news release, November 23, 2020).

180 USCIS, “USCIS Policy Update on CW-1 Departure Requirement” (news alert, August 25, 2020).

181 DHS, “Asylum Interview Interpreter Requirement Modification due to COVID-19,” *Federal Register* 85 no. 185 (September 23, 2020): 59655–61.

- ▶ **Virtual Naturalization and Asylum Interviews—2020**—USCIS field offices began piloting naturalization and asylum interviews that took place over video.<sup>182</sup> While applicants were still required to be physically present at a USCIS office, they sat in separate rooms from the USCIS officers conducting the interview via a video conferencing service to allow for social distancing. In December 2020, USCIS started conducting virtual naturalization interviews for eligible U.S. Armed Forces members serving overseas and their families.<sup>183</sup>

### 3 Immigration Enforcement

President Trump entered office having promised to ramp up U.S. immigration enforcement by removing millions of unauthorized immigrants from inside the United States and building a wall along the U.S.-Mexico border. After focusing on enforcement in the interior of the country for the first year and a half, his administration's focus shifted to the border starting in mid-2018, implementing a series of policy changes that virtually shut down the U.S. asylum system at the southwest border. In early 2020, with border apprehensions down and options to remain in the country by crossing the border illegally severely limited, resources were initially shifted back to interior enforcement, specifically targeting jurisdictions that restricted cooperation with ICE, known as "sanctuary" jurisdictions. However, in the face of the pandemic, ICE in mid-March 2020 announced that enforcement would generally focus on individuals presenting risks to public safety and those with criminal convictions.<sup>184</sup> The administration again turned its attention to the border, implementing blanket turn-backs of migrants crossing illegally, with minimal exceptions.

Whether at the border or in the interior, the Trump administration aimed to exercise its statutory and administrative authority to enforce immigration laws to the maximum extent possible. In the first year and a half in office, the Trump administration walked away from the Obama administration's priorities for interior enforcement that focused on noncitizens convicted of serious crimes, recent arrivals, and those with recent removal orders; instead, virtually every unauthorized immigrant was to be considered an equal target for removal. Subsequently, in FY 2017, ICE made 30 percent more arrests than in FY 2016—and 146 percent more arrests of immigrants with no criminal convictions, causing fear among immigrant communities.<sup>185</sup> Even so, the Trump administration never reached the record-high annual numbers of removals that took place during the first three years of the Obama administration.<sup>186</sup>

*Whether at the border or in the interior, the Trump administration aimed to exercise its statutory and administrative authority to enforce immigration laws to the maximum extent possible.*

182 USCIS, *USCIS Response to the Citizenship and Immigration Services Ombudsman's (CISOMB) 2020 Annual Report to Congress* (Washington, DC: USCIS, 2020), 5; Mark Rockwell, "COVID Prompts USCIS' Pivot to Video," FCW, December 3, 2020.

183 USCIS, "USCIS Commemorates Veterans Day with Special Naturalization Ceremonies" (press release, November 8, 2021).

184 AILA, "ICE Guidance on COVID-19."

185 ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*.

186 Muzaffar Chishti and Sarah Pierce, "Trump's Promise of Millions of Deportations Is Yet to Be Fulfilled," *Migration Information Source*, October 29, 2020.

## A. Border Security

While Trump focused on the construction of a wall along the U.S.-Mexico border as the centerpiece of his border security policy, his administration was just as, if not more, successful in executing other changes at the border. Prior to the pandemic, these policies had largely cut off non-Mexican migrants' access to the U.S. asylum system, which, due to its years-long backlog, had been such migrants' primary avenue to access the country if they had entered by crossing the border illegally. The policy changes included the introduction of the Migrant Protection Protocols (MPP, otherwise known as Remain in Mexico), a ban on U.S. asylum eligibility for migrants who have not first sought and been refused asylum in a transit country (e.g., Mexico for those travelling from Central America), agreements to return asylum seekers from the United States to Central American partner countries to request asylum there, and U.S. programs to speed up the adjudication of asylum and other humanitarian protection cases.

The Trump administration's willingness to take an increasingly muscular posture in its dealings with the United States' regional partners enabled many of these policies. Only after the United States threatened to impose tariffs on Mexican goods did Mexico agree to receive more migrants under MPP (and to step up its own immigration enforcement at its southern border with Guatemala and in the interior of the country). Similarly, after Trump threatened to impose tariffs, tax remittances, and ban travel in response to the decision by Guatemala's Constitutional Court to block the Guatemalan president from signing an Asylum Cooperative Agreement (ACA) with the United States, Guatemala signed on to the agreement within days.

At the same time, the administration continued to push forward on border wall construction. By the end of Trump's time in office, his administration had obtained a total of \$16.3 billion for this purpose, only 36 percent of which was appropriated by Congress, with the rest coming from repurposed funds from Defense Department and Treasury accounts.<sup>187</sup> By January 2021, 458 miles of barriers had been built along the nearly 2,000-mile border, including 52 miles in areas that had previously lacked a barrier.<sup>188</sup>

- ▶ **Criminal Consequence Initiative**—*May 2017*—Border Patrol agents in the Yuma, Arizona sector began implementing the Criminal Consequence Initiative (CCI, formerly known as Operation Streamline), which fast-tracks prosecutions of unauthorized entry.<sup>189</sup> As part of the proceedings, children who entered with their parents were separated from them so the parents could face prosecution, resulting in 234 separations between July and December 2017. CCI was implemented in four Border Patrol Sectors in Spring 2017, but in Yuma about half of those referred were part of families and were separated from their children in the process.

187 MPI analysis of *Consolidated Appropriations Act, 2017*, Public Law 115–31, *U.S. Statutes at Large* 131 (2017): 135–842; *Consolidated Appropriations Act, 2018*, Public Law 115–141, *U.S. Statutes at Large* 132 (2018): 348–1225; *Consolidated Appropriations Act, 2019*, Public Law 116–6, *U.S. Statutes at Large* 133 (2019): 13–477; *Consolidated Appropriations Act, 2020*, Public Law 116–93, *U.S. Statutes at Large* 133 (2019): 2317–2533; *Consolidated Appropriations Act, 2021*, Public Law 116–260, *U.S. Statutes at Large* 134 (2020): 1182–3305; William L. Painter and Audrey Singer, *DHS Border Barrier Funding* (Washington, DC: Congressional Research Service, 2020), 11–12; Braktkton Booker, “Trump Administration Diverts \$3.8 Billion in Pentagon Funding to Border Wall,” NPR, February 13, 2020.

188 Robert Farley, “Trump’s Border Wall: Where Does It Stand?” FactCheck.org, updated February 16, 2021.

189 Kevin Sieff, “The Trump Administration Used an Early, Unreported Program to Separate Migrant Families along a Remote Stretch of the Border,” *Washington Post*, July 9, 2021; Written testimony of Ronald Vitiello, CBP U.S. Border Patrol Acting Chief, Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest, *Declining Deportations and Increasing Criminal Alien Releases – The Lawless Immigration Policies of the Obama Administration*, 114th Cong., 2nd sess., May 19, 2016.

- ▶ **Placing All Families into Expedited Removal**—*November 17, 2017*—CBP instructed Border Patrol agents to process all families for expedited removal, which then requires ICE to detain those families who express a fear of persecution in their home countries and are waiting for credible-fear screenings (the initial interview between a USCIS asylum officer and an asylum seeker).<sup>190</sup> Guidance instructed agents to place families in long-term removal proceedings and release them with a notice to appear in immigration court only if ICE family detention centers were full.
- ▶ **National Guard Deployment to Border**—*April 4, 2018*—Trump ordered the Department of Defense to deploy members of the National Guard to the southern border.<sup>191</sup> The original order to deploy up to 4,000 National Guard troops lasted through September 30, 2018.<sup>192</sup> The deployment was reauthorized several times during the Trump administration, the last of which was on June 25, 2020, when the Defense Department authorized a total of 4,000 National Guard and active-duty troops to remain at the border through September 2021.<sup>193</sup> In February 2019, the governors of California and New Mexico ordered most of their Guard troops to withdraw, while the governor of Texas sent an additional 1,000 troops in July of that year.<sup>194</sup> By April 2020, about 2,500 National Guard troops were stationed at the border.<sup>195</sup>
- ▶ **Zero-Tolerance Policy**—*April 6, 2018*—The Justice Department instructed federal prosecutors to prioritize the prosecution of immigration crimes, and a month later announced that DHS would refer all individuals apprehended while illegally crossing the southwest border to the Justice Department for prosecution.<sup>196</sup> After the president's June 20, 2018, executive order ending family separations, this policy was no longer applied to parents traveling with children.<sup>197</sup> However, it continued to be applied to some adults who crossed on their own.
- ▶ **Family Separations**—*May 7 to June 20, 2018*—After the attorney general's May 7 announcement that DHS would refer all illegal border crossers for prosecution, DHS began separating thousands of families as parents were referred for prosecution. The practice ended when the president issued an executive order on June 20, amid a huge public outcry over the separation of more than 2,700 children from their parents and placement in government custody.<sup>198</sup> Previously, family separations occurred on a smaller scale, in Spring 2017 through the Criminal Consequence Initiative in Yuma (see above), and from July through November 2017 as part of a pilot project in El Paso.<sup>199</sup> It is unclear how

190 Email to Border Patrol Field Chiefs and Field Deputies, "Tracking of ER Conversions to WA/NTA," January 12, 2018.

191 Memorandum from the President to the Secretary of Defense, Attorney General, and Secretary of Homeland Security, *Securing the Southern Border of the United States*, April 4, 2018.

192 U.S. Department of Defense, "DoD, DHS Outline National Guard Role in Securing Border" (news release, April 16, 2018).

193 Ellen Mitchell, "Trump Administration to Extend Troops at the Border through 2021," *The Hill*, June 25, 2020.

194 Robert Moore, "New Mexico Governor Withdraws Most National Guard Troops from Southern Border," *Washington Post*, February 5, 2019; Jazmine Ulloa and Taryn Luna, "Slamming Trump's 'Political Theater,' California Gov. Gavin Newsom Pulls National Guard from Border," *Los Angeles Times*, February 11, 2019; Wesley Morgan, "2,100 More Troops Headed to the U.S.-Mexico Border, Pentagon Says," *Politico*, July 17, 2019.

195 Rose L. Thayer, "Additional 540 Troops Heading to US-Mexico Border to Back up Border Agents during Coronavirus Outbreak," *Stars and Stripes*, April 1, 2020.

196 Justice Department, "Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry" (news release, April 6, 2018); Justice Department, "Attorney General Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration" (speech, San Diego, CA, May 7, 2018).

197 White House, "Executive Order 13841 of June 20, 2018: Affording Congress an Opportunity to Address Family Separation," *Federal Register* 83, no. 122 (June 25, 2018): 29435–36.

198 White House, "Executive Order 13841."

199 DHS OIG, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* (Washington, DC: DHS, 2019), 5.

many children in total were forcibly separated from their parents. HHS, which ultimately cared for the majority of the children, identified 2,814 children in its care in June 2018 who had been separated from their parents.<sup>200</sup> DHS separately estimated that it separated 3,014 children from their families while the practice was in effect.<sup>201</sup> The government later identified at least 1,134 additional children who were separated and released from HHS custody between July 2017 and June 2018,<sup>202</sup> meaning an estimated total of between 3,900 and 4,100 children were separated from their parents through June 2018. Additional “for cause” separations continued after June 2018 (see below). A total of 5,636 children were separated from their parents between July 2017 and January 2021.<sup>203</sup>

→ **“For-Cause” Separations—multiyear**—According to a June 2018 court order, the administration can still separate families in a number of circumstances: if the adult relative accompanying the child is not a parent or legal guardian, if the parent has a criminal history or for another “law enforcement purpose,” if the separation is medically necessary, or if Border Patrol officers determine the separation is necessary for the “welfare of the child.”<sup>204</sup> According to testimony from the Government Accountability Office (GAO) in early 2019, such “for-cause” separations were happening at twice the rate at which they occurred in late 2016.<sup>205</sup> Between the June 2018 termination of blanket family separations and March 2020, more than 1,150 for-cause separations occurred.<sup>206</sup> A federal court ruling in January 2020 largely affirmed the administration’s ability to separate families on these discretionary grounds, though it also required CBP to conduct rapid DNA tests before separating a child from an adult due to lack of parentage.<sup>207</sup>

▶ **Active-Duty Military Deployment to Border—October 2018**—At the president’s request, the Defense Department deployed thousands of active-duty personnel to the U.S.-Mexico border, reaching a peak of 5,900 troops at one point between October and December 2018.<sup>208</sup> The deployment was scheduled to end December 15, 2018, but some orders were extended into January 2019. On February 3, 2019, the Defense Department announced another 3,750 troops would be deployed, bringing the total number of active-duty troops at the border to about 4,350.<sup>209</sup> And on April 29, 2019, the Defense Department announced a plan to send 320 additional troops to the border.<sup>210</sup> In the first week of September 2019, the Defense Department authorized the deployment of troops through

200 *Ms. L v. U.S. Immigration and Customs Enforcement (ICE)*, No. 18cv0428 DMS (MDD) (U.S. District Court for the Southern District of California, joint status report, December 4, 2019). Note, unaccompanied children are cared for by the Office of Refugee Resettlement (ORR), an office within HHS.

201 DHS OIG, *DHS Lacked Technology Needed*, 8.

202 *Ms. L v. ICE*, Case No. 18cv428 DMS MDD (U.S. District Court for the Southern District of California, joint status report, May 27, 2020).

203 DHS, *Initial Progress Report: Interagency Task Force on the Reunification of Families* (Washington, DC: DHS, 2021), 6.

204 *Ms. L v. ICE*, No. 18cv0428 DMS (MDD) (U.S. District Court for the Southern District of California, preliminary injunction granted on June 26, 2018); Testimony of Carla Provost, Border Patrol Chief, CBP, before the House Judiciary Committee, *Oversight of the Trump Administration’s Family Separation Policy*, 116th Cong., 1st sess., February 26, 2019.

205 Testimony of Kathryn A. Larin, Director of Education, Workforce, and Income Security, U.S. Government Accountability Office (GAO), before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy*, 116th Cong., 1st sess., February 7, 2019.

206 Jeremy Stahl, “Why Did the Government Separate This Family?” Slate, May 7, 2020.

207 *Ms. L v. ICE*, No. 18cv0428 DMS (MDD) (U.S. District Court for the Southern District of California, order granting in part and denying in part plaintiffs’ motion to enforce preliminary injunction, January 13, 2020).

208 U.S. Northern Command, “UPDATE: DoD Support to the Southwest Border” (press release, December 14, 2018).

209 Daniella Silva, “Pentagon to Deploy Additional 3,750 U.S. Forces to U.S.-Mexico Border,” NBC News, February 3, 2019.

210 Associated Press, “Pentagon Sending More Troops to the Southwest Border,” Associated Press, April 29, 2019.



the end of September 2020, and in June 2020, as described earlier in this section, the deployment was reauthorized through September 2021, though the share of active-duty troops, as compared to National Guard troops, was set to decrease.<sup>211</sup> As of April 2020, 2,700 active-duty troops were assigned to the border.<sup>212</sup> That month, 540 additional troops were deployed, for a total of 5,740 troops at the border, though it is not clear whether that deployment included National Guard or active-duty service members, or both.<sup>213</sup>

- Authorization to Use Lethal Force—February and July 2019—Reporting in October 2019 revealed that Defense Department guidance issued in February and July authorized troops to use deadly force at the border to protect soldiers and border security agents, and to prevent vehicles from injuring civilians, subject to a “reasonable belief” that harm was imminent.<sup>214</sup>
- Troops Deployed to Ports of Entry—March 2020—In anticipation of a Supreme Court ruling on MPP and a possible rush of migrants attempting to enter the United States, the administration sent two groups of 80 active-duty troops each to the San Ysidro, CA, and El Paso, TX, ports of entry for two weeks to control traffic flows.<sup>215</sup>
- ▶ **End of ICE’s Coordinated Release Program**—*October 23, 2018*—ICE stopped its practice of assisting detained families with their post-release plans and travel arrangements, citing the pace of migrant arrivals.<sup>216</sup>
- ▶ **Migrant Protection Protocols/Remain in Mexico**—*January 28, 2019*—Individuals arriving or entering the United States from Mexico who cross the border illegally or lack proper documentation, including asylum seekers, may be returned to Mexico for the duration of their immigration proceedings.<sup>217</sup> Implementation of MPP began at the San Ysidro port of entry on January 28, 2019, and was expanded across the border.<sup>218</sup> Between the start of the program and the end of the Trump administration,

211 Rose L. Thayer, “Esper Approves Troop Deployments along the US-Mexico Border through 2020,” *Stars and Stripes*, September 11, 2019; Mitchell, “Trump Administration to Extend Troops.”

212 Thayer, “Additional 540 Troops Heading to US-Mexico Border.”

213 Thayer, “Additional 540 Troops Heading to US-Mexico Border.”

214 Ken Klippenstein, “Military May Use Lethal Force on Civil Disturbances at Border,” *TYT*, October 29, 2019; James Laporta and Chantal Da Silva, “Exclusive: Documents Show U.S. Military Allowed to Shoot at Moving Vehicles at U.S.-Mexico Ports of Entry,” *Newsweek*, October 22, 2019.

215 Zolan Kanno-Youngs, “Military to Be Sent to Border before Supreme Court’s ‘Remain in Mexico’ Ruling,” *New York Times*, March 6, 2020.

216 Tina Vasquez, “Here’s Why ICE Is ‘Mass Releasing’ Immigrant Families from Detention Centers,” *Rewire News*, October 30, 2018.

217 DHS, “Migrant Protection Protocols” (news release, January 24, 2019). On April 8, 2019, a federal district court judge in California enjoined the policy, but a three-judge panel of the Ninth Circuit Court of Appeals stayed the injunction before it could go into effect, meaning DHS could continue implementing the Migrant Protection Protocols (MPP). See *Innovation Law Lab v. Kirstjen Nielsen*, Case No. 19-cv-00807-RS (U.S. District Court Northern District of California, April 8, 2019); *Innovation Law Lab v. Kirstjen Nielsen*, Case No. 19-15716 (U.S. Court of Appeals for the Ninth Circuit, April 12, 2019).

218 Memorandum from Kevin K. McAleenan, Commissioner of CBP, to Todd C. Owen, Executive Assistant Commissioner for Field Operations, and Carla L. Provost, Chief of U.S. Border Patrol, *Implementation of the Migrant Protection Protocols*, January 28, 2019. MPP was implemented at the following ports of entry: San Ysidro (San Diego sector), Calexico (El Centro sector), El Paso (El Paso sector), Laredo (Laredo sector), Brownsville (Rio Grande Valley sector), Eagle Pass (Del Rio sector), and Nogales (Tucson sector). Some migrants apprehended in Yuma sector were reportedly transferred to Calexico and placed in MPP there, and some apprehended in Big Bend were transferred to El Paso and placed in MPP there. See Rafael Carranza, “How Trump’s ‘Remain in Mexico’ Program Affects Arizona Border Despite No Formal Policy,” *Arizona Republic*, October 10, 2019; Human Rights Watch, “Q&A: Trump Administration’s ‘Remain in Mexico’ Program,” updated January 29, 2020; Carlos Morales, “Migrant Protection Protocols Quietly Expands to Big Bend Sector,” *Marfa Public Radio*, September 13, 2019.

68,000 people were placed in MPP.<sup>219</sup> Court challenges were unsuccessful in blocking MPP, with the Supreme Court allowing the program to continue while legal proceedings went forward.<sup>220</sup>

- **Tent Courts**—*September 2019*—DHS installed tent courts in Brownsville and Laredo, Texas, to hear the immigration cases of migrants placed in MPP across the border from those cities.<sup>221</sup> Judges heard these cases via videoconference from courts around the country. Initially, members of the public were barred from the tent courts, though they could observe some hearings from the judge’s location.<sup>222</sup> The courts were opened to the public in December 2019.
  - **Supplemental Guidance**—*December 7, 2020*—Further guidance issued by DHS allows the lawyers of migrants who are placed in MPP and who fear persecution in Mexico to participate over the phone in nonrefoulement assessments in some cases; previous DHS policy did not allow for any access to counsel during these interviews.<sup>223</sup> CBP also provided updated guidance, including that neither pregnancy nor sexual orientation alone is a reason to exclude someone from MPP, and that migrants with significant disabilities can be included in MPP if they are traveling with a caretaker who is either their parent or child.<sup>224</sup>
  - **Paperwork Issues**—*multiyear*—CBP officers often did not list physical addresses on migrants’ notices to appear (NTAs, the charging documents that provide hearing information to migrants and contact information to DHS and the Justice Department) when migrants were sent to Mexico under MPP, making it difficult for the U.S. government to communicate changes to a scheduled hearing.<sup>225</sup> DHS’s Office of Inspector General conducted a review of 106 NTAs issued to migrants in MPP and found that about 20 percent of them had been issued with incorrect information or were legally deficient.<sup>226</sup> Some migrants who completed their immigration cases were sent to Mexico with paperwork from CBP bearing false future court dates (Mexican authorities will not receive migrants without a U.S. court date scheduled).<sup>227</sup>
- ▶ **Suspension of Foreign Aid to Central America**—*March 2019*—The Trump administration suspended most foreign aid to El Salvador, Guatemala, and Honduras, asserting that the three countries had failed to prevent their citizens from migrating without authorization to the United States.<sup>228</sup> Of

219 DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* (Washington, DC: DHS, 2021).

220 *Wolf v. Innovation Law Lab*, No. 19A960 (U.S. Supreme Court, March 11, 2020).

221 Molly Hennessey-Fiske, “Tent Courts Open as Latest Hurdle for Migrants Seeking Asylum in the U.S.,” *Los Angeles Times*, September 16, 2019.

222 Michelle Hackman, “U.S. Opens Immigration ‘Tent Courts’ to Public,” *Wall Street Journal*, December 29, 2019.

223 DHS, “Supplemental Policy Guidance for Additional Improvement of the Migrant Protection Protocols” (guidance document, December 7, 2020).

224 CBP Enforcement Programs Division, “Supplemental Migrant Protection Protocols Guidance” (guidance document, December 7, 2020).

225 Tom K. Wong, “Seeking Asylum: Part 2, Appendix 1” (appendix, U.S. Immigration Policy Center, University of California San Diego, San Diego, CA, December 13, 2019); Adolfo Flores, “Border Patrol Agents Are Writing ‘Facebook’ as a Street Address for Asylum-Seekers Forced to Wait in Mexico,” BuzzFeed News, September 27, 2019.

226 DHS, OIG, *CBP Generally Provided Accurate Notices to Appear to Migrant Protection Protocols Enrollees, but Could Improve Procedures to Reduce Future Errors* (Washington, DC: DHS OIG, 2021).

227 Gustavo Solis, “CBP Agents Wrote Fake Court Dates on Paperwork to Send Migrants Back to Mexico, Records Show,” *San Diego Union-Tribune*, November 7, 2019.

228 Peter J. Meyer, *U.S. Strategy for Engagement in Central America: An Overview* (Washington, DC: Congressional Research Service, 2021); Lesley Wroughton and Patricia Zengerle, “As Promised, Trump Slashes Aid to Central America over Migrants,” Reuters, June 17, 2019.

the withdrawn aid, \$396 million was reprogrammed to other State Department activities.<sup>229</sup> After negotiating ACAs with the three countries, along with a number of other agreements on migration management, the administration announced in October 2019 that it would restore the suspended aid, targeting it at reducing migration, implementing the ACAs, supporting U.S. security interests, and creating economic opportunities.<sup>230</sup> By June 2020, all the withheld funds had been released.<sup>231</sup>

- ▶ **CBP Starts Direct Releases of Families**—*March and April 2019*—At the height of a year that saw record apprehensions of families, capacity issues caused CBP to begin releasing migrant families on their own recognizance rather than transferring them to ICE custody to be either detained or released with some form of supervision.<sup>232</sup>
- ▶ **Increased Investigations into Family Units**—*April 29, 2019*—Amid the arrival of unprecedented numbers of family units<sup>233</sup> at the U.S. southern border, ICE reallocated resources to the border to investigate human smuggling operations and the use of fraudulent documents to create fake families.<sup>234</sup> In some cases, this included collecting fingerprints from minors under age 14, if their parents consented.<sup>235</sup> As of late 2019, 400 ICE Homeland Security Investigations agents were participating in this effort, which included two rapid DNA-testing pilot programs to help identify individuals posing as families.<sup>236</sup> The second pilot—Operation Double Helix 2.0—was implemented at ten border locations, and between July and November 2019 it identified 432 fraudulent families (25 percent of the total tested).<sup>237</sup> ICE identified a total of 653 fraudulent families through October 2019, both through these pilots and other means.<sup>238</sup>
- ▶ **ICE and CBP Training Guatemalan Agents**—*May 2019*—The United States and Guatemala signed a memorandum of cooperation to allow ICE and CBP agents to train Guatemalan security forces in immigration enforcement.<sup>239</sup> The U.S. agents deployed later in 2019.
- ▶ **U.S.-Mexico Agreement**—*June 7, 2019*—After Trump threatened to impose tariffs on Mexican imports to the United States, Mexico signed an agreement with the United States in which it pledged to increase its own immigration enforcement operations, target smuggling networks, and accept more

229 Meyer, *U.S. Strategy for Engagement*.

230 U.S. Department of State, “Progress Report for the United States Strategy for Central America’s Plan for Monitoring and Evaluation,” accessed July 23, 2021; Secretary of State, “United States Continues U.S. Foreign Assistance for El Salvador, Guatemala, and Honduras” (press release, April 13, 2020).

231 Meyer, *U.S. Strategy for Engagement*.

232 Astrid Galvan and Colleen Long, “Border Patrol Orders Quick Releases of Families,” Associated Press, March 29, 2019; Jenny Aldrich, Savitri Arvey, and Gustavo López, *The Release of Families Seeking Asylum across the U.S. Southwest Border* (San Diego, CA: University of California, School of Global Policy and Strategy, 2019).

233 “Family unit” is the term CBP uses to describe individuals (a child under age 18, parent, or legal guardian) apprehended with a family member by the U.S. Border Patrol.

234 ICE, “ICE Shifts Resources to Address Crisis at Southwest Border” (news release, April 29, 2019).

235 Nomaan Merchant, “Border Patrol Expands Fingerprinting of Migrant Children,” Associated Press, April 26, 2019.

236 Statement of Derek Benner, Acting Deputy Director of ICE, before the Senate Committee on Homeland Security and Governmental Affairs, *Unprecedented Migration at the U.S. Southern Border: The Year in Review*, 116th Cong., 1st sess., November 13, 2019.

237 DHS, “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services,” *Federal Register* 85, no. 177 (September 11, 2020): 56338–422.

238 Statement of Derek Benner, Acting Deputy Director of ICE.

239 DHS, “DHS Signs Memorandum of Cooperation with Guatemala to Confront Irregular Migration and Combat Human Smuggling” (press release, May 28, 2019); Sofia Menchu, “U.S. to Deploy up to 89 DHS Agents to Guatemala: Document,” Reuters, June 25, 2019.

migrants back under MPP.<sup>240</sup> As a result, Mexico deployed more than 25,000 members of its National Guard to enforce immigration laws at Mexico's northern and southern borders and in the interior, particularly along highways popular with smugglers.<sup>241</sup> If the United States concludes that Mexico's efforts were not sufficiently reducing illegal immigration, the countries agreed to put in place "a binding bilateral agreement to further address burden-sharing" of asylum claims.<sup>242</sup>

- ▶ **Electronic Nationality Verification (ENV)**—*July 25, 2019*—The United States implemented a more streamlined removal process for nationals of El Salvador, Guatemala, and Honduras, wherein the nationality of a migrant with a final order of removal can be verified electronically if the migrant does not have a passport, rather than waiting for the consulate to do so, and travel documents can be issued electronically.<sup>243</sup> Between the end of July 2019 and September 2020, more than 53,000 individuals were removed via ENV.<sup>244</sup>
- ▶ **Asylum Cooperative Agreements**—*July through September 2019*—The United States reached agreements with Guatemala, El Salvador, and Honduras to send some asylum seekers arriving at the U.S.-Mexico border to seek asylum in these three countries instead. (See Section 5.B. for more details.)
- ▶ **Detention of Children and Families**—*August 23, 2019*—A final rule implementing the legal settlement in *Flores v. Reno* allowed DHS to indefinitely detain families, in an attempt to eliminate the likelihood that adults arriving at the border with children would be quickly released into the country, one of the pull factors that drew families to migrate.<sup>245</sup> The rule was blocked in court in September 2019 before it was set to go into effect.<sup>246</sup> (For more, see Section 5.B.)
- ▶ **Rapid Asylum Review Programs**—*October 2019*—DHS implemented the Humanitarian Asylum Review Process (HARP), targeted at Mexicans, and Prompt Asylum Case Review (PACR), targeted at migrants from El Salvador, Guatemala, and Honduras, in the El Paso border sector as pilot programs to more quickly screen asylum claims and remove asylum seekers.<sup>247</sup> Between then and February 2020, DHS expanded both programs to eight out of the nine southwestern border sectors.<sup>248</sup> (For more, see Section 5.B.)
- ▶ **Resumption of Interior Repatriation Initiative**—*December 19, 2019*—The United States began sending deported Mexican nationals on flights to the interior of Mexico, rather than border cities,

240 U.S. Department of State, "Joint Declaration and Supplementary Agreement Between the United States of America and Mexico," June 7, 2019.

241 Ariel G. Ruiz Soto, *One Year after the U.S.-Mexico Agreement: Reshaping Mexico's Migration Policies* (Washington, DC: MPI, 2020).

242 Rachel Withers, "Mexico Releases the Full Text of Trump's Immigration 'Deal,'" Vox, June 15, 2019.

243 ICE, "Enhanced Coordination Results in Increased, Faster Removals to Guatemala" (news release, August 20, 2019); American Immigration Council, "The Electronic Nationality Verification Program: An Overview" (fact sheet, January 2021); DHS, "Department of Homeland Security, U.S. Immigration and Customs Enforcement: Budget Overview" (budget document, Washington, DC, DHS, n.d.).

244 DHS, "Department of Homeland Security, U.S. Immigration and Customs Enforcement: Budget Overview."

245 ICE, CBP, and ORR, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register* 84, no. 164 (August 23, 2019): 44392–535.

246 *Jenny L. Flores v. William P. Barr*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, order re plaintiffs' motion to enforce settlement [516] and defendants' notice of termination and motion in the alternative to terminate the *Flores* settlement agreement [639], September 27, 2019).

247 Robert Moore, "Trump Administration Testing Rapid Asylum Review, Deportation Process in Texas," *Washington Post*, October 24, 2019; Hamed Aleaziz, "The Trump Administration Launched a Secretive Program to More Quickly Deport Mexican Asylum-Seekers," BuzzFeed News, November 6, 2019; Letter from Mark A. Morgan, Acting Commissioner, CBP, to Veronica Escobar, Representative from Texas, U.S. Congress, February 28, 2020.

248 DHS OIG, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs* (Washington, DC: DHS, 2021), 6.

through this joint program between the U.S. and Mexican governments.<sup>249</sup> The initiative, which began during the Obama administration but had been inactive, aims to make it more difficult for deported migrants to cross the border again.<sup>250</sup> By February 14, 2020, more than 1,000 migrants had been repatriated through this program.<sup>251</sup>

- **Expansion to San Diego Sector—May 19, 2020**—First implemented in the Tucson Sector, the Interior Repatriation Initiative expanded to San Diego in May 2020.<sup>252</sup> CBP stated that the expansion was part of efforts to prevent the spread of COVID-19, and to address an increase in apprehensions of Mexicans crossing the border illegally.
- ▶ **Guidance for Medical Treatment—December 30, 2019**—Acting CBP Commissioner Mark Morgan issued a directive outlining the medical treatment that migrants in CBP custody at the U.S.-Mexico border must receive. CBP must tell migrants to alert officers if they have medical issues, fill out health questionnaires for all migrants under age 18, and provide medical assessments—if resources allow—for children under age 12 and anyone else who reports a medical issue.<sup>253</sup> Until the December 2019 directive was issued, medical care at the U.S.-Mexico border was governed by an interim directive from January 2019, which ensured medical assessments for anyone in CBP custody under age 18.<sup>254</sup> On March 30, 2020, CBP issued implementation plans for Office of Field Operations and Border Patrol agents, further detailing standard operating procedures for providing medical care to juveniles, managing public health and infectious diseases, and providing health care during migration surges, among other things.<sup>255</sup>
- ▶ **CBP Enforcement Operation in Guatemala—January 2020**—In an unauthorized operation, CBP agents working in Guatemala stopped and returned Honduran migrants to the Guatemala-Honduras border.<sup>256</sup>
- ▶ **Detentions of Iranian Americans and Iranian Foreign Nationals—January 3-4, 2020**—CBP officers detained 277 people entering the United States from Canada at the port of entry in Blaine, Washington State, reportedly based on their nationality.<sup>257</sup> Official guidance from the Seattle field office after the United States killed Iranian General Qassem Suleimani reportedly instructed officers to detain for further investigation certain people who were born in Iran, Lebanon, and Palestine. U.S. citizens and green-card holders were among those detained.
- ▶ **CBP Designated as “Security Agency”—January 31, 2020**—The federal Office of Personnel Management designated CBP as a security agency, reducing the range of transparency measures with

249 ICE, “US and Mexico Resume Interior Repatriation Initiative” (news release, December 19, 2019).

250 ICE, “United States and Mexico Begin Interior Repatriation Initiative” (news release, October 2, 2012).

251 CBP, “Aliens Returned to Mexico under Interior Repatriation Initiative Reaches 1,000” (press release, February 14, 2020).

252 CBP, “USBP & ICE Ramping Up Repatriation Flights.”

253 Directive from Mark Morgan, Acting Commissioner of CBP, *Enhanced Medical Support Efforts*, December 30, 2019.

254 Directive from Kevin McAleenan, Commissioner of CBP, *CBP Interim Enhanced Medical Efforts (January 2019)*, January 28, 2019.

255 CBP, “CBP Medical Implementation Plan – Overall Summary” (news release, July 30, 2020).

256 U.S. Senate Committee on Foreign Relations, *DHS Run Amok? A Reckless Overseas Operation, Violations and Lies* (Washington DC: U.S. Senate Committee on Foreign Relations, 2020).

257 Richard Read and Sarah Parvini, “Customs Agents Held More Iranian Americans and Others at U.S.-Canada Border Than It Admitted, Records Show,” *Los Angeles Times*, November 17, 2020.



which the agency must comply.<sup>258</sup> This designation allows CBP to withhold the names of officers when disclosing documents to the public.

- ▶ **Targeting Development Aid to Migrants' Points of Origin**—*March 13, 2020*—CBP signed a memorandum of understanding with the U.S. Agency for International Development (USAID), agreeing to share anonymized data on the demographic characteristics and origin communities of migrants from El Salvador, Guatemala, and Honduras who are apprehended or determined to be inadmissible at the U.S.-Mexico border.<sup>259</sup> USAID will use the data to target development aid that aims to prevent irregular migration.
- ▶ **Construction of Barriers along the Southern Border**—*multiyear*—Between FY 2017 and FY 2021, Congress appropriated and Trump signed into law a total of \$5.8 billion for the repair or new construction of physical barriers along the southwest border.<sup>260</sup> The administration also redirected about \$10.5 billion in funds otherwise appropriated.<sup>261</sup> With these funds, DHS built 458 miles of new and replacement walls and fences during the Trump administration, including 52 miles of barriers where none existed before.<sup>262</sup> When Trump left office, 211 additional miles were under construction.<sup>263</sup>
  - **Waivers of Environmental and Contracting Laws**—*multiyear*—Since 2017, DHS in multiple instances waived environmental laws and regulations in order to avoid conducting environmental impact assessments in places it planned to build border barriers.<sup>264</sup> In February 2020, for the first time, DHS also waived federal contracting laws that require, for example, open competition for contracts.<sup>265</sup>
  - **Acquisition of Private Land through Eminent Domain**—*multiyear*—Between January 2017 and August 2020, the Justice Department filed 51 cases in federal court to permanently acquire private land through eminent domain to be used for border wall construction.<sup>266</sup> Most of this land was in south Texas.
  - **Emergency Declaration**—*February 15, 2019*—After Congress appropriated \$1.375 billion for border barriers in FY 2019, well short of the president's request for \$5.7 billion, Trump ordered \$3.1 billion in additional funds to build the wall be transferred from counterdrug activities and

258 Ken Klippenstein, "Exclusive: Customs and Border Protection Gains an Extra Layer of Secrecy," *The Nation*, February 4, 2020. Though not included in the reported rationale for this change, there are indications that designating CBP employees as "national security employees" has been under consideration since the Obama administration as a way to allow the agencies to take disciplinary action against employees without being subject to arbitration. See Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (Washington, DC: DHS, 2016), 17–18.

259 CBP, "CBP Signs Memorandum of Understanding with USAID" (press release, March 13, 2020).

260 *Consolidated Appropriations Act, 2017; Consolidated Appropriations Act, 2018; Consolidated Appropriations Act, 2019; Consolidated Appropriations Act, 2020; Consolidated Appropriations Act, 2021.*

261 Painter and Singer, *DHS Border Barrier Funding*; Booker, "Trump Administration Diverts \$3.8 Billion."

262 Farley, "Trump's Border Wall."

263 Molly O'Toole, "Trump Put Migrants in Border Limbo. So Far Biden Has Left Them There," *Los Angeles Times*, January 20, 2021.

264 See, for example, DHS, "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," *Federal Register* 82, no. 147 (August 2, 2017): 35984–85; DHS, "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," *Federal Register* 84, no. 211 (October 31, 2019): 58400–02.

265 DHS, "Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended," *Federal Register* 85, no. 34 (February 20, 2020): 9794–96.

266 GAO, *Southwest Border: Information on Federal Agencies' Process for Acquiring Private Land for Barriers* (Washington, DC: GAO, 2020), 30.

a Treasury Department fund for forfeitures, and he declared a national emergency to access \$3.6 billion from military construction projects.<sup>267</sup>

- o *February 13, 2020*—The president renewed the emergency declaration for another year.<sup>268</sup> The administration also notified Congress that it would transfer another \$3.8 billion in Defense Department funds to build the border wall.<sup>269</sup>
- o *January 15, 2021*—The president extended the emergency declaration for another year.<sup>270</sup>
- Transfers of Public Land—*September 2019 and July 2020*—The Department of the Interior transferred jurisdiction of 560 acres of land in September 2019<sup>271</sup> and 66 acres of land in July 2020<sup>272</sup> to the Army so the Army could build border barriers and access roads on the land. The Army requested the transfer based on the president’s emergency declaration.
- Using Overseas Contingency Operations Funding for Wall Construction—*April 25, 2020*—The Defense Department restored \$546 million in domestic military construction funds that had been slated to be transferred to the border wall account, proposing instead to use money appropriated for military projects overseas.<sup>273</sup>
- Legal Challenges:
  - o Counterdrug Funds—*multiyear*—On May 24, 2019, in *Sierra Club v. Trump*, a federal district judge in California blocked the administration from using the \$2.5 billion in counterdrug funds for the wall construction it had proposed, which the Ninth Circuit Court of Appeals upheld in June 2020.<sup>274</sup> However, the Supreme Court in July 2019 allowed the administration to proceed with that construction while legal proceedings continued.<sup>275</sup> In July 2020, the Supreme Court again affirmed that construction could go forward.<sup>276</sup>

267 *Consolidated Appropriations Act, 2019*; White House, “Presidential Proclamation 9844 of February 15, 2019: Declaring a National Emergency Concerning the Southern Border of the United States,” *Federal Register* 84, no. 34 (February 20, 2019): 4949–50.

268 White House, “Notice of February 13, 2020: Continuation of the National Emergency with Respect to the Southern Border of the United States,” *Federal Register* 85, no. 31 (February 14, 2020): 8715.

269 Booker, “Trump Administration Diverts \$3.8 Billion.”

270 White House, “Notice of January 15, 2021: Continuation of the National Emergency With Respect to the Southern Border of the United States,” *Federal Register* 86, no. 13 (January 22, 2021): 6557.

271 U.S. Department of the Interior, Bureau of Land Management, “Secretary of the Interior Transfers Jurisdiction of Five Parcels of Land to the Department of the Army to Secure the Southwest Border” (press release, September 18, 2019).

272 U.S. Department of the Interior, Bureau of Land Management, “Secretary of the Interior Transfers Jurisdiction of 65.74 Acres of Federal Land to the Department of the Army in Arizona and New Mexico” (press release, July 21, 2020).

273 Connor O’Brien and David Rogers, “Pentagon Pulls Money from Overseas Projects to Pay for Border Wall,” *Politico*, April 28, 2020.

274 *Sierra Club v. Donald J. Trump*, No. 19-cv-00892-HSG (U.S. District Court for the Northern District of California, order granting in part and denying in part plaintiffs’ motion for preliminary injunction, May 24, 2019); *Sierra Club v. Trump*, No. 19-cv-00892-HSG (U.S. District Court for the Northern District of California, order granting in part and denying in part plaintiffs’ motion for partial summary judgment, denying defendants’ motion for partial summary judgment, certifying judgment for appeal, and denying request to stay, June 28, 2019); *State of California v. Donald J. Trump, and Sierra Club v. Donald J. Trump*, Nos. 19-cv-00872-HSG and 19-cv-00892-HSG (U.S. District Court for the Northern District of California, order granting in part and denying in part plaintiffs’ motions for partial summary judgment and denying defendants’ motions for partial summary judgment, December 11, 2019).

275 *Donald J. Trump, et al. v. Sierra Club, et al.*, No. 19A60 (U.S. Supreme Court, July 26, 2019).

276 *Donald J. Trump, et al. v. Sierra Club, et al.*, No. 19A60 (U.S. Supreme Court, July 31, 2020).

- o **Military Construction Funds**—*multiyear*—A federal district judge in Texas in January permanently blocked the government from using the \$3.6 billion in military construction funds for the wall in December 2019, as did a federal district judge in California one day later.<sup>277</sup> Neither ruling took effect. In the Texas case, an appeals court allowed construction to go forward during legal proceedings in January and then, in December 2020, fully reversed the injunction.<sup>278</sup> In the California case, the district court stayed its own injunction, and an appeals court ruling upholding the injunction in October 2020 was not implemented due to expected forthcoming Supreme Court litigation.<sup>279</sup>
- ▶ **Border Patrol Staffing Increases**—*multiyear*—In his January 2017 executive order on border security, Trump directed the hiring of 5,000 additional Border Patrol officers. By the end of 2019, there were 21,370 Border Patrol agents authorized by Congress (the same number as authorized since FY 2011) but only about 19,600 agents were employed.<sup>280</sup> Despite plans to add 2,700 agents annually, CBP gained just 120 Border Patrol agents in 2018 and 112 in 2019.<sup>281</sup>
  - **DHS Volunteer Force**—*March 2019*—In response to a request from then Homeland Security Secretary Kirstjen Nielsen, at least 550 employees from across DHS volunteered to deploy to the U.S.-Mexico border to assist CBP with tasks such as transportation, medical assessments, and meal distribution, and to assist ICE with tasks such as health-care provision and litigation in immigration court.<sup>282</sup>
  - **CBP Officers Reassigned**—*March to September 2019 and August 2020*—For about six months in 2019, 731 CBP Office of Field Operations officers from the San Diego, Tucson, El Paso, and Laredo ports of entry were reassigned to Border Patrol processing facilities, where they assisted with processing and transporting recently apprehended migrants.<sup>283</sup> In August 2020, 600 CBP officers were temporarily reassigned to assist Border Patrol agents, 200 in the Laredo sector and 400 in the Rio Grande Valley sector.<sup>284</sup>

277 *El Paso County, Texas and Border Network for Human Rights v. Donald J. Trump*, No. EP-19-CV-66-DB (U.S. District Court for the Western District of Texas, December 10, 2019); *State of California, et al.; Sierra Club, et al. v. Donald Trump, et al.*, Nos. 19-cv-00872-HSG and 19-cv-00892-HSG (U.S. District Court for the Northern District of California, order granting in part and denying in part plaintiffs' motions for partial summary judgment and denying defendants' motions for partial summary judgment, December 11, 2019).

278 *El Paso County, Texas; Border Network for Human Rights v. Donald J. Trump*, No. 19-51144 (U.S. Fifth Circuit Court of Appeals, January 8, 2020); *El Paso County, Texas; Border Network for Human Rights v. Donald J. Trump*, No. 19-51144 (U.S. Fifth Circuit Court of Appeals, December 4, 2020).

279 *Donald J. Trump, et al. v. Sierra Club, et al.* (U.S. Supreme Court, petition for a writ of certiorari, November 2020), 11–12.

280 U.S. Border Patrol, "Border Patrol Agent Nationwide Staffing by Fiscal Year," accessed February 6, 2019; Testimony of Mark Morgan, Acting Commissioner of CBP, before the Senate Committee on Homeland Security and Governmental Affairs, *Unprecedented Migration at the U.S. Southern Border: The Year in Review*, 116th Cong., 1st sess., November 13, 2019.

281 Molly O'Toole, "Trump Ordered 15,000 New Border and Immigration Officers—But Got Thousands of Vacancies Instead," *Los Angeles Times*, January 27, 2019; DHS, *FY 2021 Budget in Brief* (Washington, DC: DHS, 2020).

282 Memorandum from Kirstjen Nielsen, Secretary of Homeland Security, to DHS Component Heads and Joint Task Forces, *Request for DHS Volunteers at the Southern Border*, March 27, 2019; Nicole Ogrysko, "At Least 550 DHS Employees Have Filled Temporary Volunteer Assignments along Southern Border," Federal News Network, July 22, 2019.

283 CBP, "Temporary Re-Assignment of CBP Officers to Border Patrol Sectors" (press release, March 27, 2019); Julián Aguilar, "Hundreds of CBP Officers Returned to Port Duty after Assisting U.S. Border Patrol," *Texas Tribune*, September 24, 2019.

284 Jorge Velas, "Around 200 CBP Agents Coming to Laredo for 'Surge Operation,'" *Laredo Morning Times*, August 24, 2020.

### ► Pending at end of administration

- Use of Data from Commercial License Plate Readers—CBP reported in July 2020 that it had plans to access license plate information from commercial vendors to track suspects and develop new leads throughout the country, as well as to identify people that may require enhanced screening when crossing the border.<sup>285</sup>
- Entry/Exit Process Using Facial Recognition—On November 19, 2020, CBP published a proposed rule that would establish a nationwide biometric entry/exit system, going into effect first at airports, and later at land and sea ports. Under the proposed rule, all foreign nationals entering or departing the country may be required to have their photograph taken and analyzed by facial recognition technology.<sup>286</sup> Under the existing system, foreign nationals ages 14 to 79 are fingerprinted upon entry, but no biometrics are taken again prior to exit.
- Body Cameras for Border Patrol Agents—In September 2020, CBP announced it would provide body cameras for 3,800 agents in the San Diego, Yuma, Tucson, El Paso, Big Bend, Del Rio, and Rio Grande Valley sectors of the southwest border and the Swanton sector of the northern border.<sup>287</sup> The cameras were expected to be rolled out in Spring 2021.
- Trusted Traveler Program Fee Changes—CBP published a proposal in September 2020 to standardize the application process and fees for the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Global Entry, and NEXUS programs.<sup>288</sup> The programs allow certain pre-approved travelers to bypass full CBP processing at designated ports of entry. Under the proposal, each program would have a \$120 application fee.

## B. Interior Enforcement

Unlike border enforcement, which is largely controlled by the federal government, interior immigration enforcement, which entails the investigation, arrest, detention, and removal of unauthorized or otherwise removable noncitizens in the interior of the United States, often relies on cooperation between federal and local authorities. Over the past decade, political polarization has led some jurisdictions to restrict cooperation with federal immigration authorities, particularly ICE, while others have actively encouraged it. Local attitudes toward immigration enforcement became more uneven during the Trump administration; as a result, ICE was able to make more immigration arrests through the criminal justice system in cooperative jurisdictions and fewer in noncooperative jurisdictions.<sup>289</sup> Noncooperation policies also contributed to the Trump administration's inability to make as many immigration arrests in the interior of the country as the Obama administration did in FY 2010 and FY 2011.<sup>290</sup>

285 DHS, *Privacy Impact Assessment for the CBP License Plate Reader Technology* (Washington, DC: DHS, 2020).

286 DHS, "Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States," *Federal Register* 85 no. 224 (November 19, 2020): 74162–93

287 CBP, "CBP Awards Contract for Agent Body Cameras" (news release, September 23, 2020).

288 CBP, "Harmonization of the Fees and Application Procedures for Global Entry and SENTRI Programs and Other Changes," *Federal Register* 85, no. 175 (September 9, 2020): 55597–619; CBP, "Harmonization of the Fees and Application Procedures for the Global Entry and SENTRI Programs and Other Changes," *Federal Register* 85, no. 231 (December 1, 2020): 77016.

289 Capps et al., *Revving Up the Deportation Machinery*.

290 Capps et al., *Revving Up the Deportation Machinery*.

At the same time, the administration used other means to eliminate the sense of safety that unauthorized immigrants might feel in noncooperative jurisdictions, often called “sanctuary” jurisdictions. ICE scaled up the number of arrests it made outside of jails (i.e., in the community), exceeding so-called at-large arrest numbers during prior peaks in FYs 2009–11.<sup>291</sup> The agency also quadrupled the number of immigration investigations at worksites. And it used new strategies to exert pressure on jurisdictions that limit their cooperation, such as reducing their access to federal law enforcement grants, issuing subpoenas for information on detainees, and filing lawsuits against noncooperative jurisdictions.

Finally, the Trump administration, more so than any past administration, made use of its authority to limit the visas granted to people from countries that did not consistently accept back their nationals when the United States ordered them removed.<sup>292</sup> Through visa sanctions and other forms of diplomatic pressure, the Trump administration reduced the number of countries that refused to accept the return of their nationals from 23 to 13, as of mid-2020.<sup>293</sup>

- ▶ **New Interior Enforcement Regime**—*January 25, 2017*—In a January 25 executive order on interior enforcement, the president initiated sweeping changes to immigration enforcement in the U.S. interior, including greatly expanding the classes of noncitizens considered priorities for removal and directing agencies to execute U.S. immigration laws against “all removable aliens.”<sup>294</sup> The order abolished the prosecutorial discretion guidelines used by ICE under the Obama administration, which prioritized for removal only those noncitizens who had criminal convictions, had recently crossed the border illegally, or had recently been ordered removed.<sup>295</sup>
- ▶ **Increased Checks by CBP on Buses and Trains**—*April 20, 2017*—The Trump administration reversed Obama-era policies that required CBP agents to receive approval from headquarters before conducting checks of people’s immigration status on buses and trains, such as Greyhound and Amtrak.<sup>296</sup> Following this change, checks within 100 miles of the border (the zone within which CBP has authority to undertake such actions) increased.
  - **CBP Guidance Limits Practice**—*January 28, 2020*—A memo from CBP Chief Carla Provost told agents they are constitutionally required to obtain permission from the bus company or one of its employees before boarding a bus.<sup>297</sup> Greyhound, the nation’s largest bus company, announced a week later it would no longer allow CBP agents to board busses without a warrant.<sup>298</sup>

291 Capps et al., *Revving Up the Deportation Machinery*.

292 Jill H. Wilson, *Immigration: “Recalcitrant” Countries and the Use of Visa Sanctions to Encourage Cooperation with Alien Removals* (Washington, DC: Congressional Research Service, 2020).

293 Wilson, *Immigration: “Recalcitrant” Countries*; Franklin Foer, “How Trump Radicalized ICE,” *The Atlantic*, September 2018.

294 White House, “Executive Order 13768 of January 25, 2017: Enhancing Public Safety in the Interior of the United States,” *Federal Register* 82, no. 18 (January 25, 2017): 8799–8803.

295 Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director of ICE; R. Gil Kerlikowske, Commissioner of CBP; Leon Rodriguez, Director of USCIS; and Alan D. Bersin, Acting Assistant Secretary for Policy, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, November 20, 2014.

296 Memorandum from Ronald D. Vitiello, U.S. Border Patrol Chief, to all chief patrol agents and all directorate chiefs, *Removal of the Requirement to Draft Operation Orders for Routine Transportation Check Operations*, April 20, 2017; Adiel Kaplan and Vanessa Swales, “Border Patrol Searches Have Increased on Greyhound, Other Buses Far from Border,” NBC News, June 5, 2019.

297 Gene Johnson, “AP Exclusive: Agency Memo Contradicts Greyhound Bus Raids,” Associated Press, February 14, 2020.

298 Gene Johnson, “Greyhound to Stop Allowing Immigration Checks on Buses,” Associated Press, February 21, 2020.



- ▶ **Victims of Immigration Crime Engagement (VOICE) Office**—*April 26, 2017*—DHS created ICE’s VOICE office to assist victims of crimes committed by removable immigrants.<sup>299</sup> Among the services offered: A new DHS-Victim Information and Notification Exchange (DHS-VINE) automated service to help victims track the immigration custody status of foreign nationals charged or convicted of certain crimes.
- ▶ **Limits on Privacy Rights for Nonimmigrants and Unauthorized Immigrants**—*April 27, 2017*—In line with the January 25 executive order on interior enforcement, which stated that agencies may no longer extend the protections of the *Privacy Act* to individuals other than U.S. citizens and lawful permanent residents (i.e., green-card holders), DHS issued a new policy on the collection, use, and dissemination of personally identifiable information.<sup>300</sup> The policy gives DHS more discretion to share the information of nonimmigrants (those on temporary visas) and unauthorized immigrants. And it permits nonimmigrants and unauthorized immigrants to access their records only through *Freedom of Information Act* (FOIA) requests and makes them ineligible to correct their personal information.
- ▶ **Limits on Stays of Removal Related to Private Immigration Bills**—*May 5, 2017*—ICE limits when and for how long it will issue stays of removal in connection with private immigration bills sponsored for individuals by members of Congress and allows the agency to limit congressional requests for investigative reports.<sup>301</sup>
- ▶ **End of the Family Case Management Program**—*June 20, 2017*—The administration ended this alternative to detention (ATD) program for arriving families, which provided participants with case management, access to support services, and reintegration planning for those ordered removed. The Obama administration started the program in January 2016, and by its end, it had served 954 families who were approved for release from family detention.<sup>302</sup> Of the total participants, 99 percent attended their court appearances and ICE check-ins.
  - **Funds Approved to Restart Program**—*2019 and 2020*—In a reversal, the FY 2019 appropriations package approved by Congress and signed into law on February 15, 2019, provided \$30.5 million to restart the program, and the FY 2020 package signed into law on December 20, 2019, provided \$15 million for it.<sup>303</sup> However, the program was not restarted, but rather components of the program, such as having case managers help families identify community resources and develop goals, were incorporated into ICE’s existing ATD program under the name Extended Case Management Services (ECMS).<sup>304</sup> ECMS is meant to serve individuals who have experienced serious trauma and families.

299 DHS, “DHS Announces Launch of New Office for Victims of Illegal Immigrant Crime” (news release, April 26, 2017).

300 Memorandum from Jonathan R. Cantor, Acting Chief Privacy Officer, DHS, *DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally Identifiable Information*, April 27, 2017.

301 Letter from Thomas D. Homan, Acting Director of ICE, to Senator Charles E. Grassley, May 5, 2017.

302 DHS OIG, *U.S. Immigration and Customs Enforcement’s Award of the Family Case Management Program Contract* (Washington, DC: DHS, 2017).

303 U.S. Congress, “Explanatory Statement Submitted by Mrs. Lowey, Chairwoman of the House Committee on Appropriations, Regarding H.J. Res. 31,” accessed April 29, 2019; U.S. Congress, “Explanatory Statement Submitted by Mrs. Lowey, Chairwoman of the House Committee on Appropriations Regarding H.R. 1158, Consolidated Appropriations Act, 2020,” *Congressional Record* 165, no. 204 (December 17, 2019): H11016.

304 DHS, “U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021 Congressional Justification,” accessed September 21, 2021.

- ▶ **Narrowing of Prosecutorial Discretion**—*August 15, 2017*—In a memo to ICE attorneys, DHS greatly narrowed the instances in which the government should grant prosecutorial discretion to noncitizens identified for removal.<sup>305</sup> The memo also instructed ICE attorneys to review cases the agency had administratively closed for prosecutorial discretion to determine whether the basis for closure was still appropriate under the administration’s revised enforcement priorities.
- ▶ **Enforcement Actions against U Visa Applicants**—*October 26, 2017*—ICE informed the American Immigration Lawyers Association that it would take enforcement action against noncitizens with final orders of removal, even if they had pending U visa applications.<sup>306</sup> U visas are reserved for victims of certain crimes who are helpful to U.S. law enforcement or government officials in the investigation or prosecution of the crime. After encountering such an immigrant, ICE will contact USCIS to get a recommendation on whether the U visa application will likely be approved. If USCIS does not respond within five days, ICE will initiate removal proceedings. (For more, see Sections 5.E. and 7.)
- ▶ **Detention of Pregnant Women**—*December 2017*—ICE ended an Obama-era policy that ordered the agency to generally release pregnant women from federal custody.<sup>307</sup> Between calendar years 2016 and 2018, the number of detained pregnant women increased from 1,400 to 2,100.<sup>308</sup>
- ▶ **E-Verify Upgrade**—*2017*—USCIS upgraded the E-Verify system so it can handle an increased number of concurrent users.<sup>309</sup> E-Verify allows employers to check whether new hires are authorized to work by entering their names and other biographic information into an online system. E-Verify is a voluntary program, but some states have implemented some type of E-Verify mandate and all federal contractors and subcontractors are required to participate.
- ▶ **Expansion of Expedited Removal**—*July 23, 2019*—DHS issued a regulation drastically expanding the unauthorized immigrant population subject to expedited removal<sup>310</sup>—a form of administrative removal where immigrants do not have the chance to make their case before a judge, unless they express a fear of return to their country of origin. Previously, noncitizens encountered within 100 miles of a land border who were not admitted or paroled into the country and could not demonstrate that they had been in the United States for more than 14 days were subject to this form of removal.<sup>311</sup> The July 2019 regulation expanded the target population to noncitizens encountered anywhere in the country who were not admitted or paroled, and who could not demonstrate that they had been in the United States for at least two years. However, the administration did not immediately implement this regulation, and a federal district court ruling on September 27, 2019, blocked it from going

305 Hamed Aleaziz, “An ICE Memo Lays Out the Differences between Trump and Obama on Immigration Enforcement,” BuzzFeed News, October 8, 2018.

306 AILA, “AILA/ICE Liaison Meeting Minutes” (unpublished meeting notes, October 26, 2017).

307 ICE, “Identification and Monitoring of Pregnant Detainees” (ICE Directive 11032.3, December 14, 2017).

308 GAO, *Immigration Enforcement: Arrests, Detentions, and Removals, and Issues Related to Selected Populations* (Washington, DC: GAO, 2019), 38.

309 Statements by Tammy M. Meckley, Associate Director of the Immigration Records and Identity Services Directorate, USCIS, at the Citizenship and Immigration Services Ombudsman Seventh Annual Conference, Washington, DC, December 7, 2017.

310 DHS, “Designating Aliens for Expedited Removal,” *Federal Register* 84, no. 141 (July 23, 2019): 35409–14.

311 DHS, “Designating Aliens for Expedited Removal,” *Federal Register* 69, no. 154 (August 11, 2004): 48877–81. Much less commonly, noncitizens who arrived by sea without being admitted or paroled and were in the United States for two years or less could also be subjected to expedited removal. See Justice Department, Immigration and Naturalization Service, “Notice Designating Aliens Subject to Expedited Removal under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act,” *Federal Register* 67, no. 219 (November 11, 2002): 68924–26.

into effect.<sup>312</sup> A federal appeals court ruling in June 2020 reversed the district court’s ruling, and a directive sent to the lower court to implement the reversal on September 30, 2020, cleared the way for implementation by ICE.<sup>313</sup> ICE agents and employees were directed to start implementing the policy on October 16, 2020, though they were instructed to exempt migrants who had arrived before the regulation was first established in July 2019.<sup>314</sup> Between October 2020 and January 20, 2021, 17 foreign nationals were removed through expanded expedited removal.<sup>315</sup>

- ▶ **End of a Detention Hotline**—*August 7, 2019*—ICE shut down a detention hotline that provided immigrants in custody with a way to report abuse, connect with their families, and obtain legal resources.<sup>316</sup> The National Immigration Detention Hotline was launched by a California advocacy group, Freedom for Immigrants, in 2013. In February 2020, a federal district court judge issued a preliminary injunction, forcing the government to restore the hotline while the case is litigated.<sup>317</sup>
- ▶ **Reopening DACA Recipients’ Removal Cases**—*October 2019*—ICE began to request that immigration courts reopen the removal cases of immigrants protected by the DACA program.<sup>318</sup> This would allow ICE to more quickly remove former DACA recipients if the DACA program were terminated. (For more on DACA, see Section 7.A.)
- ▶ **Revisions to ICE’s National Detention Standards**—*December 2019*—ICE implemented new National Detention Standards (NDS), which govern the conditions of federal prisons and local jails that contract with ICE to hold immigrant detainees.<sup>319</sup> The new standards, which updated standards published in 2000, made a number of changes, including reducing the maximum time a detainee can spend in segregation, increasing medical evaluations of such detainees, and adding a section on preventing sexual abuse and assault; however, they also generally relaxed many standards in deference to the standards of individual facilities.<sup>320</sup> For example, the new NDS lowered food preparation standards, removed a requirement that new facilities or those renewing their contracts with ICE have outdoor recreation spaces, and loosened requirements for timeliness in providing medical care.
- ▶ **Deportations of Venezuelans through Third Countries**—*2019 to March 2020*—Venezuelans were deported indirectly from the United States to Venezuela, with stopovers for some in Panama and for others in Trinidad and Tobago, after the Federal Aviation Administration banned flights to and from Venezuela in May 2019.<sup>321</sup>

312 *Make the Road New York v. Kevin McAleenan*, No. 19-cv-2369 (KBJ) (U.S. District Court for the District of Columbia, September 27, 2019).

313 *Make the Road New York v. Wolf*, No. 19-5298 (U.S. Circuit Court of Appeals for the District of Columbia, June 23, 2020); AILA, “Practice Alert: Implementation of Expedited Removal Expansion,” updated October 27, 2020.

314 Shaun Courtney, “Undocumented Migrants Face Fast Removals in Renewed Trump Push,” Bloomberg Government, October 6, 2020; Hamed Aleaziz, “ICE Is Planning to Fast-Track Deportations across the Country,” BuzzFeed News, October 7, 2020.

315 Hamed Aleaziz, “The Biden Administration Has Suspended a Trump-Era Policy that Put Immigrants at Risk of Being Deported Without Due Process,” BuzzFeed News, October 14, 2021.

316 *Freedom for Immigrants v. U.S. Department of Homeland Security*, Case No. 2:19-cv-10424-AB (U.S. District Court Central California, February 11, 2020).

317 *Freedom for Immigrants v. U.S. Department of Homeland Security*.

318 Bob Ortega, “ICE Reopening Long-Closed Deportation Cases against Dreamers,” CNN, December 21, 2019.

319 ICE, “2019 National Detention Standards for Non-Dedicated Facilities,” updated December 19, 2019.

320 American Civil Liberties Union (ACLU), “Summary of Changes to ICE National Detention Standards” (fact sheet, ACLU, New York, n.d.).

321 Letter from Senator Robert Menendez to Michael Pompeo, Secretary of State; Elaine Chao, Secretary of Transportation, and Chad Wolf, Under Secretary for Strategy, Policy, and Plans, DHS, October 16, 2020.

- ▶ **Expanding DNA Collection from Immigration Detainees**—*January 2020*—After a proposed rule to expand DNA collection to most immigration detainees was published in October 2019, but before the final rule was issued, CBP began piloting expanded DNA collection. The final rule was published on March 9, 2020.<sup>322</sup> By December 31, 2020, CBP was collecting DNA nationwide.<sup>323</sup> The agency collects DNA from noncitizens ages 14 to 79 in its custody who are facing removal and U.S. citizens ages 14 to 79 arrested and facing federal charges, or subject to a federal warrant. ICE said it would collect DNA from all detainees ages 14 and older booked into one detention facility, and its pilot program reportedly began at a facility in Dallas on May 1, 2020.<sup>324</sup> By the end of September 2020, DNA testing of detainees was operational across Michigan and Ohio as well.<sup>325</sup> It is not clear whether DNA testing was in effect nationwide for those in ICE custody. (For more on DNA collection from detainees, see Section 4.)
  
- ▶ **Subpoenaing Information from Sanctuary Cities**—*January 2020*—ICE adopted a new tactic of issuing administrative subpoenas for information on state and local detainees deemed by ICE to be removable and whom the agency says states are withholding from it. Between January 13 and February 21, 2020, ICE issued subpoenas on state and local law enforcement agencies in Connecticut; New York State; Oregon; San Diego County, CA; Washington, Wasco, and Clackamas Counties, OR; the City and County of Denver, CO; and the city of Hillsboro, OR.<sup>326</sup> San Diego County, CA, and Washington County, OR, volunteered to comply, and a federal judge ordered Denver to comply.<sup>327</sup> The other jurisdictions resisted the subpoenas.
  
- ▶ **Blocking New York State Residents from Trusted Traveler Programs**—*February 5, 2020*—DHS cut off New Yorkers' ability to enroll or re-enroll in Trusted Traveler Programs—Global Entry, NEXUS, SENTRI, and the Free and Secure Trade (FAST) program—in response to a state law that bars the state DMV from sharing information with federal immigration authorities.<sup>328</sup> DHS said that without access to DMV data, it cannot verify that applicants meet program requirements. New York amended its law in April 2020 to allow for some data sharing relevant to these programs.<sup>329</sup> On July 23, 2020, DHS announced it would once again allow New York residents to enroll.<sup>330</sup> Government lawyers

322 Justice Department, "DNA-Sample Collection from Immigration Detainees," *Federal Register* 85, no. 46 (March 9, 2020): 13483–93.

323 CBP, "CBP to Meet Legal Requirement to Collect DNA Samples from Certain Populations of Individuals in Custody" (news release, December 3, 2020).

324 Betsy Woodruff Swan and Daniel Lippman, "DHS Begins Collecting DNA from Undocumented Immigrants after Whistleblower Complaints," *Politico*, May 15, 2020.

325 Darcie Moran and Sarah Alvarez, "More Immigration Detainees Face DNA Collection before End of the Year," *Detroit Free Press*, October 6, 2020.

326 ICE, "ICE Serves 5 Immigration Subpoenas in Oregon for Criminal Alien Information from Local Law Enforcement" (press release, February 21, 2020).

327 Elliot Spagat, "San Diego Sheriff Agrees to Share Immigration Information," *Associated Press*, February 21, 2020; ICE, "Washington County Provides Criminal Alien Information Previously Refused under Oregon Sanctuary Policies" (press release, February 27, 2020); *United States Immigration and Customs Enforcement v. Fran Gomez*, No. 20-mc-00011-WJM-MEH (U.S. District Court for the District of Colorado, April 20, 2020).

328 Letter from Chad Wolf, Acting Secretary of Homeland Security, to Mark J. F. Schroeder, Acting Commissioner, and Theresa L. Egan, Executive Deputy Commissioner, New York State Department of Motor Vehicles, February 5, 2020.

329 Marina Villeneuve, "As Budget Passes, Cuomo Says: 'The State Has No Money,'" *Associated Press*, April 3, 2020.

330 DHS, "New York Amends Dangerous Green Light Law to Cooperate with Federal Law Enforcement on DMV Records" (press release, July 23, 2020).

revealed later that day in a court filing that DHS officials had falsely claimed that no other state limited information sharing in the way New York did.<sup>331</sup>

- ▶ **Border Patrol Agents Tasked with Interior Enforcement**—*February 2020*—CBP confirmed that it would send 100 Border Patrol agents to ten cities in the United States—reportedly Atlanta, Boston, Chicago, Detroit, Houston, Los Angeles, New Orleans, New York, Newark, and San Francisco—to support ICE’s interior enforcement operations.<sup>332</sup> The cities varied in the degrees to which they limited cooperation with ICE, from Houston, which had no such restrictive policies, to New York City, which had barred local law enforcement from honoring ICE detainers and limited information sharing with the agency, with some exceptions.
- ▶ **Round-the-Clock Surveillance of Unauthorized Immigrants**—*February 2020*—ICE is attempting to implement 24-7 monitoring of unauthorized immigrants in order to increase arrests in major cities that limit cooperation with ICE, reportedly including Atlanta, Boston, Chicago, Detroit, Los Angeles, New Orleans, New York, Newark, and San Francisco.<sup>333</sup> To do so, it requested the help of at least 500 agents from the Homeland Security Investigations subdivision of ICE, which typically focuses on international criminal and trafficking investigations. The initiative was scheduled to last through December 31, 2020.
- ▶ **ICE Designated as “Security Agency”**—*June 11, 2020*—The federal Office of Personnel Management designated ICE as a security agency, reducing the range of transparency measures with which the agency must comply.<sup>334</sup> This designation allows ICE to withhold the names of personnel when disclosing documents to the public.
- ▶ **Increased Standards for Companies Providing Immigration Bonds**—*July 31, 2020*—DHS adopted a rule giving ICE greater ability to decline bonds from surety companies, which can underwrite bonds when immigrants cannot afford them.<sup>335</sup> The rule allows ICE to reject new bonds from companies that have yet to pay ICE a certain number of or amount in past bonds or that have seen 35 percent or more of their underwritten bonds breached in the past year. It also requires companies challenging ICE’s determination that a bond has been breached to file an administrative appeal before appealing the decision to federal courts.
- ▶ **Coercion to Consent to Deportation at ICE Facilities**—*Fall 2020*—In October 2020, a coalition of immigrant rights groups led by the Southern Poverty Law Center and Freedom for Immigrants filed a complaint against ICE for allegedly using violent force to get Cameroonian detainees at the Adams County Correctional Center in Mississippi to sign deportation documents.<sup>336</sup> The complaint also cited similar allegations from the Winn Correctional Center in Louisiana. Cuban immigrants detained

331 Ed Shanahan and Zolan Kanno-Youngs, “Homeland Security Dept. Admits Making False Statements in Fight with N.Y.,” *New York Times*, July 23, 2020.

332 Caitlin Dickerson and Zolan Kanno-Youngs, “Border Patrol Will Deploy Elite Tactical Agents to Sanctuary Cities,” *New York Times*, February 14, 2020.

333 Caitlin Dickerson, Zolan Kanno-Youngs, and Annie Correal, “Flood the Streets’: ICE Targets Sanctuary Cities with Increased Surveillance,” *New York Times*, March 5, 2020.

334 Ken Klippenstein, “ICE Just Became Even Less Transparent,” *The Nation*, July 2, 2020.

335 DHS, “Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches,” *Federal Register* 85 no. 148 (July 31, 2020): 45968–90.

336 Complaint by Freedom for Immigrants et al. to DHS, “Re: Immigration and Customs Enforcement Officers’ Use of Torture to Coerce Immigrants into Signing Immigration Documents at Adams County Correctional Facility,” October 7, 2020.



in Georgia and Louisiana reported being asked if they wanted to be reunited with their family and subsequently being forced to unknowingly sign commercial travel documents for travel to Cuba.<sup>337</sup> It is unknown whether anyone was deported using these documents.

- ▶ **Billboards Displaying Noncitizens Released from Criminal Custody**—*October 2, November 6, and December 22, 2020*—ICE launched billboard campaigns in Philadelphia, PA, and Charlotte and Asheville, NC, featuring pictures of local noncitizens who were previously arrested or convicted of crimes but were released rather than transferred to ICE custody.<sup>338</sup>
- ▶ **New Requirements for Bond Cancellations**—*November 2020*—ICE revised the terms of its immigration bonds, no longer cancelling them when ICE is notified that an immigrant has been in criminal custody for more than 30 days. Instead, they would be cancelled only once the immigrant is in ICE custody.<sup>339</sup> This change was in response to states and localities increasingly refusing to honor ICE detainers.
- ▶ **More Permissive 287(g) Memoranda of Agreement**—*2020*—ICE updated the language of the memoranda of agreement (MOAs) it signs with state and local law enforcement agencies participating in the 287(g) program, under which selected law enforcement officers may be deputized as immigration officers within jails and prisons. The new MOAs expand the authority of 287(g) participating agencies, reduce requirements for deputized officers, and remove the expiration dates of the agreements, making them indefinite.<sup>340</sup>
- ▶ **Agreements Giving States Authority over DHS Policy**—*January 2021*—DHS signed agreements with at least five states—Arizona, Indiana, Louisiana, Montana, and Texas—and a county sheriff’s department in North Carolina that would require DHS to notify them of all proposed policy changes affecting immigration enforcement, legal immigration, and immigration benefits, as those changes, the agreements argued, would affect states and localities.<sup>341</sup> The jurisdictions would then have six months to review and comment before DHS implements any changes.
- ▶ **Reinstatement of Secure Communities**—*multiyear*—The president’s January 25, 2017, executive order on interior enforcement mandated the termination of the Priority Enforcement Program, which was a more tailored version of the Secure Communities program ended by the Obama administration. Secure Communities is a federal-state information-sharing program that examines the fingerprints of individuals booked into state or local custody and flags them for enforcement if they are identified as removable. From the reactivation of Secure Communities on January 25, 2017, through April

337 Monique O. Madan, “Cuban Detainees: ICE Forces Us to Sign Forms Saying We Wanted to Go Back, ‘Visit’ Family,” *Miami Herald*, October 29, 2020.

338 ICE, “ICE Launches Billboards in Pennsylvania Featuring At-Large Public Safety Threats” (news release, October 2, 2020); ICE, “ICE Launches Billboards in Charlotte Featuring At-Large Public Safety Threats” (news release, November 6, 2020); ICE, “ICE Launches Billboards in Asheville Featuring At-Large Public Safety Threats” (news release, December 22, 2020).

339 ICE, “Agency Information Collection Activities; Revision of a Currently Approved Collection: Immigration Bond,” *Federal Register* 84, no. 166 (August 27, 2019): 44913–15; ICE, “ICE Form I-352,” updated November 2020.

340 Lena Graber and Noah Feldman, “Changes to the 287(g) Program” (policy brief, Immigrant Legal Resource Center, October 2020).

341 Hamed Aleaziz, “The DHS Has Signed Unusual Agreements with States that Could Hamper Biden’s Future Immigration Policies,” *BuzzFeed News*, January 15, 2021; *State of Texas v. United States, et al.*, (U.S. District Court for the Southern District of Texas, Exhibit A, January 22, 2021); Keith Schubert, “Cynically Driven: Experts Question Montana’s Lawsuit Challenging Change in Federal Immigration Policy,” *Daily Montanan*, March 12, 2021.

2019, more than 150,000 noncitizens with criminal convictions were removed as a result of Secure Communities.<sup>342</sup>

- ▶ **Limits on Visas for Nationals of Recalcitrant Countries—*multiyear***—In the president’s January 25, 2017, executive order on interior enforcement, he ordered DHS and the State Department to cooperate in refusing to grant visas to nationals of recalcitrant countries (those that systematically refuse or delay cooperation on the return of their nationals). The aim of such visa sanctions is to pressure these countries to accept the return of their nationals when they are subject to removal from the United States. Much of this work appears to have occurred away from the public eye. In April 2019, the State Department published a final rule allowing officers to suspend the issuance of a visa already in process if the applicant falls within the scope of visa sanctions placed on recalcitrant countries.<sup>343</sup> By June 2020, the number of recalcitrant countries had been reduced from 23 at the start of the administration to 13.<sup>344</sup> And as of July 2020, seven countries were subject to visa sanctions as a result of noncompliance: Burundi, Cambodia, Eritrea, Laos, Myanmar (also known as Burma), Pakistan, and Sierra Leone, while at least six more had either been subject to sanctions or the threat of sanctions.<sup>345</sup>
  - **Vietnam—2017**—At some point in its first year, the Trump administration abandoned the U.S. government’s practice of not deporting Vietnamese nationals who arrived before 1995, pursuant to a 2008 diplomatic agreement between the United States and Vietnam.<sup>346</sup> Saying they were renegotiating an agreement with Vietnam, the administration began detaining Vietnamese nationals who had previously had their removals stayed, with the intention of removing them. This effort was abandoned in August 2018 when it became clear that Vietnam would not comply with the return effort, but reports later surfaced that the administration was renewing these efforts.<sup>347</sup>
  - **Mauritania—2017**—Under pressure from the Trump administration, the Mauritanian embassy started issuing travel documents, called “laissez-passers,” so its nationals could be sent back.<sup>348</sup> This raised serious concerns about the racial and ethnic discrimination and slavery these immigrants could face in Mauritania if deported.<sup>349</sup>
  - **Cambodia, Eritrea, Guinea, and Sierra Leone—September 2017**—DHS announced the implementation of visa sanctions on nationals of Cambodia, Eritrea, Guinea, and Sierra Leone

342 ICE, “Secure Communities,” updated March 20, 2018; TRAC Immigration, “Removals under the Secure Communities Program,” accessed February 28, 2020.

343 State Department, “Refusal Procedures for Visas,” *Federal Register* 84, no. 77 (April 22, 2019): 16610–13.

344 As of June 3, 2020, the recalcitrant countries were Bhutan, Burundi, Cambodia, China, Cuba, Eritrea, Hong Kong, India, Iran, Iraq, Laos, Russia, and Pakistan. See Wilson, *Immigration: “Recalcitrant” Countries*.

345 Wilson, *Immigration: “Recalcitrant” Countries*; DHS, “DHS Announces Imposition of Visa Sanctions on Burundi” (press release, June 19, 2020).

346 The agreement provides that “Vietnamese citizens are not subject to return to Vietnam under this agreement if they arrived in the United States before July 12, 1995.” See Governments of the United States and Vietnam, “Agreement between the Government of the United States of America and the Government of the Socialist Republic of Vietnam on the Acceptance of the Return of Vietnamese Citizens,” January 22, 2008. See also *Hoang Trinh v. Thomas D. Homan*, Case No. 8:18-cv-316 (U.S. District Court Central District of California, February 22, 2018).

347 Charles Dunst and Krishnadev Calamur, “Trump Moves to Deport Vietnam War Refugees,” *The Atlantic*, December 12, 2018.

348 Nellie Peyton, “Mauritanians Who Sought Refuge in U.S. Face Deportation, then Jail,” Reuters, December 17, 2018.

349 Letter from Senator Kamala Harris et al. to Homeland Security Secretary Kirstjen Nielsen and Secretary of State Mike Pompeo, October 12, 2018.

in an effort to pressure the countries' governments to accept their nationals ordered deported from the United States.<sup>350</sup> The administration removed the sanctions on Guinea in August 2018, in recognition of its agreement to accept its deported nationals.<sup>351</sup>

- Laos and Myanmar—*July 2018*—DHS announced visa sanctions for certain government officials from Laos and Myanmar in an effort to pressure these governments to accept their nationals ordered deported from the United States.<sup>352</sup> In April 2020, the visa sanctions for Laos were expanded to include all immigrant visas for Lao citizens.<sup>353</sup>
- Ethiopia—*January 18, 2019*—DHS filed a *Federal Register* notice on countries whose nationals were eligible to participate in the H-2A and H-2B nonimmigrant worker programs. In the notice, DHS explained that Ethiopia had been removed from the list of eligible countries because it had been “at risk of noncompliance” with ICE repatriation efforts since 2016.<sup>354</sup>
- Ghana—*January 31, 2019*—DHS announced visa sanctions for certain nationals of Ghana to pressure the country's government to accept its nationals ordered deported from the United States.<sup>355</sup> The sanctions were lifted in January 2020.<sup>356</sup>
- Pakistan—*April 5, 2019*—DHS put into effect visa sanctions against Pakistan, a country identified as recalcitrant.<sup>357</sup>
- Brazil—*June 2019*—Following U.S. threats of sanctions, Brazil's Federal Police agreed to loosen travel document requirements for nationals ordered removed from the United States in order to facilitate their repatriation. In October 2019 and January 2020, Brazil received the first mass deportation flights from the United States since 2006.<sup>358</sup>
- Burundi—*June 12, 2020*—The State Department instructed consular officers to stop issuing all nonimmigrant visas, except transit visas and those for diplomats and international organization employees, to Burundians applying in Burundi, as a consequence of the country not accepting its nationals ordered removed from the United States.<sup>359</sup>

350 The visa restrictions were applied against certain government officials from Cambodia, Guinea, and Sierra Leone, as well as to all citizens of Eritrea. See DHS, “DHS Announces Implementation of Visa Sanctions on Four Countries” (press release, September 13, 2017). As the government began increasing removals to Cambodia, a federal court issued a temporary restraining order protecting nearly 2,000 Cambodian nationals from detention and removal. See *Nak Kim Chhoeun v. David Marin*, No. SACV 17-01898-CJC (U.S. District Court Central District of California Southern Division, January 3, 2019).

351 Wilson, *Immigration: “Recalcitrant” Countries*, 2.

352 DHS, “DHS Announces Implementation of Visa Sanctions” (press release, July 10, 2018).

353 U.S. Embassy in Laos, “Important Information Regarding Suspension of Issuance of Immigrant Visas,” accessed July 9, 2020.

354 DHS, “Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs,” *Federal Register* 84, no. 13 (January 18, 2019): 133–36.

355 DHS, “DHS Announces Implementation of Visa Sanctions on Ghana” (press release, January 31, 2019).

356 Wilson, *Immigration: “Recalcitrant” Countries*, 2.

357 Details regarding the breadth of the visa sanctions against Pakistan have yet to be released. See Wilson, *Immigration: “Recalcitrant” Countries*, 2.

358 Lisandra Paraguassu, “Exclusive: Brazil Facilitates Deportation of Its Nationals after U.S. Pressure,” Reuters, August 26, 2019;

Lisandra Paraguassu, “Brazil Green Lights U.S. Deportation of More Brazilians by Plane,” Reuters, January 23, 2020.

359 DHS, “DHS Announces Imposition of Visa Sanctions on Burundi.”

- ▶ **Directing an Increase in ICE Officers**—*multiyear*—In his January 2017 executive order on interior enforcement, Trump directed DHS to hire 10,000 additional ICE officers. When the president took office there were about 5,800 deportation officers and immigration enforcement agents within ICE Enforcement and Removal Operations (ERO).<sup>360</sup> No additional ERO officers were authorized under Trump, despite his administration requesting funding for at least 1,000 new officers in its budget request each year.<sup>361</sup>
- ▶ **Funding Restrictions for “Sanctuary” Cities**—*multiyear*—The president’s January 25, 2017, executive order on interior enforcement directed that “sanctuary” jurisdictions not receive federal grants. A district court injunction on April 25, 2017, prevented the government from making additional federal grants conditional on a jurisdiction’s compliance with 8 U.S. Code 1373, a federal statute that prohibits localities from placing restrictions on sharing citizenship and immigration status information with federal authorities.<sup>362</sup> The court did, however, allow these conditions to remain in place for the two Justice Department grants to which they had been applied before the Trump administration: the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, which funds a variety of local law enforcement programs, and grants from the Office of Community Oriented Policing Services (COPS), which funds community policing officers, equipment, and training. The court made the injunction permanent on November 20, 2017, and the Ninth U.S. Circuit Court of Appeals upheld the permanent injunction on August 1, 2018.<sup>363</sup> In the wake of this injunction, the Justice Department tried to find other ways to limit federal grants to sanctuary jurisdictions:
  - **Adding New Immigration Conditions to Byrne JAG Grants**—*July 25, 2017*—The Justice Department tried to increase the number of localities that could be prohibited from receiving FY 2017 Byrne JAG funds by expanding the initial requirements for the grants: instead of just requiring recipients to comply with federal law and allow for the sharing of information about citizenship and immigration status, the Justice Department required recipients to also allow federal immigration officials access to jails and prisons to interview detainees (known as the Access Condition) and alert ICE of the release dates of suspected removable noncitizens (the Notice Condition).<sup>364</sup> Several cities and states sued, and there are injunctions in some jurisdictions preventing the government from requiring these conditions be met, including in Chicago, Philadelphia, and San Francisco, as well as the state of California.<sup>365</sup> Some of these

360 DHS, *Budget-in-Brief: Fiscal Year 2016* (Washington, DC: DHS, 2015), 47.

361 DHS, *FY 2018 Budget in Brief* (Washington, DC: DHS, 2017), 36; U.S. Congress, “Explanatory Statement Submitted by Mrs. Lowey, Chairwoman of the House Committee on Appropriations Regarding H.J. Res. 31”; U.S. Congress, “Explanatory Statement Submitted by Mrs. Lowey, Chairwoman of the House Committee on Appropriations Regarding H.R. 1158.”

362 *County of Santa Clara v. Donald J. Trump, and City and County of San Francisco v. Donald J. Trump*, Case No. 17-cv-00574-WHO and Case No. 17-cv-00485-WHO (U.S. District Court Northern District of California, order granting motions to enjoin, April 25, 2017).

363 *County of Santa Clara v. Donald J. Trump, and City and County of San Francisco v. Donald J. Trump*, Case No. 17-cv-00574-WHO and Case No. 17-cv-00485-WHO (U.S. District Court for the Northern District of California, order granting motion for summary judgment, November 20, 2017); *City and County of San Francisco v. Donald J. Trump, and County of Santa Clara v. Donald J. Trump*, No. 17-17478 and No. 17-17480 (U.S. Court of Appeals for the Ninth Circuit, August 1, 2018).

364 Justice Department, “Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs” (press release, July 25, 2017).

365 *City of Chicago v. Jefferson Beauregard Sessions III*, Case No. 17 C 5720 (U.S. District Court for the Northern District of Illinois, July 27, 2018); *City of Philadelphia v. Jefferson Beauregard Sessions III*, Civil Action No. 17-3894 (U.S. District Court for the Eastern District of Pennsylvania, June 6, 2018); *City and County of San Francisco v. Jefferson Beauregard Sessions III and State of California v. Jefferson Beauregard Sessions III*, Case No. 17-cv-04642-WHO and Case No. 17-cv-04701-WHO (U.S. District Court for the Northern District of California, October 5, 2018).

have been upheld by federal appeals courts.<sup>366</sup> A lower court injunction had also prohibited imposing these conditions on grants to seven states including New York, but an appeals court decision in February 2020 allowed the Justice Department to apply them.<sup>367</sup>

- Prioritizing Non-Sanctuary Cities for COPS Grants—September 7, 2017—The Justice Department announced it would give priority consideration for FY 2017 COPS grants to jurisdictions that attest to their cooperation with the Notice and Access Conditions.<sup>368</sup> Of those jurisdictions granted COPS funding two months later, the Justice Department announced that 80 percent met these conditions.<sup>369</sup> A federal appeals court ruled against the City of Los Angeles in a lawsuit challenging this prioritization.<sup>370</sup>
- Adding New Immigration Conditions to Various Justice Department Grants—multiyear—The Justice Department took additional steps to limit grants to sanctuary jurisdictions, adding essentially the same conditions in FY 2018 as in FY 2017 plus some new ones to at least five additional Justice Department grants, but wording them in a way that used existing immigration law to justify them.<sup>371</sup> New conditions included certifying compliance with immigration laws that prohibit harboring noncitizens who are in the country illegally and certifying that the jurisdiction is not impeding Justice Department reporting requirements on the number of unauthorized immigrants in prison. On February 15, 2019, a federal judge in the Los Angeles case issued a permanent nationwide injunction, preventing the Justice Department from making Byrne JAG funding and a juvenile gang prevention grant conditional on these certifications.<sup>372</sup> The judge temporarily narrowed the injunction to affect only Los Angeles on April 19, 2019, and on July 1, 2019, agreed to vacate the injunction as it related to the gang prevention grant, taking away much of its impact.<sup>373</sup> But in another case, a federal district judge in Illinois ruled on September 26, 2019, that the conditions could not be used to deny FY 2018 funding or any future funding to the City of Evanston, IL, or to the 1,400 cities represented in the U.S. Conference of Mayors.<sup>374</sup>

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366 See, for example, *City of Philadelphia v. Attorney General*, No. 18-2648 (U.S. Third Circuit Court of Appeals, February 15, 2019); *City of Providence and City of Central Falls v. William P. Barr*, No. 19-1802 (U.S. First Circuit Court of Appeals, March 24, 2020).

367 The seven states were Connecticut, New Jersey, New York, Rhode Island, Washington, and the Commonwealths of Massachusetts and Virginia. See *New York v. U.S. Department of Justice*, Nos. 19-267(L); 19-275(con) (U.S. Court of Appeals for the Second Circuit, February 26, 2020).

368 Justice Department, “Department of Justice Announces Priority Consideration Criteria for COPS Office Grants” (press release, September 7, 2017).

369 Justice Department, “Attorney General Sessions Announces \$98 Million to Hire Community Policing Officers” (press release, November 20, 2017).

370 *City of Los Angeles v. William P. Barr*, No. 18-55599 (U.S. Circuit Court of Appeals for the Ninth Circuit, July 12, 2019).

371 Justice Department, Office of Justice Programs, “Forms: Certifications Relating to 8 U.S.C. § 1373 and Certain Other Federal Statutes Related to Immigration,” updated November 2018.

372 *City of Los Angeles v. Jefferson B. Sessions, III*, Case No. CV 18-7347-R (U.S. District Court for the Central District of California, February 15, 2019).

373 *City of Los Angeles v. William P. Barr*, Case No. 2:18-cv-07347-R-JC (U.S. District Court for the Central District of California, order for partial stay of injunction pending appeal, April 19, 2019); *City of Los Angeles v. William P. Barr*, Case No. 2:18-cv-07347-R-JC (U.S. District Court for the Central District of California, order on joint motion for partial vacatur, July 1, 2019).

374 *City of Evanston and the U.S. Conference of Mayors v. William P. Barr*, Case No. 18 CV 4853 (U.S. District Court for the Northern District of Illinois, September 26, 2019).



- ▶ **Lawsuits against State and Local Laws and Policies**—*multiyear*—The Justice Department filed lawsuits challenging laws and policies that restrict state and local collaboration with federal immigration authorities.
  - *March 6, 2018*—The Justice Department filed a lawsuit challenging three California laws attempting to restrict the reach of ICE.<sup>375</sup> One law limits employers' cooperation with ICE during worksite enforcement actions, another requires the state attorney general to inspect ICE detention facilities in the state, and the third restricts the circumstances under which local officers can provide ICE with information about a detainee's release date and under which local detainees can be transferred directly to ICE custody.<sup>376</sup> Federal courts upheld the main provisions of the laws but struck down a bar on employers voluntarily consenting to ICE agents entering nonpublic areas of their places of employment.<sup>377</sup> On October 22, 2019, the Justice Department filed a request for the Supreme Court to rule on the case, which was denied in June 2020.<sup>378</sup>
  - *January 24, 2020*—The administration filed suit to challenge a California law that prevents ICE from operating private detention facilities in the state.<sup>379</sup>
  - *January 24, 2020*—The administration filed a brief supporting two New Jersey counties that sued the state over its Immigrant Trust Directive, which bars local law enforcement from complying with ICE detainers and generally limits the extent to which local officers can participate in immigration enforcement.<sup>380</sup> The suit was dismissed in July 2020.<sup>381</sup>
  - *February 10, 2020*—The Justice Department filed its own lawsuit challenging New Jersey's Immigrant Trust Directive.<sup>382</sup>
  - *February 10, 2020*—The Justice Department sued King County, WA, and the county executive for a policy directing the relevant county agency and the local airport to insert prohibitions

375 *United States v. California*, No. 18-264 (U.S. District Court for the Eastern District of California, complaint, March 6, 2018).

376 State of California, *An Act to Add Sections 7285.1, 7285.2, and 7285.3 to the Government Code, and to Add Sections 90.2 and 1019.2 to the Labor Code, Relating to Employment Regulation*, Chapter 492, *Statutes of 2017* (2017); State of California, *An Act to Amend Sections 384 and 1010.6 of the Code of Civil Procedure, ... and to Repeal and Add Sections 270 and 271 Of, the Welfare and Institutions Code, Relating to Public Safety, Making an Appropriation Therefor, to Take Effect Immediately, Bill Related to the Budget*, Chapter 17, *Statutes of 2017* (2017); State of California, *An Act to Amend Sections 7282 and 7282.5 Of, and to Add Chapter 17.25 (Commencing With Section 7284) to Division 7 of Title 1 Of, the Government Code, and to Repeal Section 11369 of the Health and Safety Code, Relating to Law Enforcement*, Chapter 495, *Statutes of 2017* (2017).

377 *United States v. California*, No. 2:18-cv-490-JAM-KJN (U.S. District Court for the Eastern District of California, order re: the United States of America's motion for preliminary injunction, July 5, 2018).

378 *United States v. California*, No. 19-532 (U.S. Supreme Court, Petition for a Writ of Certiorari, October 22, 2019); U.S. Supreme Court, "Search Results: No. 19-352," accessed August 25, 2021.

379 *United States v. Gavin Newsom*, Civil Action No. '20CV0154 MMAAHG (U.S. District Court for the Southern District of California, complaint for declaratory and injunctive relief, January 24, 2020).

380 Monsy Alvarado, "Trump Administration Backs Two NJ Counties in Lawsuits Challenging Limited ICE Cooperation," NorthJersey.com, January 25, 2020.

381 Monsy Alvarado, "Federal Judge Dismisses Lawsuit Filed by NJ Counties Challenging Limits on ICE Cooperation," NorthJersey.com, July 29, 2020.

382 *United States v. New Jersey* (U.S. District Court for the District of New Jersey, complaint for declaratory and injunctive relief, February 10, 2020).

on working with flights carrying deportees into future contracts for service providers at the airport.<sup>383</sup>

- ▶ **287(g) Expansion**—*multiyear*—The Trump administration placed a high priority on expanding the 287(g) program, under which certain state or local law enforcement officers are authorized to assist with the investigation, apprehension, or detention of unauthorized immigrants. As of January 2021, ICE had 287(g) Jail Enforcement Model agreements with 72 law enforcement agencies in 21 states, a 140 percent increase from the 30 agreements in effect in January 2017.<sup>384</sup> It also had 287(g) Warrant Service Officer agreements with 76 law enforcement agencies in 11 states.
  - Warrant Service Officer Program—*May 6, 2019*—ICE created the Warrant Service Officer Program as a type of 287(g) agreement in an attempt to avoid liability issues that arise when local law enforcement agencies, pursuant to ICE detainers, hold detainees past their release date and to work around restrictions that sanctuary localities may place on such cooperation. Officers in participating agencies are deputized after a day of training to issue administrative immigration arrest warrants, which ICE says allows them to hold detainees for two days to execute a transfer of custody to ICE.<sup>385</sup> The program began in Florida but was expanded to other states.
- ▶ **Worksite Enforcement**—*multiyear*—In FY 2018 and FY 2019, the Trump administration put a much stronger emphasis on worksite enforcement, as evidenced by the promise of Acting ICE Director Thomas Homan that his agency would quintuple worksite investigations in FY 2018.<sup>386</sup> Though investigations did not increase quite that sharply, they did rise fourfold in FY 2018 and held roughly steady in FY 2019, before declining slightly in FY 2020:
  - FY 2017: 1,691 opened worksite investigations
  - FY 2018: 6,848 opened worksite investigations<sup>387</sup>
  - FY 2019: 6,812 opened worksite investigations<sup>388</sup>
  - FY 2020: 4,326 opened worksite investigations<sup>389</sup>
- ▶ **Fines for Immigrants Ordered Removed**—*multiyear*—In December 2018, ICE began issuing fines to immigrants who had been ordered removed but had not departed the United States.<sup>390</sup> The action stemmed from an executive order issued on January 25, 2017, in which Trump instructed DHS to collect all the fines it was authorized to from immigrants illegally in the country.<sup>391</sup> Immigrants remaining in the country after being ordered removed can be fined up to \$813 for each day they

383 *United States v. King County*, No. 2:20-cv-203 (U.S. District Court for the Western District of Washington, complaint, February 10, 2020).

384 ICE, “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” updated January 13, 2021.

385 ICE, “ICE Launches Program to Strengthen Immigration Enforcement” (press release, May 6, 2019).

386 Tal Kopan, “ICE Chief Pledges Quadrupling or More of Workplace Crackdowns,” CNN, October 17, 2017.

387 ICE, “ICE Worksite Enforcement Investigations in FY18 Surge” (press release, December 11, 2018).

388 Michelle Hackman, “Workplace Immigration Inquiries Quadruple under Trump,” *Wall Street Journal*, December 5, 2019.

389 DHS, “U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2022 Congressional Justification,” accessed December 20, 2021, 80.

390 Franco Ordoñez, “Trump Administration Hits Some Immigrants in U.S. Illegally with Fines up to \$500,000,” NPR, July 2, 2019.

391 White House, “Executive Order 13768.”

violate their removal order.<sup>392</sup> By December 2019, ICE had issued notices of intention to fine to about 230 people—meanwhile, there were 1.16 million immigrants with outstanding final orders of removal as of March 2020.<sup>393</sup>

## 4 U.S. Department of Justice

Under the Trump administration, the U.S. Department of Justice played an uncommonly vigorous role in immigration policymaking—a function more traditionally driven by DHS. While the Justice Department’s only immediate area of influence over immigration is the immigration court system, which is housed in the department, under the leadership of Attorney General Jeff Sessions (February 2017–November 2018) and his successors Matthew Whittaker (November 2018–February 2019), William Barr (February 2019–December 2020), and Jeffrey Rosen (December 2020–January 2021), it also shaped border security and interior enforcement policy.

The Justice Department played a central role in the administration’s infamous family separation policy, placing a high priority on prosecuting cases of illegal entry, including those that would cause family separations. The Justice Department also contributed to the administration’s efforts to redefine asylum and narrow eligibility. With DHS, the Justice Department authored two regulations that blocked asylum

applications from anyone who crossed the border between ports of entry or who failed to apply for asylum in at least one transit country on their way to the United States.<sup>394</sup> Attorneys General Sessions and Barr each issued decisions narrowing legal interpretations of the types of persecution that qualify for asylum—making it especially difficult for victims of domestic or gang violence to qualify.<sup>395</sup> They did this using the referral and review power, which allows attorneys general to overrule decisions made by the Board of Immigration Appeals and set new precedent for the immigration courts. Attorneys general used this power more under the Trump administration than in any other administration.<sup>396</sup>

*While the Justice Department’s only immediate area of influence over immigration is the immigration court system ... it also shaped border security and interior enforcement policy.*

The administration exercised countervailing approaches to the immigration court system: while tirelessly pushing to speed adjudications to reduce the court’s sizable backlog, it also made it more difficult for judges to efficiently manage their dockets and accelerated the addition of new cases. While completed cases

392 While the statute sets the fine at \$500, it is regularly adjusted for inflation, most recently to \$813 in June 2020. See DHS, “Civil Monetary Penalty Adjustments for Inflation,” *Federal Register* 85, no. 117 (June 17, 2020): 36469–83.

393 Stephen Dinan, “Exclusive: ICE Revives Six-Figure Fines against Illegal Immigrants Living in Sanctuary,” *Washington Times*, December 7, 2019; Testimony of Matthew Albence, Deputy Director and Senior Official Performing the Duties of the Director of ICE, before the House Appropriations Committee, Subcommittee on Homeland Security, *Immigration and Customs Enforcement Budget Request for FY2021*, 116th Cong., 2d sess., March 11, 2020.

394 DHS and EOIR, “Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims,” *Federal Register* 83, no. 218 (November 9, 2018): 55934–53; EOIR and USCIS, “Asylum Eligibility and Procedural Modifications,” *Federal Register* 84, no. 136 (July 16, 2019): 33829–45.

395 *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, June 11, 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (Attorney General, July 29, 2019).

396 Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review* (Washington, DC: MPI, 2021).

increased, so did the backlog, rising 92 percent between the end of FY 2017 and the end of FY 2020.<sup>397</sup> As of September 30, 2020, there were 1,260,039 immigration cases in the backlog.

- ▶ **Changes to Immigration Judge Hiring Process—April 2017**—In a memorandum approved by Attorney General Sessions, the Justice Department made a number of changes to the immigration judge hiring process to reduce delays, decrease the role of the immigration court’s leadership, and grant greater discretion and influence to Justice Department political appointees.<sup>398</sup> The Justice Department made two more updates to this process, as well as the process for hiring appellate immigration judges, in March 2018 and March 2019, that, among other things, increased flexibility, shortened process deadlines, and transferred some of the hiring responsibilities from the attorney general and to the director of EOIR.<sup>399</sup>
- ▶ **Prioritization of Immigration Crime Prosecutions—April 11, 2017**—The Justice Department instructed federal prosecutors to prioritize the prosecution of immigration crimes and to appoint one border security coordinator per office to oversee such prosecutions and coordinate with DHS.<sup>400</sup>
- ▶ **End of a Program Providing Free Attorneys for Unaccompanied Minors—June 2017**—The administration phased out an AmeriCorps initiative that provided lawyers for thousands of unaccompanied children.<sup>401</sup>
- ▶ **Creation of the Office of Policy—December 11, 2017**—EOIR launched a new Office of Policy to manage all agency policy and regulatory review and development, coordinate with other agencies, manage internal and external communications, and supervise the provision of legal and policy trainings, among other responsibilities.<sup>402</sup> A final rule published on November 3, 2020, codified the office.<sup>403</sup>
- ▶ **Immigration Judges Allowed to Deny Cancellation Requests after Cap Reached—January 4, 2018**—EOIR published a final rule allowing immigration judges to issue final decisions denying nonmeritorious cancellation of removal cases, regardless of whether the annual limitation has been reached.<sup>404</sup> Cancellation of removal allows certain immigrants to terminate removal proceedings and receive permanent residence in the United States if they can show they have lived in the United States for an extended period of time, meet certain good moral character requirements, and, in some cases,

397 MPI analysis of data from EOIR, “Pending Cases, New Cases, and Total Completions.”

398 The memorandum changes the multistep hiring process put in place by former Attorney General Alberto Gonzales in March 2007 after it was revealed that the Justice Department hired immigration judges and other staff based on political and ideological considerations. See memorandum from Dana J. Boente, Acting Deputy Attorney General, Justice Department, *Immigration Judge Hiring Process*, April 4, 2017.

399 Memorandum from James R. McHenry, III, Director of EOIR, to the Deputy Attorney General, *Immigration Judge and Appellate Immigration Judge Hiring Process*, February 19, 2019.

400 Memorandum from Jeff Sessions, Attorney General, to all federal prosecutors, *Renewed Commitment to Criminal Immigration Enforcement*, April 11, 2017.

401 University of Las Vegas William S. Boyd School of Law, “Trump Administration Ending AmeriCorps Legal Aid Program for Unaccompanied Children, but UNLV Law’s Work Continues” (news release, June 12, 2017); AILA, “AILA South Florida Chapter Board Meeting Minutes” (unpublished meeting notes, October 20, 2017).

402 Catholic Legal Immigration Network, Inc. (CLINIC), “FOIA Disclosures on the Office of Policy,” updated October 24, 2019.

403 EOIR, “Organization of the Executive Office for Immigration Review,” *Federal Register* 85, no. 213 (November 3, 2020): 69465–82.

404 EOIR, “Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal,” *Federal Register* 82, no. 232 (December 5, 2017): 57336–40.

that their removal would cause certain U.S.-citizen or permanent resident relatives unusual hardship. The Justice Department is limited from cancelling the removal of more than 4,000 unauthorized immigrants per year. Before this change, judges were required to suspend both negative and positive decisions on cancellation applications if the 4,000 slots were already taken for the year.

- ▶ **Expansion of the Board of Immigration Appeals**—*February 27, 2018*—EOIR published a final rule expanding the size of the immigration court’s appellate body, the BIA, from 17 judges to 21 judges.<sup>405</sup> Then in April 2020, EOIR published a final rule that expanded it further to 23 judges.<sup>406</sup> As of June 2020, the Trump administration had appointed ten permanent judges to the BIA.<sup>407</sup>
- ▶ **Zero-Tolerance Policy**—*April 6, 2018*—Building on an April 2017 memorandum, the Justice Department instructed federal prosecutors along the southwest border to prosecute all illegal entry cases referred to them.<sup>408</sup> In May 2018, the department announced that DHS would refer 100 percent of individuals illegally crossing the southwest border to the Justice Department for prosecution.<sup>409</sup> After the president’s June 2018 executive order ending family separations, this policy was no longer applied to parents traveling with children (see also Section 3.A.). According to reports, some areas of the border have since rolled back zero tolerance and are refraining from charging migrants who cross illegally.<sup>410</sup> The Justice Department announced that in FY 2019 it prosecuted more people for the misdemeanor crime of entering the United States illegally—81,000—than in any year since record-keeping began more than 25 years prior.<sup>411</sup>
- ▶ **Review of the Legal Orientation Program**—*April 2018*—The administration announced a pause on the Legal Orientation Program, which provides more than 50,000 noncitizens in immigration detention per year information on navigating the legal system.<sup>412</sup> After much public outcry over the announcement, the administration backtracked and said the program would continue while EOIR conducted a review of it.<sup>413</sup>
  - *September 5, 2018*—EOIR released the first phase of its analysis, finding program participants had longer detention stays and were less likely to obtain representation than other detained

405 EOIR, “Expanding the Size of the Board of Immigration Appeals,” *Federal Register* 83, no. 39 (February 27, 2018): 8321–23.

406 EOIR, “Expanding the Size of the Board of Immigration Appeals,” *Federal Register* 85, no. 63 (April 1, 2020): 18105–07.

407 Board of Immigration Appeals (BIA) members appointed by the Trump administration include William Cassidy, V. Stuart Couch, Deborah K. Goodwin, Stephanie E. Gorman, Keith E. Hunsucker, Philip J. Montante Jr., Aaron R. Petty, Kevin W. Riley, David H. Wetmore (Chief Appellate Immigration Judge), and Earle B. Wilson. The administration also appointed three temporary members. See EOIR, “Board of Immigration Appeals,” updated June 5, 2020.

408 Memorandum from Jeff Sessions, Attorney General, to federal prosecutors along the Southwest border, *Zero-Tolerance for Offenses under 8 U.S.C. § 1325 (a)*, April 6, 2018.

409 Justice Department, “Attorney General Announces Zero-Tolerance Policy”; Justice Department, “Attorney General Delivers Remarks.”

410 Alicia A. Caldwell, “Border Patrol Stops Prosecuting First-Time Border Crossers in Texas Region,” *Wall Street Journal*, March 28, 2019.

411 Justice Department, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019” (press release, October 17, 2019).

412 *Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2019*, Senate Report 115–275, 115th Cong., 2nd sess. (June 14, 2018).

413 Testimony of Jeff Sessions, Attorney General, before U.S. Senate Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, *Review of the FY2019 Budget Request for the U.S. Dept. of Justice*, 115th Cong., 2d sess., April 25, 2018.



immigrants.<sup>414</sup> The Vera Institute of Justice, which administers the program, said the review had “insurmountable methodological flaws.”<sup>415</sup>

- *January 29, 2019*—EOIR finished the second phase of its analysis.<sup>416</sup> The study found participants had marginally longer hearings and were more likely to file applications for relief or protection.
- *March 7, 2019*—EOIR’s director testified before the House of Representatives, saying the second phase of the analysis found the program not cost effective. He declined to say whether the administration would again move to end the program but did say he wanted to engage with Congress about it going forward.<sup>417</sup>
- ▶ **Moving to an Electronic Filing System**—*July 19, 2018*—The immigration court piloted its new electronic filing system, EOIR Court and Appeals System (ECAS), at five immigration courts and the BIA. An electronic system was intended to improve case scheduling and adjudication efficiency.<sup>418</sup> As of December 2020, the system was in use at 33 out of 68 courts and two out of three adjudication centers.<sup>419</sup> That month, EOIR published a proposed rule that would expand and make permanent the electronic records program, including making electronic filing required for represented cases.<sup>420</sup> (See “Expansion of Electronic Filing System and Limits on Law Student Representation” below.)
- ▶ **Allowing Deficient Court Notices**—*August 31, 2018*—The BIA ruled that a deficient court notice (i.e., a notice to appear or NTA), one that fails to include the time and place of the foreign national’s removal hearing, can be rectified by issuing a subsequent notice of hearing that includes the missing information.<sup>421</sup> The ruling stopped a rash of thousands of court terminations after the Supreme Court ruled that, at least in the context of a specific immigration benefit called cancelation of removal, paperwork that failed to designate a hearing’s time and place did not constitute a legal notice to appear in court.<sup>422</sup> In 2020, the BIA built upon this in a series of rulings, holding that court notices that lack information about the foreign national’s immigration status, fail to include the address of the immigration court, or are not provided in the native language of the foreign national are still sufficient.<sup>423</sup>
- ▶ **Clarified and Streamlined Court Scheduling Process**—*December 21, 2018*—Following a Supreme Court decision calling into question the validity of NTAs if they fail to designate a specific hearing date

414 EOIR, *LOP Cohort Analysis* (Washington, DC: EOIR, 2018).

415 Vera Institute of Justice, “Statement on DOJ Analysis of Legal Orientation Program” (press release, September 5, 2018).

416 EOIR, *LOP Cohort Analysis: Phase II* (Washington, DC: EOIR, 2019).

417 Testimony of James McHenry, Director of EOIR, Justice Department, before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Executive Office for Immigration Review*, 116th Cong., 1st sess., March 7, 2019.

418 EOIR, “EOIR Launches Electronic Filing Pilot Program” (news release, July 19, 2018); Testimony of James McHenry, Director of EOIR, Justice Department, before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies, *Executive Office for Immigration Review*, 116th Cong., 1st sess., March 7, 2019.

419 EOIR, “EOIR Courts & Appeals Systems (ECAS) Locations,” updated December 17, 2020.

420 EOIR, “Executive Office for Immigration Review Electronic Case Access and Filing,” *Federal Register* 85, no. 234 (December 4, 2020): 78240–58.

421 *Matter of German Bermudez-Cota*, 27 I&N Dec. 441 (BIA, August 31, 2018).

422 Reade Levinson and Kristina Cooke, “U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here’s Why,” Reuters, October 17, 2018.

423 *Matter of Jonathan Said Herrera-Vasquez*, 27 I&N Dec. 825 (BIA, May 8, 2020); *Matter of Juana Rosales Vargas, Jonathan Jair Rosales Rosales*, 27 I&N Dec. 745 (BIA, January 9, 2020); *Matter of J.J. Rodriguez*, 27 I&N Dec. 762 (BIA, January 31, 2020).

and place, EOIR was inundated with foreign nationals who had received NTAs from DHS that had “false” dates, including dates that do not exist, such as September 31, 2018, or dates on which the court is not open.<sup>424</sup> In the wake of these problems, EOIR provided DHS access to its Interactive Scheduling System (ISS) to allow the DHS officers who issue NTAs to control scheduling on EOIR’s dockets and determine which cases are scheduled for particular dates and times.<sup>425</sup> Previously, a case would not be scheduled with EOIR until the DHS officer had filed the NTA with the court.

- ▶ **Dual Appeals Court-Immigration Judge Positions**—*March 2019*—The Justice Department posted six vacancies for the BIA that noted the board members would be able to serve from immigration courts throughout the country and act in a dual capacity, adjudicating cases at the trial court level and also reviewing court decisions appealed to the BIA.<sup>426</sup> Previously, the entire appellate board solely reviewed appeals cases and worked out of EOIR’s headquarters in Virginia.
- ▶ **Fast-Track Hiring Procedures for Appeals Court Judges**—*March 18, 2019*—EOIR created new hiring procedures for BIA members, allowing sitting immigration judges to bypass the typical two-year probationary period to be appointed immediately on a permanent basis.<sup>427</sup> The following August, six new BIA members were hired through this process.<sup>428</sup>
- ▶ **“No Dark Courtrooms”**—*March 29, 2019*—The director of EOIR issued a memorandum memorializing policy changes made since 2017 to minimize the number of immigration courtrooms that go unused each day.<sup>429</sup> Such changes have included increased hiring of immigration judges, increasing the availability of video teleconferencing, and improving scheduling and docketing practices.
- ▶ **Ending Interpretations at Master Calendar Hearings**—*June 2019*—The Justice Department began replacing in-court interpreters at initial immigration court hearings with videos informing foreign nationals of their rights.<sup>430</sup> The pre-recorded video advisals are in English and Spanish and targeted separately to detained and nondetained individuals.<sup>431</sup>
  - *June 9, 2020*—An audit of EOIR’s financial management revealed that calculations showing the high cost of interpreters in immigration court were significantly overestimated. That calculation had led to the usage of video advisals. After the audit, EOIR abandoned its plan to expand the use of the recordings and their use declined in courts where they were piloted.<sup>432</sup>

424 See Maria Gabriella Pezzo and Roberto Daza, “ICE Is Sending out Fake Court Dates to Immigrants. Here’s Why,” VICE News, November 1, 2018.

425 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Acceptance of Notices to Appear and Use of the Interactive Scheduling System*, December 21, 2018.

426 Tanvi Misra, “DOJ Changed Hiring to Promote Restrictive Immigration Judges,” Roll Call, October 29, 2019.

427 Memorandum from James R. McHenry III, Director of EOIR, to the Deputy Attorney General, *Candidate for an Appellate Immigration Judge Position*, July 18, 2019.

428 Misra, “DOJ Changed Hiring to Promote Restrictive Immigration Judges.”

429 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *No Dark Courtrooms*, March 29, 2019.

430 Tal Kopan, “Trump Administration Ending In-Person Interpreters at Immigrants’ First Hearings,” *San Francisco Chronicle*, July 3, 2019.

431 EOIR, “Proactive Disclosures,” accessed December 30, 2019.

432 Nanette Asimov, “Trump Officials Cut Immigration Court Interpreters After Misstating Costs, Report Finds,” *San Francisco Chronicle*, June 9, 2020; DOJ Office of the Inspector General, *Audit of the Executive Office for Immigration Review’s Fiscal Year 2019 Financial Management Practices* (Washington DC: DOJ, 2020).

- ▶ **Allowing the EOIR Director to Adjudicate Appeals**—*August 26, 2019*—In an interim final regulation, EOIR expanded the powers of the EOIR director, allowing the director to adjudicate cases before the BIA if those cases have been pending for more than 90 days (for appeals assigned to a single board member) or more than 180 days (for those assigned to a three-member panel).<sup>433</sup> Such cases were previously adjudicated by the attorney general. On November 3, 2020, the final rule was published.<sup>434</sup>
- ▶ **Expanding the Authority of the BIA**—*September 3, 2019*—EOIR issued a regulation expanding the authority of the BIA.<sup>435</sup> The rule allows the BIA to consider any issue on appeal, regardless of whether the parties raised it. The rule also states that when foreign nationals appeal BIA decisions to federal court, the court must assume the BIA considered all issues and arguments, even if the BIA did not mention them in its final decision. Without being able to see the BIA's reasoning, this will make it more difficult for foreign nationals to demonstrate the BIA was mistaken on appeal.
- ▶ **Expanding the Authority of the Director of EOIR**—*September 3, 2019*—EOIR issued a regulation expanding the authority of the director of EOIR over the agency's accreditation program for non-attorneys.<sup>436</sup> EOIR runs a Recognition and Accreditation (R&A) Program through which non-attorneys and their associated nonprofit organizations may become accredited in order to represent foreign nationals before immigration court. The EOIR director has the power to review denied requests, and this regulation expanded that power by allowing the director to make these decisions precedential and to refer such cases to the attorney general for review.
- ▶ **Expedited Appellate Review**—*October 1, 2019*—In the interest of speeding the appeals process, the director of EOIR issued a memo placing new case processing and performance requirements on the BIA.<sup>437</sup>
- ▶ **Online Case Status Information**—*February 25, 2020*—EOIR announced an online resource for checking case information.<sup>438</sup> Previously, automated case information was only available through a call-in hotline.
- ▶ **Creation of Denaturalization Section**—*February 26, 2020*—The Justice Department added a denaturalization section to its Office of Immigration Litigation in anticipation of an increased number of denaturalization referrals.<sup>439</sup>
- ▶ **Increasing DNA Collection from Immigration Detainees**—*March 9, 2020*—The Justice Department published a final rule that would greatly increase instances in which DNA samples are collected from foreign nationals in immigration custody.<sup>440</sup> Because the national mandate for DNA collection until

433 EOIR, "Organization of the Executive Office for Immigration Review."

434 EOIR, "Organization of the Executive Office for Immigration Review."

435 EOIR, "Board of Immigration Appeals: Affirmance without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," *Federal Register* 84, no. 127 (July 2, 2019): 31463–71.

436 EOIR, "Board of Immigration Appeals: Affirmance without Opinion."

437 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Case Processing at the Board of Immigration Appeals*, October 1, 2019.

438 EOIR, "Executive Office for Immigration Review Expands Automated Case Information Channels" (news release, February 25, 2020).

439 Justice Department, "The Department of Justice Creates Section Dedicated to Denaturalization Cases" (press release, February 26, 2020).

440 Justice Department, "DNA-Sample Collection from Immigration Detainees," *Federal Register* 85, no. 46 (March 9, 2020): 13483–93.

then had broad exceptions for individuals in immigration custody, the rule was expected to increase DHS's collection of DNA samples from 7,000 annually to approximately 755,000.<sup>441</sup> ICE officials conducted a pilot of the practice in Dallas beginning in May 2020 and planned to begin expanding across the country in October.<sup>442</sup> (For more on DNA collection from detainees, see Section 3.B.)

- ▶ **Hearings for Children over Video Teleconference (VTC)**—*March 9, 2020*—The administration launched a pilot program in Houston to hear all immigration court cases of unaccompanied minors in government custody via VTC.<sup>443</sup> The initiative was likely intended to speed up proceedings for these children.
- ▶ **Creation of Regional Deputy Chief Immigration Judge Positions**—*August 2020*—EOIR started advertising to fill new roles of regional deputy chief immigration judges in six locations: Chicago, Houston, Las Vegas, Miami, New York, and San Francisco.<sup>444</sup> They would be responsible for overseeing immigration judges in a certain region.
- ▶ **Creation of the Chief Administrative Law Judge**—*October 7, 2020*—EOIR issued a rule creating the position of chief administrative law judge in the Office of the Chief Administrative Hearing Officer.<sup>445</sup> The position supervises administrative law judges and their staff, taking those responsibilities from the chief administrative hearing officer, whose duties shifted to cover more administrative responsibilities.
- ▶ **Orders Requiring Filings by Mail**—*November 2020*—Immigration judges or supervisory immigration judges mailed orders directing attorneys representing some immigrants in court proceedings to file applications for relief with the court within a five- to six-week period, or their clients would be ordered removed.<sup>446</sup> This posed particular difficulties for immigrants, many of them children, who had been planning to file for relief with USCIS instead, but now risked being ordered removed if they did that.
- ▶ **Decertification of Immigration Judge Union**—*November 2, 2020*—The Federal Labor Relations Authority (FLRA) ruled that immigration judges were management officials and therefore not eligible for collective bargaining, effectively decertifying the National Association of Immigration Judges, which had been the recognized union since 1979.<sup>447</sup> This decision was the culmination of an effort by the Justice Department to decertify the union, which started in August 2019 when the agency first petitioned the FLRA to take away judges' collective bargaining power.

441 Justice Department, "DNA-Sample Collection from Immigration Detainees," *Federal Register* 84, No. 204 (October 22, 2019): 56400.

442 Hamed Aleaziz, "ICE Is Planning to Expand DNA Collection of Detained Immigrants Nationwide," BuzzFeed News, September 18, 2020.

443 Lomi Kriel, "New Trump Administration Policies Fast-Track Some Children's Immigration Court Hearings, Including Video Pilot in Houston," *Houston Chronicle*, March 4, 2020.

444 USA Jobs, "Regional Deputy Chief Immigration Judge," accessed June 4, 2021; EOIR, "Composition of the Office of the Chief Immigration Judge," updated March 18, 2021.

445 EOIR, "Office of the Chief Administrative Hearing Officer, Chief Administrative Law Judge," *Federal Register* 85, no. 195 (October 7, 2020): 63204–08.

446 Priscilla Alvarez, "Justice Department Places New Pressure on Immigrants Facing Deportation," CNN, November 24, 2020; Shannon Dooling, "'We've Never Seen These Orders Issued Before': New Deadlines In Immigration Court Have Attorneys Scrambling," WBUR, November 24, 2020.

447 *U.S. Department of Justice, EOIR and National Association of Immigration Judges, International Federation of Professional and Technical Engineers, Judicial Council 2*, No. WA-RP-19-0067 (National Labor Relations Authority, November 2, 2020).

- ▶ **Delegation of Regulation-Issuing Authority**—November 17, 2020 to January 20, 2021—Attorney General Barr issued an order delegating to the EOIR director the authority to issue regulations related to immigration through January 20, 2021.<sup>448</sup>
- ▶ **A Grant of TPS Does Not Constitute an Admission**—November 23, 2020—The BIA ruled that a grant of Temporary Protected Status (TPS) does not count as an admission to the country that would allow a TPS holder who entered the country illegally to be eligible to apply for a green card, outside of the Sixth, Eighth, and Ninth Circuits, which have ruled otherwise.<sup>449</sup> (For more on TPS and adjustment of status, see Section 5.D.)
- ▶ **Eliminating Master Calendar Hearings for Certain Noncitizens**—December 1, 2020—A policy memorandum went into effect requiring that noncitizens in removal proceedings who are not detained and who have representation have their master calendar hearings vacated.<sup>450</sup> Instead, they are to submit written pleadings, evidence, and applications for relief, after which they will be scheduled for merits hearings or have their cases resolved without a hearing.
- ▶ **Adjustments to the Asylum Clock**—December 4, 2020—A memorandum from the EOIR director created separate systems to track the days elapsed in an asylum case, to determine when certain actions can or must be taken.<sup>451</sup> One system is a 180-day Asylum Clock, by the end of which a case is supposed to be completed by an immigration judge, absent exceptional circumstances. The other system is a 180-day Employment Authorization Document (EAD) Clock, by the end of which asylum applicants may be granted work authorization if their case is still pending and they have submitted a separate application for an EAD. The Asylum Clock is paused only in exceptional circumstances, according to the discretion of individual immigration judges. The EAD Clock is paused if any applicant-caused delays arise in the case. Previously, these two clocks were not separated.
- ▶ **Speeding Up Appellate Review and Eliminating Administrative Closure**—January 15, 2021—A final rule published in December 2020 gave the BIA new powers to issue orders of removal and voluntary departure and grants of relief, while limiting the ability of the BIA and immigration judges to reopen cases or reconsider decisions. It also shortened the maximum length of briefing extensions before the BIA.<sup>452</sup> The rule largely eliminated the authority of appeals board members and immigration judges to administratively close cases, a tool that previously allowed them to temporarily remove some cases from the active docket.
- ▶ **Fee Increases**—January 19, 2021—The Justice Department issued a final rule on December 18, 2020, effective January 19, 2021, that would raise filing fees on a range of EOIR forms for the first time since 1986.<sup>453</sup> Many of the increases were significant; the cost of appealing an immigration judge decision

448 William P. Barr, Attorney General, *Order No. 4910-2020: Delegation of Authority to the Director, Executive Office for Immigration Review, to Issue Regulations Related to Immigration Matters within the Jurisdiction of the Executive Office for Immigration Review*, November 17, 2020.

449 *Matter of Roberto Carlos Padilla Rodriguez*, 28 I&N Dec. 164 (BIA, November 23, 2020).

450 Memorandum from James R. McHenry, Director, EOIR, to all of EOIR, *Enhanced Case Flow Processing in Removal Proceedings*, November 30, 2020.

451 Memorandum from James R. McHenry, Director, EOIR, to all of EOIR, *Asylum Processing*, December 4, 2020.

452 EOIR, “*Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*,” *Federal Register* 85, no. 242 (December 16, 2020): 81588–656.

453 EOIR, “*Executive Office for Immigration Review; Fee Review*,” *Federal Register* 85, no. 244 (December 18, 2020): 82750–95.



to the BIA would increase from \$110 to \$975. The proposed rule also clarified that the \$50 asylum fee imposed by USCIS in August 2020 (see Section 5.B.) would apply to asylum applications filed before the courts as well. However, a federal district court judge enjoined most of the rule the day before it went into effect.<sup>454</sup> The increased fee for motions to reopen or reconsider, which rose from \$110 to \$145, as well as one other fee increase were allowed to go into effect.

- ▶ **Increasing the Immigration Judge Corps**—*multiyear*—Through a series of strategies, including decreasing the time required to hire new immigration judges and hiring back retired immigration judges, the administration increased the corps of immigration judges from 289 judges in FY 2016 to 517 at the end of FY 2020.<sup>455</sup>
- ▶ **Pending at end of administration**
  - Requiring Filings with Immigration Courts when Providing Legal Advice—On September 30, 2020, the Justice Department proposed a rule that would require practitioners (both attorneys and others providing services) to file a notice of appearance with the immigration court any time they provided legal advice or judgment to a noncitizen in court proceedings.<sup>456</sup> The proposed rule had the potential to curtail services offered by legal orientation programs to noncitizens representing themselves in court, if indeed those services fell under the umbrella of providing legal advice or judgment, because it would not be feasible for these providers to file notices of appearance for every person they worked with.<sup>457</sup>
  - Defining “Good Cause” for Continuances—On November 27, 2020, the Justice Department proposed a rule that would narrow the situations in which immigration judges could rule that the “good cause” standard for granting continuances had been met.<sup>458</sup> It would also codify scenarios that would not constitute good cause, such as when a continuance would not affect the outcome of the proceedings, or when the continuance is being requested so an immigrant could seek parole, deferred action, or an exercise of prosecutorial discretion.
  - Limiting Circumstances for Granting Motions to Reopen or Reconsider and Stays of Removal—EOIR proposed a rule on November 27, 2020, that would sharply limit the situations in which immigrants could file motions to reopen or reconsider their cases with immigration courts or the BIA.<sup>459</sup> The proposed rule, for example, would prohibit granting these motions on the basis of an applicant having an application for relief pending before USCIS. The proposed rule would also make it more difficult for immigrants to win a stay of removal before EOIR,

454 *Catholic Legal Immigration Network, Inc., et al. v. EOIR et al.*, No. 20-cv-03812 (APM) (U.S. District Court for the District of Columbia, January 18, 2021).

455 EOIR, “Immigration Judge (IJ) Hiring,” updated July 2021; EOIR, “Backgrounder on EOIR Strategic Caseload Reduction Plan,” accessed January 3, 2019; memorandum from James McHenry, Acting Director of EOIR, Justice Department, to Deputy Attorney General, *Executive Office for Immigration Review’s Strategic Caseload Reduction Plan*, October 23, 2017.

456 EOIR, “Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances,” *Federal Register* 85, no. 190 (September 30, 2020): 61640–53.

457 Letter from Patricia Lee Refo, President, American Bar Association, to Lauren Alder Reid Assistant Director, Office of Policy, EOIR, *Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances, EOIR Docket No. 18-0301; A.G. Order No. 4841-2020*, October 30, 2020.

458 EOIR, “Good Cause for a Continuance in Immigration Proceedings,” *Federal Register* 85, no. 229 (November 27, 2020): 75925–41.

459 EOIR, “Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal,” *Federal Register* 85, no. 229 (November 27, 2020): 75942–59.

requiring them to file stay requests with DHS first, increasing the documents that must be filed with a stay request, and also prohibiting EOIR adjudicators from granting stays if the DHS prosecutor in the case opposes them.

- Expansion of Electronic Filing System and Limits on Law Student Representation—EOIR proposed a rule on December 4, 2020, that would expand the electronic filing system to all courts and the BIA and make it permanent, rather than a pilot project.<sup>460</sup> The proposed rule would also impose stricter regulations on law students and law graduates, newly requiring them to submit all filings through an attorney or accredited representative and to be physically accompanied by an attorney or accredited representative in order to represent immigrants at hearings.

## A. *Instructions to Immigration Judges*

The Executive Office for Immigration Review (EOIR) is the office within the Justice Department that houses the immigration court system, employing more than 500 immigration judges located in 67 immigration courts and two adjudication centers across the United States as of the end of FY 2020.<sup>461</sup> In the interest of speeding the adjudication of immigration cases, and thus allowing the administration to deport more immigrants more quickly, the Justice Department and EOIR made a number of changes to how and where immigration judges conduct adjudications.

As a result of the Trump administration's efforts, the number of cases adjudicated increased. During Trump's presidency, immigration judges completed an average of 217,000 cases per year, up from an average of 146,000 completions per year during Obama's second term.<sup>462</sup> Likewise, the share of completed cases that resulted in deportation orders (including both removal orders and voluntary departures) rose from an average of 61 percent during the final four years of Obama's presidency to an average of 73 percent during Trump's presidency; the share that resulted in relief being granted shrank from 14 percent to 11 percent.<sup>463</sup> There is widespread concern that the administration's emphasis on speed and efficiency sacrificed due process and denied foreign nationals a meaningful opportunity to apply for the benefits to which they were legally entitled.<sup>464</sup>

- ▶ **Mobilization of Immigration Judges**—*March 2017*—In his January 25, 2017, executive order on border security, the president ordered the Justice Department to assign immigration judges to particular detention facilities in order to increase the speed and efficiency of removal hearings. In March 2017, the Justice Department mobilized more than 100 immigration judges, assigning them

460 EOIR, "Executive Office for Immigration Review Electronic Case Access and Filing," *Federal Register* 85, no. 234 (December 4, 2020): 78240–58.

461 EOIR, "Immigration Judge (IJ) Hiring," updated July 2021; EOIR, "Office of the Chief Immigration Judge," updated December 7, 2020.

462 MPI analysis of data from EOIR, "Pending Cases, New Cases, and Total Completions."

463 MPI analysis of data from EOIR, "FY 2020 Decision Outcomes," updated October 13, 2020; EOIR, "FY 2019 Decision Outcomes," updated October 23, 2019; EOIR, Planning, Analysis, and Statistics Division, *Statistics Yearbook: Fiscal Year 2018* (Falls Church, VA: EOIR, n.d.), 13; EOIR, Planning, Analysis, and Statistics Division, *Statistics Yearbook: Fiscal Year 2017* (Falls Church, VA: EOIR, n.d.), 14.

464 Pierce, "As the Trump Administration Seeks to Remove Families"; House Committee on the Judiciary, "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" (hearing, January 29, 2020). The latter source includes links to statements submitted by many advocacy organizations.

to detention facilities across the country (including along the southwest border).<sup>465</sup> The mobilization included both in-person assignments and dockets heard via VTC.

- *May 2018*—The Justice Department announced the assignment of 18 supervisory immigration judges to ten immigration courts near the southwest border.<sup>466</sup> The judges were to hear cases in person and using VTC.
- ▶ **Limit Continuances**—*July 31, 2017*—In a memo, the chief immigration judge instructed immigration judges to limit continuances (when judges postpone case adjudications or hearings). To do so, the memo encouraged the judges to carefully consider both the number and length of continuances granted.<sup>467</sup>
  - *January 8, 2021*—A new memo on continuances replaced the 2017 memo. Like the 2017 memo, it directs judges to limit continuances.<sup>468</sup> It also aligns EOIR policy on continuances with the attorney general decision in *Matter of L-A-B-R-*, making it more difficult for immigrants to be granted continuances while waiting for USCIS to adjudicate applications for immigration benefits.
- ▶ **Weakened Child-Friendly Court Practices**—*December 20, 2017*—The chief immigration judge issued a memo that replaced prior guidance on children in the courtroom and weakened child-friendly court practices.<sup>469</sup> The memo eliminates prior language instructing judges to use the “best interests of the child” standard to ensure that a case involving a minor takes place in a “child appropriate” hearing environment. The memo also failed to include prior practices designed to make court proceedings less difficult for children, such as allowing them to visit an empty courtroom before their hearing or allowing them to call in for master calendar hearings if they do not reside close to the court.
- ▶ **Discouraging Changes in Venue for Court Cases**—*January 17, 2018*—The chief immigration judge issued a memo instructing immigration judges to discourage changes in venue, stating they cause “problems in caseload management and operational inefficiencies” in the courts.<sup>470</sup>
- ▶ **New Court Performance Metrics**—*January 17, 2018*—The immigration court implemented performance measures as an accountability tool to ensure it is “operating at peak efficiency.”<sup>471</sup> For

465 Justice Department, “Justice Department Releases Statistics on the Impact of Immigration Judge Surge” (news release, October 4, 2017).

466 Justice Department, “Justice Department Announces Additional Prosecutors and Immigration Judges for Southwest Border Crisis” (news release, May 2, 2018).

467 Memorandum from MaryBeth Keller, Chief Immigration Judge, Justice Department, to all immigration judges, all court administrators, all attorney advisors and judicial law clerks, and all immigration court staff, *Operating Policies and Procedures Memorandum 17-01: Continuances*, July 31, 2017.

468 Memorandum from James R. McHenry III, EOIR Director, Justice Department, to all of EOIR, *Continuances*, January 8, 2021.

469 Memorandum from MaryBeth Keller, Chief Immigration Judge, Justice Department, to all immigration judges, all court administrators, all attorney advisors and judicial law clerks, and all immigration court staff, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children*, December 20, 2017.

470 Memorandum from MaryBeth Keller, Chief Immigration Judge, Justice Department, to all immigration judges, all court administrators, all attorney advisors and judicial law clerks, and all immigration court staff, *Operating Policies and Procedures Memorandum 18-01: Changes of Venue*, January 17, 2018.

471 Memorandum from James McHenry, Director of EOIR, Justice Department, to the Office of the Chief Immigration Judge, all immigration judges, all court administrators, and all immigration court staff, *Case Priorities and Immigration Court Performance Measures*, January 17, 2018.

example, one measure of good performance is whether 85 percent of nondetained removal cases are completed within one year of initiation.

- *November 19, 2018*—The director of EOIR instructed immigration judges to adjudicate all asylum cases within 180 days.<sup>472</sup> Previously, certain cases referred to immigration courts from USCIS were not subject to the 180-day adjudication deadline.<sup>473</sup> The EOIR director also laid out more limited circumstances in which judges should approve continuances in asylum cases. The memo said that beyond meeting the “good cause” standard typically required for a grant of a continuance, asylum applicants asking for additional time before their next hearing would need to meet the “exceptional circumstances” standard required to exceed the 180-day adjudication deadline.
- *December 21, 2018*—The director of EOIR implemented performance standards for the Office of the Chief Administrative Hearing Officer, a tribunal within EOIR that has jurisdiction over cases related to employers, such as unfair immigration-related employment practices.<sup>474</sup>
- ▶ **Performance Standards for Immigration Judges**—*October 1, 2018*—The immigration court implemented performance standards for immigration judges, designating “satisfactory performance” as completing 700 cases per year and having less than 15 percent of cases remanded from the BIA or federal courts, in addition to meeting a number of other benchmarks.<sup>475</sup>
- ▶ **Limits on the Use of Status Dockets**—*August 16, 2019*—The director of EOIR issued a memo limiting instances in which immigration judges could use status dockets.<sup>476</sup> Moving a case to a status docket allows a judge to effectively pause the case while, for example, waiting for an individual’s application for immigration status to be adjudicated by USCIS. This practice grew increasingly important under the Trump administration because the attorney general ended another common tool for delaying these cases, administrative closure, and because under the administration’s case processing priorities judges were obligated to finish 85 percent of non-status-docket cases within one year. The August 2019 memo limited the types of cases judges could place on status dockets, making it more difficult for immigrants to seek relief before USCIS while in removal proceedings. As of July 2019, shortly before the memo was issued, there were 21,000 cases sitting on status dockets.<sup>477</sup>
- ▶ **Expedited Case Processing**—*January 31, 2020*—The acting deputy director of EOIR issued a memo establishing uniform case management and docketing practices, including scheduling initial master calendar hearings in nondetained cases within 30 and 90 days of the filing of the charging

472 Memorandum from James McHenry, Director of EOIR, Justice Department, to all of EOIR, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)*, November 19, 2018.

473 Memorandum from Brian M. O’Leary, Chief Immigration Judge, EOIR, Justice Department, to all immigration judges, all court administrators, all attorney advisors and judicial law clerks, and all immigration court staff, *The Asylum Clock*, December 2, 2013.

474 Memorandum from James R. McHenry, Director of EOIR, Justice Department, to all of the Office of the Chief Administrative Hearing Officer (OCAHO), *OCAHO Case Completion Goals*, December 21, 2018.

475 EOIR, “EOIR Performance Plan: Adjudicative Employees,” accessed January 3, 2019.

476 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Use of Status Dockets*, August 16, 2019.

477 Email from Mary Cheng, Deputy Chief Immigration Judge, EOIR, Justice Department, *Status Docket*, July 29, 2019, obtained by Hoppock Law Firm via *Freedom of Information Act* (FOIA) request.

document.<sup>478</sup> The memo also contains mandatory time frames for bond hearings, credible-fear reviews, and rescheduled cases.

- ▶ **Reduced Opportunity to Retain Counsel**—*January 31, 2020*—The acting deputy director of EOIR issued a memo stating that there is no court policy mandating or requiring judges to grant continuances.<sup>479</sup> This gives judges room to deny continuances despite past EOIR policy stating that foreign nationals should be granted at least one continuance in order to have time to retain counsel.<sup>480</sup>
- ▶ **Speeding Cases with Pro Bono Representation**—*December 10, 2020*—A memo largely reiterating existing policy and encouraging pro bono representation also newly advised immigration judges that delays in asylum proceedings, such as issuing continuances, could discourage pro bono representation.<sup>481</sup>
- ▶ **Fee Review Policy**—*December 18, 2020*—A memorandum established an EOIR policy of reviewing its fees biennially, which had previously been required by an Office of Management and Budget circular but not regularly implemented.<sup>482</sup>
- ▶ **Revised Case Processing Priorities**—*multiyear*—The administration made a number of changes to ensure that certain types of cases would receive expedited treatment.
  - *January 31, 2017*—In a memo to immigration judges, the chief immigration judge instructed them to prioritize cases involving (1) detained immigrants, (2) unaccompanied minors in Office of Refugee Resettlement (ORR) custody who do not have sponsors, and (3) foreign nationals released from custody on bond after six months or more of detention.<sup>483</sup> This memo removed unaccompanied minors (as a broader group), families, and recent border-crossers released from custody from the priorities.
  - *January 17, 2018*—Arguing that changes in priority designations hurt docket efficiency, the EOIR director greatly narrowed which cases were prioritized, limiting them to individuals in detention and any other cases subject to statutory or regulatory deadlines.<sup>484</sup>
  - *November 16, 2018*—EOIR announced that it had created expedited dockets for all cases involving families at ten immigration court locations: Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, Miami, New Orleans, New York City, and San Francisco.<sup>485</sup> The

478 Memorandum from Sirce E. Owen, Acting Deputy Director, EOIR, Justice Department, to all of EOIR, *Case Management and Docketing Practices*, January 31, 2020.

479 Memorandum from Sirce E. Owen, *Case Management and Docketing Practices*.

480 The court reaffirmed the policy that judges should grant at least one continuance to give foreign nationals an opportunity to retain counsel as recently as July 2017. See Memorandum from MaryBeth Keller, *Operating Policies and Procedures Memorandum 17-01: Continuances*.

481 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Pro Bono Legal Services*, December 10, 2020.

482 Memorandum from James McHenry, Director of EOIR, Justice Department, to all of EOIR, *Fees*, December 18, 2020.

483 Memorandum from MaryBeth Keller, Chief Immigration Judge, Justice Department, to all immigration judges, all court administrators, and all immigration court staff, *Case Processing Priorities*, January 31, 2017.

484 Memorandum from James McHenry, *Case Priorities and Immigration Court Performance Measures*.

485 Memorandum from James McHenry, Director of EOIR, Justice Department, to all of EOIR, *Tracking and Expedition of "Family Unit" Cases*, November 16, 2018.



expectation was that such cases would be completed within one year or less. As of January 10, 2020, 118,224 family units had been placed on this accelerated docket.<sup>486</sup>

- *November 19, 2018*—EOIR announced a policy of expediting asylum applications, with the expectation that they would be adjudicated within 180 days.<sup>487</sup>
- *January 2020*—EOIR reportedly told assistant chief immigration judges in an email that the court cases of unaccompanied children being held in government custody should be prioritized in the same way as cases involving detained individuals, and that they should be completed within the same 60-day period laid out for cases of detained individuals in the EOIR director’s January 2018 memo.<sup>488</sup>

#### ▶ **Pending at end of administration**

- **Allowing Immigration Judges Contempt Power**—The Justice Department indicated that it would publish a proposed rule that, if implemented, would allow immigration judges to sanction by financial penalty actions in contempt of the judge’s proper exercise of authority.<sup>489</sup> Congress allowed for such authority in a 1996 law, the *Illegal Immigration Reform and Immigrant Responsibility Act*, but all administrations since then have declined to implement it.

## B. *Attorney General Referral and Review*

The Trump administration made unprecedented use of the attorney general’s ability to self-refer immigration cases for review. The referral and review power allows the attorney general to be the final arbiter on immigration court cases and unilaterally make law. Attorneys general under the Trump administration far outpaced those in prior administrations in terms of use of this power, with 17 self-referrals, compared to four under the entirety of the Obama administration and ten under Bush.<sup>490</sup> Using this power, attorneys general under Trump made major changes to the definition of asylum, the docket management strategies of immigration judges, and more.

- ▶ **Limits on Asylum Hearings**—*March 5, 2018*—In *Matter of E-F-H-L*, Attorney General Sessions overruled a case that held asylum and withholding-of-removal applicants were entitled to full evidentiary hearings.<sup>491</sup>
- ▶ **End of Administrative Closure of Immigration Cases**—*May 17, 2018*—In *Matter of Castro-Tum*, Sessions ruled that immigration judges generally cannot administratively close cases (an option that judges had previously used to temporarily take cases off of the court docket, usually to allow for the

486 EOIR, “Family Unit’ Data for Select Courts,” accessed January 2, 2020.

487 Memorandum from James McHenry, Director of EOIR, Justice Department, to all of EOIR, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)*, November 19, 2018.

488 Priscilla Alvarez, “Trump Administration Puts Pressure on Completing Deportation Cases of Migrant Children,” CNN, February 12, 2020.

489 Justice Department, “Civil Money Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority” (proposed rule 1125-AB02, Spring 2020).

490 Pierce, *Obscure but Powerful*, 7.

491 *Matter of E-F-H-L*, 27 I&N Dec. 226 (Attorney General, March 5, 2018).

completion of immigration processes before other agencies).<sup>492</sup> However, the Fourth and Seventh Circuit Courts of Appeals later rejected *Castro-Tum* in their jurisdictions.<sup>493</sup> Immigration judges and the BIA thus retained administrative closure authority only in cases arising in Illinois, Indiana, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wisconsin.

- *June 15, 2018*—ICE’s Office of the Principal Legal Advisor issued a memo to ICE attorneys instructing them to file motions to place cases that had been administratively closed back on to the court docket.<sup>494</sup> At that time, there were more than 355,000 administratively closed cases. By the end of July 2020, only a small portion of cases had been moved back to the active docket, and more than 290,000 cases remained administratively closed.<sup>495</sup>
- ▶ **Limits on Asylum for Victims of Private Violence**—*June 11, 2018*—In *Matter of A-B-*, Sessions limited the ability of victims of domestic or gang violence to qualify for asylum.<sup>496</sup> In December 2018, a federal district court judge enjoined the application of this ruling to credible-fear interviews (the initial interview between a USCIS asylum officer and an asylum seeker), but it still applies at the ultimate adjudication of asylum cases.<sup>497</sup> A federal appeals court partially upheld the district court’s decision on July 17, 2020, allowing the government to apply some, but not all, of the attorney general’s ruling in *Matter of A-B-* at the credible-fear stage of the asylum process.<sup>498</sup>
  - **Further Limits on Asylum**—On January 14, 2021, Acting Attorney General Rosen made a second attorney general decision in *Matter of A-B-* after self-referring the case that further restricted which cases qualify for asylum.<sup>499</sup> He ruled that violence or threats experienced by an asylum seeker do not constitute persecution if the government in the applicant’s origin country made attempts to prevent them.
- ▶ **Limits on Continuances**—*August 16, 2018*—In *Matter of L-A-B-R-*, Sessions made it more difficult for foreign nationals to have their immigration court cases postponed while they wait for USCIS to adjudicate their applications for immigration benefits.<sup>500</sup>
  - *January 22, 2020*—In *Matter of L-N-Y-*, the BIA made it even more difficult for foreign nationals to receive continuances while waiting for USCIS adjudications, ruling that an applicant’s eligibility for relief before USCIS and the potential effects of the relief on the proceedings

492 *Matter of Castro-Tum*, 27 I&N Dec. 271 (Attorney General, May 17, 2018). This decision ended the ability of foreign nationals in removal proceedings to apply for the provisional unlawful presence waiver, which requires any pending removal proceedings be administratively closed prior to filing. See 8 *Code of Federal Regulations* § 212.7(e)(4)(iii). As a result, foreign nationals in removal proceedings who are trying to legalize as the spouse or child of a U.S. citizen or legal permanent resident must do so by applying from within their home country.

493 *Jesus Humberto Zuniga Romero v. William Barr*, No. 18-1850 (U.S. Court of Appeals for the Fourth Circuit, August 29, 2019); *Yeison Meza Morales v. William P. Barr*, No. 19-1999 (U.S. Court of Appeals for the Seventh Circuit, June 26, 2020).

494 Memorandum from Adam V. Loiacono, Deputy Principle Legal Advisor for Enforcement and Litigation, and Ken Padilla, Deputy Principle Legal Advisor for Field Legal Operations, Office of the Principal Legal Advisor (OPLA), ICE, to OPLA headquarters and field personnel, *OPLA Guidance: Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)*, June 15, 2018.

495 TRAC, “The Life and Death of Administrative Closure,” updated September 10, 2020.

496 *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, June 11, 2018).

497 *Grace v. Matthew G. Whitaker*, No. 18-cv-01853 (U.S. District Court for the District of Columbia, December 19, 2018).

498 *Grace v. William P. Barr*, No. 19-5013 (U.S. Court of Appeals for the District of Columbia, July 17, 2020).

499 *Matter of A-B-*, 28 I&N Dec. 199 (Attorney General, January 14, 2021).

500 *Matter of L-A-B-R-*, 27 I&N Dec. 405 (Attorney General, August 16, 2018).

alone do not justify a continuance grant.<sup>501</sup> The BIA held that judges, when deciding whether to grant a continuance, should weigh how long it will take USCIS to adjudicate the benefit and whether the foreign national is held in detention.

- ▶ **Limits on Terminations**—*September 18, 2018*—In *Matter of S-O-G- & F-D-B-*, Sessions ruled that immigration judges can only terminate cases in very specific scenarios.<sup>502</sup>
- ▶ **End of Bond for Asylum Seekers**—*April 16, 2019*—In *Matter of M-S-*, Attorney General Barr ruled that immigration judges do not have the authority to hold bond hearings for arriving asylum seekers.<sup>503</sup> Without this option, assuming ICE has the resources to hold them, many asylum seekers would be held in custody indefinitely while their immigration proceedings are pending.<sup>504</sup> A federal district court judge enjoined the decision in July 2019, requiring immigration courts to continue to provide bond hearings to certain asylum seekers.<sup>505</sup> The Ninth Circuit Court of Appeals upheld the district court’s decision in March 2020.<sup>506</sup> However, in January 2021, the Supreme Court vacated the Ninth Circuit’s decision and instructed the court to reconsider the case.<sup>507</sup>
- ▶ **Limits on Asylum Based on Family Membership**—*July 29, 2019*—In *Matter of L-E-A-*, Barr made it more difficult for applicants to qualify for asylum on the grounds of persecution based on one’s family relationship, holding that most nuclear families are not sufficiently “socially distinct” to meet the requirements of persecution on the basis of membership in a particular social group.<sup>508</sup>
- ▶ **Expansion of the Attorney General’s Authority**—*September 3, 2019*—EOIR issued a regulation expanding the authority of the attorney general to make binding law.<sup>509</sup> While the BIA decides around 30,000 cases each year, it only makes a handful of those precedential, or binding law. This regulation allows the attorney general to bind immigration judges and DHS to any precedent set in those tens of thousands of cases.
- ▶ **Limits on Cancellation of Removal**—*October 25, 2019*—In *Matter of Castillo-Perez*, Barr held that foreign nationals with two or more convictions for driving under the influence should presumptively be denied cancellation of removal.<sup>510</sup>

501 *Matter of L-N-Y*, 27 I&N Dec. 755 (BIA, January 22, 2020).

502 *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (Attorney General, September 18, 2018).

503 *Matter of M-S-*, 27 I&N Dec. 509 (Attorney General, April 16, 2019). Before referring *Matter of M-S-* to himself, then Attorney General Jeff Sessions referred *Matter of M-G-G-* with the intention of reviewing the same issue. However, after the referral, the respondent was removed from the country, prompting the attorney general to no longer review the case. See *Matter of M-G-G-*, 27 I&N Dec. 475 (Attorney General, October 12, 2018); *Matter of M-S-*, 27 I&N Dec. 476 (Attorney General, October 12, 2018).

504 Note, however, that because of prior law, families and unaccompanied children are exempted from this decision.

505 *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 2:18-cv-00928-MJP (U.S. District Court Western District of Washington at Seattle, July 2, 2019).

506 *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, March 27, 2020). Previously, on July 22, 2019, the Ninth Circuit declined to stay the order requiring bond hearings. See *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, July 22, 2019).

507 *ICE, et al. v. Yolany Padilla, et al.*, No. 20-234 (U.S. Supreme Court, certiorari – summary dispositions, January 11, 2021); Hillel R. Smith, *Is Mandatory Detention of Unlawful Entrants Seeking Asylum Constitutional?* (Washington, DC: Congressional Research Service, 2021).

508 *Matter of L-E-A-*.

509 EOIR, “Board of Immigration Appeals: Affirmance without Opinion.”

510 *Matter of Castillo-Perez*, 27 I&N Dec. 664 (Attorney General, October 25, 2019).

- ▶ **Increasing the Effects of State Criminal Convictions**—*October 25, 2019*—In *Matter of Thomas-Thompson*, Barr ruled that state court orders that modify, clarify, or otherwise alter a foreign national's sentence, such as expungements, will be disregarded unless they are based on reasons related to the merits of the underlying criminal proceeding.<sup>511</sup> Thus, a foreign national's expunged criminal conviction may still prevent the individual from receiving certain immigration benefits.
- ▶ **Limits on Relief under the Convention Against Torture**—*February 26, 2020*—In *Matter of R-A-F*, Barr narrowed the definition of "torture" for the purposes of qualifying for deferral of removal under the Convention Against Torture.<sup>512</sup> As a result of Barr's opinion, the torture must be "specifically intended" to inflict severe harm or suffering and it must be motivated by a specific aim, including, among other things, obtaining information or a confession, or punishing the victim for an act.
- ▶ **Clarifying Definitions under the Convention Against Torture**—*July 14, 2020*—In *Matter of O-F-A-S*, Barr settled developing confusion between immigration courts and federal courts of appeals on the requirement that to be considered torture for the purposes of a claim under the Convention Against Torture, an applicant's pain or suffering must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>513</sup> Barr clarified that a perpetrator must be acting in a way made possible only by their authority under the law for them to be considered as acting in "an official capacity," possibly including a misuse of such authority.
- ▶ **Increased Immigration Consequences for Foreign Nationals with Convictions**—*July 30, 2020*—In *Matter of Onesta Reyes*, Barr found that certain state court convictions can be considered aggravated felonies for immigration purposes, even if they are broader than (and therefore different from) the convictions defined in federal law as aggravated felonies, as long as every criminal act they cover is included in the aggravated felony definition.<sup>514</sup> The decision thus bars convicted foreign nationals from certain immigration benefits and increases the likelihood that they will be deported.<sup>515</sup>
- ▶ **Increased Scrutiny in BIA Review of Asylum Cases**—*September 24, 2020*—In *Matter of A-C-A-A*, Barr held that in a review of an asylum case, the BIA must consider *de novo* the facts found by the immigration judge and each element of the asylum claim.<sup>516</sup> The attorney general also reiterated the importance of finding that the harm or threats an asylum seeker faced were "on account of" membership in a cognizable particular social group, not simply incidental to the persecutor's motivation.
- ▶ **Exemption from the Persecutor Bar Rejected**—*November 5, 2020*—In *Matter of Daniel Girmai Negusie*, Barr found that coercion and duress are irrelevant to the application of the persecutor bar.<sup>517</sup> Individuals who commit persecution are barred from receiving asylum and withholding of removal in the United States. This decision eliminates an exemption for applicants who show that they committed

511 *Matter of Michael Vernon Thomas, Joseph Lloyd Thompson*, 27 I&N Dec. 674 (Attorney General, October 25, 2019).

512 The opinion also holds that the BIA should consider *de novo* the application of law to facts, including, for example, whether the anticipated treatment in an applicant's home country rises to the regulations' definition of "torture." See *Matter of R-A-F*, 27 I&N Dec. 778 (Attorney General, February 26, 2020).

513 *Matter of O-F-A-S*, 28 I&N Dec. 35 (Attorney General, July 14, 2020).

514 *Matter of Onesta Reyes*, 28 I&N Dec. 52 (Attorney General, July 30, 2020).

515 *Matter of Onesta Reyes*, 27 I&N Dec. 708 (Attorney General, November 21, 2019).

516 *Matter of A-C-A-A*, 28 I&N Dec. 84 (Attorney General 2020).

517 *Matter of Daniel Girmai Negusie*, 28 I&N Dec. 120 (Attorney General, November 5, 2020).

persecution under imminent threat. Barr’s decision also concludes that, if evidence in the record indicates the persecutor bar may apply, the burden is on the applicant to show by a preponderance of the evidence that it does not, rather than on DHS to show that the applicant is ineligible for protection.

► **Pending at end of administration**

- **Expansion of the Attorney General’s Referral and Review Power**—The Justice Department indicated it intended to significantly expand the attorney general’s referral and review power.<sup>518</sup> Under the established practice, the attorney general can only review cases that have been decided by the BIA. The Justice Department intended to introduce regulations that would enable the attorney general to also review cases pending before the BIA and those decided by immigration judges but not yet appealed. This would increase the cases on which the attorney general could rule by more than 700 percent, from an average of 33,000 cases per year to 247,000.<sup>519</sup>
- **Raising the Threshold for Asylum Eligibility**—On June 17, 2020, Barr referred the case *Matter of A-M-R-C-* to himself to review several issues related to when applicants are barred from receiving asylum, sufficient due process, and a significant delay between the BIA’s decision and the attorney general’s review, but a decision was not issued before the end of the Trump administration.<sup>520</sup> The BIA decisions in *Matter of A-M-R-C-* were issued in 2006.<sup>521</sup>

## 5 Humanitarian Migration

Humanitarian migrants were a frequent target of Trump’s rhetoric and the subject of many policy changes throughout his presidency. The administration implemented overlapping policies to decrease the number of refugees and asylum seekers who could access protection in the United States, including setting the lowest annual refugee admissions ceilings since the modern U.S. refugee resettlement program began in 1980.<sup>522</sup> The Trump administration also increased screening of refugees, slowing down the resettlement process and leading to admissions below the already low annual caps.

On the U.S.-Mexico border, a series of policies targeting different populations made almost all migrants crossing the border or arriving without documentation ineligible for asylum and/or subject to quick removal.<sup>523</sup> For example, a twin set of policies, the Humanitarian Asylum Review Process (HARP) and Prompt Asylum Case Review (PACR), subjected Mexican and Central American migrants, respectively, to faster asylum screenings and,

*The administration implemented overlapping policies to decrease the number of refugees and asylum seekers who could access protection in the United States.*

518 Justice Department, “Referral of Decisions in Immigration Matters to the Attorney General” (proposed rule 1125-AA86, Fall 2018).

519 MPI analysis of data from EOIR, *Statistics Yearbook: Fiscal Year 2017* (Washington, DC: EOIR, 2017), 10, 36.

520 *Matter of A-M-R-C-*, 28 I&N Dec. 7 (Attorney General, June 17, 2020).

521 Daniel M. Kowalski, “EOIR Posts Case Underlying *Matter of A-M-R-C-*,” Lexis Nexis, June 19, 2020.

522 MPI Data Hub, “U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present,” accessed September 16, 2021.

523 Chishti and Bolter, “Interlocking Set of Trump Administration Policies.”



if unsuccessful, removal. These programs were implemented in conjunction with a rule that made Central Americans ineligible for U.S. asylum if they had not first sought and been denied asylum in Mexico, moving asylum seekers more quickly through a system in which it was becoming increasingly difficult to obtain protection.

In addition to high-profile changes to refugee resettlement and access to asylum at the U.S.-Mexico border, the administration also reduced access to other humanitarian pathways, including by narrowing the standards abused or neglected children and young adults must meet to receive Special Immigrant Juvenile status, and terminating TPS for 98 percent of beneficiaries.<sup>524</sup>

## A. Refugees

The Trump administration worked to shrink every aspect of the U.S. refugee resettlement system. It set progressively lower refugee admissions ceilings, ultimately setting the FY 2021 ceiling at 15,000—just 15 percent of what it had been when Trump took office (110,000 in FY 2017, set by the Obama administration). In two of its four years, the administration admitted the fewest refugees in a single year since the resettlement program began in 1980. Throughout his term, Trump also changed the allocation strategy for refugee admissions and instituted stricter screening of refugees prior to resettlement. Refugees admitted from the Middle East decreased, while those admitted from Europe increased; similarly, the share of resettled refugees who were Muslim decreased from 46 percent in FY 2016 to 16 percent in FY 2019.<sup>525</sup> As the number of arriving refugees dwindled, the United States lost its place as the world leader in refugee resettlement. The decreased arrivals and associated funding cuts also damaged the United States' resettlement infrastructure, shrinking the network of organizations across the country that assist newly resettled refugees—a reduction in resettlement capacity that will likely take years to rebuild.

- ▶ **Refugee Ban**—*June 26 to October 24, 2017*—Pursuant to the president's March 2017 "travel ban" executive order (see Section 6), the administration suspended the travel of refugees into the United States for 120 days, during which the administration reviewed the refugee application and adjudication process for potential security threats.<sup>526</sup>
  - **Targeted Refugee Ban**—*October 24 to December 23, 2017*—The administration announced it would deprioritize the resettlement applications of refugees from 11 countries deemed a "high risk" to national security (reportedly Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen) while the government further reviewed these security

524 MPI analysis of data from Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2018), 5.

525 Mark Greenberg, Julia Gelatt, and Amy Holovnia, "As the United States Resettles Fewer Refugees, Some Countries and Religions Face Bigger Hits than Others" (commentary, MPI, Washington, DC, September 2019).

526 Pursuant to the president's March 2017 "travel ban" executive order. See White House, "Executive Order 13780 of March 6, 2017: Protecting the Nation from Foreign Terrorist Entry into the United States," *Federal Register* 82, no. 45 (March 9, 2017): 13209–19.

risks.<sup>527</sup> In practice, this amounted to the continuation of the refugee ban for nationals of those 11 countries, until it was enjoined by a court in December 2017.<sup>528</sup>

- **Additional Vetting for Refugees from “High Risk” Countries—January 29, 2018**—Following the second security review of refugees from the 11 countries, the administration announced it would implement additional screening measures for refugees from those countries and would periodically update the list of “high risk” countries.<sup>529</sup> Those changes included longer interviews, separate interviews for children, and an expanded list of “national security indicators” that would warrant additional screenings.<sup>530</sup>
- ▶ **End of the Central American Minors (CAM) Refugee and Parole Program—August 16, 2017**—The administration ended the parole portion of the CAM Program, an in-country refugee processing program for minors in El Salvador, Guatemala, and Honduras who had parents in the United States.<sup>531</sup> On November 9, 2017, the State Department stopped accepting new applications for the refugee side of the program.<sup>532</sup> On January 31, 2018, USCIS stopped interviewing applicants for the CAM Program altogether.
  - *March 1, 2019*—A federal district court judge in Northern California ordered DHS to continue processing the cases of 2,714 Central American minors who had been conditionally approved to be paroled into the United States, but whose approvals were terminated with the program.<sup>533</sup> In an update to the court, the government reported that 950 CAM applicants had traveled to the United States as of December 17, 2020.
- ▶ **Elimination of Offices Serving Small Numbers of Refugees—December 2017**—The State Department determined that refugee resettlement affiliates, often local NGOs, that were expected to serve fewer than 100 refugees in FY 2018 would not be allowed to resettle new refugees.<sup>534</sup>
- ▶ **Increased Data Sharing with the UN Refugee Agency—January 9, 2019**—DHS signed a memorandum of understanding with the United Nations High Commissioner for Refugees (UNHCR)

527 White House, “Executive Order 13815 of October 24, 2017: Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities,” *Federal Register* 82, no. 207 (October 27, 2017): 50055–58; memorandum from Secretary of State Rex W. Tillerson, Acting Secretary of Homeland Security Elaine Duke, and Director of the Office of the Director of National Intelligence Daniel Coats, to the president, *Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities*, October 23, 2017.

528 International Refugee Assistance Project (IRAP), *Debunking “Extreme Vetting”: Recommendations to Build Back the U.S. Refugee Admissions* (New York: International Refugee Assistance Project, 2020) 22–24.

529 DHS, “DHS Announces Additional, Enhanced Security Procedures for Refugees Seeking Resettlement in the United States” (press release, January 29, 2018).

530 IRAP, *Debunking “Extreme Vetting,”* 25.

531 DHS, “Termination of the Central American Minors Parole Program,” *Federal Register* 82, no. 157 (August 16, 2017): 38926–27. However, advocates allege the program stopped much earlier, with USCIS cancelling and stopping interviews within the first week of the president taking office and stopping issuing decisions to interviewed beneficiaries. See, for example, *S.A. v. Donald J. Trump*, No. 18-cv-03539-LB (U.S. District Court Northern District of California, December 10, 2018).

532 USCIS, “Central American Minors (CAM): Information for Parole Applicants,” updated June 18, 2019.

533 *S.A. v. Donald J. Trump*, No. 18-cv-03539-LB (U.S. District Court Northern District of California, March 1, 2019); *S.A. v. Donald J. Trump*, No. 18-cv-03539-LB (U.S. District Court Northern District of California, defendants’ seventh quarterly report, December 30, 2020).

534 Yeganeh Torbati and Mica Rosenberg, “Exclusive: State Department Tells Refugee Agencies to Downsize U.S. Operations,” Reuters, December 21, 2017.

to expand the biometric and biographic data UNHCR shares with DHS.<sup>535</sup> DHS will compare the data received from UNHCR to the data it receives from refugees for identity verification as part of the vetting process prior to resettlement in the United States.

- ▶ **Requiring States and Localities to Consent to Refugee Resettlement**—*September 26, 2019*—The president issued an executive order requiring both states and local entities to provide written consent in order to continue receiving refugees,<sup>536</sup> offering an unprecedented level of state and local control over refugee resettlement. By the end of January 2020, 42 states and more than 100 localities had consented to receiving refugees.<sup>537</sup>
  - *January 15, 2020*—A federal district judge temporarily enjoined the executive order, meaning refugees could be resettled even in states and localities that had not opted in.<sup>538</sup>
  - *January 8, 2021*—A U.S. court of appeals upheld the district court’s ruling, saying that Trump’s executive order was in conflict with the *Refugee Act*.<sup>539</sup>
- ▶ **Refugees from Hong Kong**—*July 14, 2020*—The president issued an executive order finding that Hong Kong is no longer sufficiently autonomous to receive different treatment by the United States from mainland China.<sup>540</sup> The order states that due to this finding, refugee slots within the FY 2020 ceiling may be reallocated to residents of Hong Kong.
- ▶ **Limiting Refugee Data Availability**—*October 9, 2020*—The State Department announced that its Bureau of Population, Refugees, and Migration would transition to a new IT system and would no longer publish reports on demographic information (including age, educational attainment, languages spoken, and ethnicity) of admitted refugees by country of birth.<sup>541</sup>
- ▶ **Historic Reductions in Refugee Admissions**—*multiyear*—In addition to suspending refugee admissions from June 26 to October 24, 2017, the administration set lower annual refugee ceilings each year, and annual admissions of refugees hit record low numbers.
  - FY 2017: 50,000 ceiling (lowered from 110,00 after Trump entered office), 53,716 actual admissions<sup>542</sup>
  - FY 2018: 45,000 ceiling, 22,548 actual admissions<sup>543</sup>

535 DHS, *Privacy Impact Assessment for the United Nations High Commissioner for Refugees (UNHCR) Information Data Share* (Washington, DC: DHS, 2019).

536 White House, “Executive Order 13888 of September 26, 2019: Enhancing State and Local Involvement in Refugee Resettlement,” *Federal Register* 84, no. 190 (October 1, 2019): 52355–56.

537 Muzaffar Chishti and Sarah Pierce, “Despite Trump Invitation to Stop Taking Refugees, Red and Blue States Alike Endorse Resettlement,” *Migration Information Source*, January 29, 2020.

538 *HIAS, Inc. v. Donald Trump*, Civil No. PJM 19-3346 (U.S. District Court for the District of Maryland, memorandum opinion, January 15, 2020).

539 *HIAS, Inc. v. Donald Trump*, No. 20-1160 (U.S. Court of Appeals for the Fourth Circuit, January 8, 2021).

540 White House, “Executive Order 13936 of July 14, 2020: The President’s Executive Order on Hong Kong Normalization,” *Federal Register* 85, no. 138 (July 17, 2020): 43413–17.

541 State Department, “Migration of Refugee Case Processing System” (press release, September 25, 2020).

542 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS),” accessed January 4, 2019.

543 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS),”

- FY 2019: 30,000 ceiling,<sup>544</sup> 30,000 actual admissions<sup>545</sup>
- FY 2020: 18,000 ceiling,<sup>546</sup> 11,814 actual admissions<sup>547</sup>
- FY 2021: 15,000 ceiling,<sup>548</sup> 1,403 admissions through January 2021.<sup>549</sup>

USCIS blamed the slowing of refugee admissions, in part, on the need to reassign staff from the Refugee Affairs Division to the Asylum Division to address the backlog in asylum cases. During FY 2018, 100 of the 168 refugee officers were assigned to asylum cases.<sup>550</sup> By February 2019, USCIS reported that “nearly all” refugee officers were returned to processing refugee applications.<sup>551</sup> The reduction in refugee admissions, combined with the pauses in admissions and increases in security vetting, had a particular impact on Iraqis eligible for the Direct Access Program (DAP), which allows Iraqis who have worked for the U.S. military or U.S. government to be resettled through the refugee program. In FY 2020, 537 Iraqis were resettled through the refugee program, in FY 2019 and FY 2018, 465 and 147 Iraqis were resettled, respectively.<sup>552</sup> By comparison, nearly 7,000 Iraqis were resettled through the DAP in FY 2017.

- ▶ **Admitting Refugees by Category**—*multiyear*—Beginning in FY 2020, the president changed the way refugee admissions are allocated. In contrast to past years, when admissions were allocated by refugees’ region of origin, the president determined that admissions would be split among several different categories. As such, the U.S. refugee program was instructed to no longer accept individual referrals for refugees who fell outside the designated categories.<sup>553</sup>

- For FY 2020, admissions slots were distributed among: refugees fleeing religious persecution, certain former Soviet and Indochinese nationals, and Iranian religious minorities (5,000 admissions); Iraqis who assisted the U.S. military (4,000); Guatemalans, Hondurans, and Salvadorans (1,500); with the remaining 7,500 slots for other refugees.<sup>554</sup>
- In FY 2021, admissions were allocated among: people who had faced or fear religious persecution (5,000 admissions); Iraqis who assisted the U.S. military (4,000); Guatemalans, Hondurans, and Salvadorans (1,000); with the remaining 5,000 slots allotted to other refugees.<sup>555</sup>

544 White House, “Presidential Determination on Refugee Admissions for Fiscal Year 2019,” *Federal Register* 83, no. 212 (November 1, 2018): 55091–92.

545 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS).”

546 White House, “Presidential Determination on Refugee Admissions for Fiscal Year 2020,” *Federal Register* 84, no. 230 (November 29, 2019): 65903–05.

547 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS).”

548 White House, “Presidential Determination on Refugee Admissions for Fiscal Year 2021,” *Federal Register* 85, no. 216 (November 6, 2020): 71219–21.

549 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS).”

550 Letter from USCIS, “The Department of Homeland Security’s Response to Senator Van Hollen’s June 22, 2018 Letter,” October 1, 2018.

551 USCIS, “Asylum Division Quarterly Stakeholder Meeting” (phone call, February 19, 2019).

552 MPI analysis of data from State Department, “Worldwide Refugee Admissions Processing System (WRAPS).”

553 U.S. Department of State, “Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021,” accessed July 2, 2021; U.S. Department of State, “Report to Congress on Proposed Refugee Admissions for Fiscal Year 2020,” accessed July 2, 2021.

554 White House, “Presidential Determination on Refugee Admissions for Fiscal Year 2020.”

555 White House, “Presidential Determination on Refugee Admissions for Fiscal Year 2021.”

- ▶ **Increased Vetting of Refugees—*multiyear***—Over the course of the administration, the agencies involved in the refugee resettlement program added various new security checks and other vetting measures, referred to by Trump as “extreme vetting.”<sup>556</sup> Combined, the changes slowed the review of refugee applications and, ultimately, the number of refugees admitted to the country.
  - **Increased Data Collection—*October 23, 2017***—The Departments of State and Homeland Security, along with the Director of National Intelligence, issued a memo mandating more expansive data collection from refugees.<sup>557</sup> Agencies were required to collect contact information going back ten years (instead of five), more thorough address information, and contact information for all close relatives (not just those in the United States). The memo also expanded the number of people who required extra security checks and interviews, and those whose social media would be reviewed.
  - **Vetting Quotas—*February 2018***—The State Department limited the number of certain security checks (known as Security Advisory Opinions, or SAOs) resettlement officers could request per month and warned that the turnaround on those requests would be between one and three months. The initial quota was set at 2,010 requests per month and was then lowered to 500 requests per month on April 30.<sup>558</sup> For the expanded population who had to undergo SAOs as part of their applications, the process slowed significantly. These limits were eliminated sometime before February 2019.
  - **Pipeline DHS Review (PDR)—*April 2, 2018***—USCIS formally began a process of reviewing files of refugees from the 11 “high risk” countries identified in January 2018 and other individuals identified for extra security screening, who had already completed USCIS interviews, to determine if they warranted a reinterview in light of other vetting changes.<sup>559</sup> In February 2019, about 6,000 cases were pending in the PDR, and of the 1,300 that had completed the review, 14 percent had resulted in a reinterview.<sup>560</sup>
- ▶ **Closures of Refugee Resettlement Offices—*multiyear***—As of May 2020, 134 refugee resettlement affiliates (the organizations that support refugees after arrival) had closed or been “zeroed out” (i.e., prohibited by the State Department from resettling any refugees) since FY 2017.<sup>561</sup> These closures and budget restrictions represent a 38 percent decrease in national resettlement capacity. It is unclear whether they closed due to a December 2017 State Department decision to eliminate affiliates that resettled fewer than 100 refugees annually<sup>562</sup> or if they were forced to close because of a lack of funds due to decreasing refugee admissions (the organizations receive funding per refugee served).

556 Philip Rucker, “Trump Says He Ordered U.S. to ‘Step up Our Already Extreme Vetting Program,’” *Washington Post*, October 31, 2017.

557 Memorandum from Rex Tillerson, *Resuming the United States Refugee Admissions Program; IRAP, Debunking “Extreme Vetting,”* 19–22.

558 IRAP, *Debunking “Extreme Vetting,”* 26–27.

559 Memorandum from Joanna Ruppel, Chief, Refugee Affairs Division, to All International Operations Division Staff and All Refugee Affairs Division Staff, *Pipeline DHS Review (PDR) Guidance*, April 2, 2018.

560 IRAP, *Debunking “Extreme Vetting,”* 28.

561 Silva Mathema and Sofia Carratala, *Rebuilding the U.S. Refugee Program for the 21st Century* (Washington, DC: Center for American Progress, 2020).

562 Torbati and Rosenberg, “Exclusive: State Department Tells Refugee Agencies to Downsize.”



## B. Asylum Seekers

The Trump administration used a variety of policy measures to cut off access to protection for those seeking safety in the United States. At the U.S.-Mexico border, the administration took steps to prevent migrants from accessing asylum by forcing them to wait in Mexico both before requesting asylum (through metering, a practice of allowing only a limited number of asylum seekers through ports of entry each day) and while their claims were considered (under the Migrant Protection Protocols [MPP], also known as Remain in Mexico). It sought to restrict asylum eligibility based on certain common grounds for seeking protection and made groups of migrants ineligible if they had not previously applied for and been denied asylum in a transit country. And in an effort to reduce the growing asylum case backlog, policies were put in place to quickly remove migrants who did not pass initial credible-fear screenings. At the same time, these initial fear screenings were made more difficult to pass: only 44 percent passed the initial screening in FY 2020, compared with 88 percent in FY 2017.<sup>563</sup> Together, these programs and policies made successful asylum claims elusive and left thousands of migrants without a means of seeking protection.<sup>564</sup>

- ▶ **Raised Standards for Credible-Fear Interviews**—*February 2017 and April 2019*—USCIS made administrative changes to guidance documents that make the preliminary asylum interview more difficult for applicants.
  - *February 13, 2017*—USCIS released revised lesson plans for asylum officers.<sup>565</sup> Changes include requiring applicants to establish their identity “by a preponderance of the evidence” (rather than the prior standard of “with a reasonable degree of certainty”) and requiring officers to conduct a full analysis of the credibility of the applicant’s claim (rather than the prior standard of finding that there is a significant possibility that the claim would be found credible during the ultimate asylum adjudication).
  - *April 30, 2019*—USCIS further revised the lesson plans, emphasizing that asylum officers may request that credible-fear interviewees submit corroborating evidence, removing reminders to officers to consider the effects of trauma when making a credibility determination, instructing officers to give more weight to discrepancies in the applicant’s recounting of their fear, and requiring officers to provide a written explanation of positive credible-fear findings, not just negative ones.<sup>566</sup> On October 31, 2020, a federal district court judge found the 2019 lesson plan violated federal law by making the credible-fear screening too similar to the asylum eligibility determination and vacated it.<sup>567</sup> USCIS was to revert to the 2017 version of the lesson plan until updates were made to the newest version.

563 MPI analysis of USCIS, “[Credible Fear Workload Report Summary](#),” accessed October 4, 2021; USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions.”

564 Chishti and Bolter, “Interlocking Set of Trump Administration Policies.”

565 Memorandum from John Lafferty, Chief, Asylum Division, USCIS, to all Asylum Office personnel, *Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans*, February 13, 2017.

566 USCIS, “[Lesson Plan Overview](#)” (lesson plan, April 30, 2019); CLINIC and AILA, “[Credible Fear Lesson Plans Comparison Chart: 2006 -> 2014 -> 2017 -> 2019](#)” (chart, CLINIC and AILA, Washington, DC, May 30, 2019).

567 *Maria M. Kiakombua v. Chad F. Wolf*, No. 19-cv-1872 (KBJ) (U.S. District Court for the District of Columbia, October 31, 2020).

- ▶ **Limits on Asylum Hearings**—*March 5, 2018*—In *Matter of E-F-H-L*, Attorney General Sessions overruled a case that held asylum and withholding-of-removal applicants are entitled to full evidentiary hearings.<sup>568</sup>
- ▶ **Metering**—*April 2018*—The Trump administration expanded the practice of limiting the number of asylum seekers allowed to enter the United States each day at ports of entry along the southern border, a practice begun in a less uniform way in 2016.<sup>569</sup> Under this practice, known as “metering,” there is no way for asylum seekers to know how long they will need to wait and no official way to hold their spot in line. While the administration did not release an official statement about the effects of this practice, or even where it was being implemented, researchers estimated that more than 15,000 migrants were waiting on metering lists in nine Mexican border cities as of November 2020; however, at its height in August 2019, they estimated that 26,000 were waiting.<sup>570</sup> By November 2020, most asylum seekers on the metering lists had been waiting for at least nine months, since they were not processed into the United States while the pandemic ban on nonessential travel at ports of entry was in effect.<sup>571</sup> The capacity limitations that DHS claimed necessitated metering have been called into question: an Associated Press analysis of government data found that CBP holding cells at 75 percent of stations along the U.S.-Mexico border were at most half full on the majority of days between July 2018 and June 2019.<sup>572</sup> Even so, the DHS inspector general found that at seven ports of entry within the Laredo and San Diego sectors, officers routinely turned away migrants, telling them they did not have capacity or capability to process them, regardless of actual ability to do so.<sup>573</sup>
- ▶ **Limits on Asylum for Victims of Private Violence**—*June 11, 2018*—In *Matter of A-B*, Sessions limited the ability of victims of domestic or gang violence to qualify for asylum.<sup>574</sup> A federal court district judge later enjoined the application of this ruling to credible-fear interviews, but it still applies at the ultimate asylum adjudication.<sup>575</sup> A federal appeals court partially upheld the district court’s decision on July 17, 2020, allowing the government to apply some, but not all, of the attorney general’s ruling in *Matter of A-B* at the credible-fear stage of the asylum process.<sup>576</sup> On January 14, 2021, Acting Attorney General Rosen referred the case to himself and issued a new decision, written to override the federal court decisions and again limiting the ability of victims of domestic and gang violence to qualify for asylum.<sup>577</sup>
- ▶ **Asylum Ban**—*November 9, 2018*—DHS and the Justice Department published an interim final rule that would make anyone who is subject to a presidential proclamation barring their entry into

568 *Matter of E-F-H-L*.

569 Email from Todd Hoffman, Executive Assistant Commissioner, Office of Field Operations, CBP, to Directors of Field Operations El Paso, Laredo, San Diego, and Tucson, “[Metering Guidance Memo](#),” April 27, 2018; Stephanie Leutert et al., *Asylum Processing and Waitlists as the U.S.-Mexico Border* (Austin, TX: University of Texas at Austin, Robert Strauss Center for International Security and Law, 2018), 3.

570 Stephanie Leutert, Savitri Arvey, and Ellie Ezzell, *Metering Update: August 2019* (Austin, TX: University of Texas at Austin, Robert Strauss Center for International Security and Law, 2019); Stephanie Leutert and Savitri Arvey, *Metering Update: November 2020* (Austin, TX: University of Texas at Austin, Robert Strauss Center for International Security and Law, 2020).

571 Leutert and Arvey, *Metering Update: November 2020*.

572 Elliot Spagat, “[Holding-Cell Stats Raise Questions about Trump Asylum Policy](#),” Associated Press, February 13, 2020.

573 DHS OIG, *CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry* (Washington, DC: DHS, 2020).

574 *Matter of A-B*.

575 *Grace v. Matthew G. Whitaker*.

576 *Grace v. William P. Barr*.

577 *Matter of A-B*, 28 I&N Dec. 199 (Attorney General, January 14, 2021).

the country and who enters anyway ineligible for asylum.<sup>578</sup> Concurrently, the president issued a proclamation barring the entry of anyone who crosses the southern border illegally, set to expire 90 days after issuance.<sup>579</sup> As a result, anyone who crossed the U.S.-Mexico border between ports of entry was no longer eligible for asylum. On November 19, a federal district court judge in San Francisco issued a temporary restraining order, preventing the government from implementing the regulation.<sup>580</sup> The Ninth Circuit upheld that ruling in February 2020.<sup>581</sup> In a separate case, a federal district judge in Washington, DC, ruled on August 2, 2019, that the rule violates federal law.<sup>582</sup> The administration appealed that ruling, and it remained pending when Trump left office.

- Proclamations Barring Entry of Foreign Nationals Who Cross the Border Illegally—November 15, 2018; February 12 and May 13, 2019—The president issued three proclamations barring entry for anyone who crosses the southern border illegally,<sup>583</sup> the third of which was to expire 90 days after the administration obtained relief from the injunction blocking the rule’s implementation. The injunction was still in place at the end of Trump’s term, and thus, the proclamation had no effect during his term.
- ▶ **Asylum Officer Hiring and Temporary Assignments—2019**—After maintaining an asylum officer force of between 540 and 555 from FY 2017 through FY 2019, USCIS onboarded more than 300 new officers to reach a total of 866 asylum officers in FY 2020.<sup>584</sup> In FY 2018, 92 percent of asylum officers were temporarily assigned to conduct fear screenings at the U.S.-Mexico border, and in FY 2019, 74 percent were, cutting back on capacity to adjudicate affirmative filings.<sup>585</sup> In FY 2020, 21 percent were assigned to the border.
- ▶ **Migrant Protection Protocols (MPP)—January 29, 2019**—While not limited to asylum seekers, MPP cuts off access to the United States by requiring some migrants who arrive at the southwest border, including those seeking humanitarian protection, to wait in Mexico for the duration of their immigration court proceedings. (For more on MPP, see Section 3.A.)
- ▶ **CBP Conducting Credible-Fear Interviews—April 2019**—Under a CBP pilot program, Border Patrol agents received training to conduct credible-fear interviews of some recent arrivals at U.S. borders,

578 DHS and EOIR, “Aliens Subject to a Bar on Entry.”

579 White House, “Presidential Proclamation 9822 of November 9, 2018: Addressing Mass Migration through the Southern Border of the United States,” *Federal Register* 83, no. 221 (November 15, 2018): 57661–64.

580 *East Bay Sanctuary Covenant v. Donald J. Trump*, No. 18-cv-06810-JST (U.S. District Court Northern District of California, November 19, 2018). On December 19, 2018, the same judge issued a preliminary injunction, continuing to block the change. See *East Bay Sanctuary Covenant v. Donald J. Trump*, No. 18-cv-06810-JST (U.S. District Court Northern District of California, December 19, 2018).

581 *East Bay Sanctuary Covenant v. Donald Trump*, No. 18-17274 (U.S. Court of Appeals for the Ninth Circuit, opinion, February 28, 2020).

582 *O.A. v. Trump and S.M.S.R. v. Trump*, Nos. 18-2718 (RDM) and 18-2838 (RDM) (U.S. District Court for the District of Columbia, August 2, 2019).

583 White House, “Presidential Proclamation 9822”; White House, “Presidential Proclamation 9842 of February 7, 2018: Addressing Mass Migration through the Southern Border of the United States,” *Federal Register* 84, no. 29 (February 12, 2019): 3665–67; White House, “Presidential Proclamation 9880 of May 8, 2019: Addressing Mass Migration Through the Southern Border of the United States,” *Federal Register* 84, no. 92 (May 13, 2019): 21229–31.

584 USCIS Ombudsman, *Annual Report 2020* (Washington, DC: DHS, 2020), 46.

585 USCIS Ombudsman, *Annual Report 2020*, 45.

supplementing the USCIS asylum officers who usually conduct these interviews.<sup>586</sup> As of February 2020, 75 Border Patrol agents and 16 CBP officers were conducting interviews.<sup>587</sup> While the program was initially limited to interviews with single adults, some agents began conducting credible-fear interviews of families in September 2019.<sup>588</sup> CBP agents and officers approved a smaller proportion of claims than asylum officers: from May 2019 through July 2020, CBP employees approved 37 percent of credible-fear interviews, while asylum officers approved 64 percent.<sup>589</sup> By the beginning of August 2020, no credible-fear cases were being decided by CBP officers.<sup>590</sup>

- *August 29, 2020*—A federal judge issued a preliminary injunction barring CBP agents from conducting credible-fear interviews.<sup>591</sup> The judge found that the agents received insufficient training to serve as asylum officers under statutory requirements.
- ▶ **Reduced Preparation Time for Credible-Fear Interviews**—*July 2, 2019*—USCIS reduced the amount of time allotted for asylum seekers to consult with others between being detained and having their credible-fear screenings from 48 hours to one calendar day.<sup>592</sup> USCIS also directed asylum officers not to grant extensions of this period, except in extraordinary circumstances.
  - *March 1, 2020*—In finding that Ken Cuccinelli was unlawfully appointed to his position of principal deputy director of USCIS, a U.S. district court in Washington, DC, also invalidated this policy.<sup>593</sup>
- ▶ **Transit-Country Asylum Ban**—*July 16, 2019*—The administration issued a preliminary rule, effective immediately, that made ineligible for U.S. asylum all migrants arriving at the U.S.-Mexico land border who passed through a third country (one other than their country of origin) on their way to the United States, if they had not already applied for asylum and been rejected in that country, and if they arrived on July 16, 2019, or later.<sup>594</sup> Excepted from the policy were Mexicans (who would not have passed through a third country before reaching the United States) and victims of severe forms of trafficking. Those barred from asylum eligibility were still able to apply for protection under withholding of removal and the Convention Against Torture, which have higher standards of proof than asylum. The rule was initially blocked by lower courts, but on September 11, 2019, the Supreme Court allowed it to go into effect nationwide while the court case against it proceeded.<sup>595</sup> A different federal district court

586 Testimony of Robert E. Perez, Deputy Commissioner of CBP, before the House Homeland Security Committee, Subcommittee on Border Security, Facilitation, and Operations, *A Review of the FY 2020 Budget Request for U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services*, 116th Cong., 1st sess., May 9, 2019; Molly O’Toole, “Border Patrol Agents, Rather Than Asylum Officers, Interviewing Families for ‘Credible Fear,’” *Los Angeles Times*, September 19, 2019.

587 Testimony of Mark Morgan, Acting CBP Commissioner, before the House Appropriations Committee, Subcommittee on the Department of Homeland Security, *U.S. Customs and Border Protection Budget Request for FY2021*, 116th Cong., 2nd sess., February 27, 2020.

588 O’Toole, “Border Patrol Agents, Rather Than Asylum Officers.”

589 MPI analysis of data from USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions.”

590 MPI analysis of data from USCIS, “Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions.”

591 *A.B.-B. et al v. Mark Morgan, et al.*, No. 20-cv-846 (RJL) (U.S. District Court for the District of Columbia, August 29, 2020).

592 *L.M.-M. v. Kenneth T. Cuccinelli II*, Civil Action No. 19-2676 (RDM) (U.S. District Court for the District of Columbia, March 1, 2020).

593 *L.M.-M. v. Kenneth T. Cuccinelli II*.

594 EOIR and USCIS, “Asylum Eligibility and Procedural Modifications.”

595 *William P. Barr v. East Bay Sanctuary Covenant*, No. 19A230 (U.S. Supreme Court, September 11, 2019).

blocked the policy in June 2020, and immigration officers subsequently stopped applying the ban.<sup>596</sup> The final rule, which superseded the preliminary rule and the injunctions against it, went into effect on January 19, 2021, and was largely unchanged from the preliminary rule.<sup>597</sup>

- **Metered Migrants Exempted—November 19, 2019**—A U.S. district court judge ruled that migrants who arrived at the U.S.-Mexico border prior to July 16, 2019, but who were not permitted to enter the United States until later because they had been subject to metering, were not barred from asylum eligibility under the transit-country asylum ban.<sup>598</sup> The day before the final rule was scheduled to take effect, the judge issued a new order reaffirming that migrants who had been subject to metering were not subject to the ban.<sup>599</sup> Metering at ports of entry limits the number of asylum seekers who can enter daily.
- ▶ **Limits on Asylum Based on Family Membership—July 29, 2019**—In *Matter of L-E-A-*, Attorney General Barr generally eliminated the possibility for applicants to qualify for asylum on the grounds of persecution based on one’s family relationship, holding that most nuclear families are not sufficiently “socially distinct” to meet the requirements of persecution on the basis of membership in a particular social group.<sup>600</sup>
- ▶ **Asylum Cooperative Agreements—July through September 2019**—The administration signed agreements with the governments of Guatemala (on July 26), El Salvador (September 20), and Honduras (September 25) under which the United States can send asylum seekers to one of those countries to seek protections there instead of in the United States.<sup>601</sup> Asylum seekers who state that they fear persecution or torture in the country to which they are to be sent, and who can demonstrate that such treatment is more likely than not, are excluded from the agreements, as are unaccompanied children.
  - **Guatemala Agreement Implemented—November 15, 2019**—The agreement with Guatemala was the only one implemented during the Trump administration, though Guatemala

596 *Capital Area Immigrants’ Rights Coalition v. Donald J. Trump and I.A. v. William P. Barr*, No. 19-2117 (TJK) and No. 19-2530 (TJK) (U.S. District Court for the District of Columbia, June 30, 2020); Hamed Aleaziz and Adolfo Flores, “Immigration Officers Have Been Told to Stop Applying the Trump Administration’s Asylum Ban,” BuzzFeed News, July 1, 2020.

597 EOIR and USCIS, “Asylum Eligibility and Procedural Modifications,” *Federal Register* 85, no. 243 (December 17, 2020): 82260–90.

598 *Al Otro Lado, Inc. v. McAleenan*, No. 17-cv-02366-BAS-KSC (U.S. District Court for the Southern District of California, order granting plaintiffs’ motion for provisional class certification; and granting plaintiffs’ motion for preliminary injunction, November 19, 2019). The Ninth Circuit Court of Appeals has since denied the administration’s motion to stay this injunction. See *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-02366-BAS-KSC (U.S. Court of Appeals for the Ninth Circuit, order, March 5, 2020).

599 *Al Otro Lado, Inc. v. Peter T. Gaynor, et. al.*, No. 17-cv-02366-BAS-KSC (U.S. District Court for the Southern District of California, temporary restraining order, January 18, 2021).

600 *Matter of L-E-A-*.

601 DHS Office of Strategy, Policy, and Plans, “Agreement between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims,” *Federal Register* 84, no. 224 (November 20, 2019): 64095–99; DHS Office of Strategy, Policy, and Plans, “Agreement between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims,” *Federal Register* 85, no. 85 (May 1, 2020): 25462–68; John Washington, “Sweeping Language in Asylum Agreement Foists U.S. Responsibilities Onto El Salvador,” *The Intercept*, September 23, 2019; Molly Hennessy-Fiske and Molly O’Toole, “U.S. to Send Asylum Seekers to Honduras, Bypassing American Asylum,” *Los Angeles Times*, December 16, 2019. The administration published an interim final rule to implement these and any further asylum cooperative agreements under U.S. law. See EOIR and USCIS, “Implementing Bilateral and Multilateral Asylum Cooperative Agreements under the Immigration and Nationality Act,” *Federal Register* 84, no. 223 (November 19, 2019): 63994–64011.



suspended the agreement on March 17, 2020, due to COVID-19 transmission concerns.<sup>602</sup> By March 16, more than 900 Salvadoran and Honduran asylum seekers had been sent to that country, with just 34 choosing to pursue asylum there.<sup>603</sup> Through January 2021, none of those asylum applications had been adjudicated. Initially, only single adults from El Salvador and Honduras were subject to the agreement, but it was expanded to include families.<sup>604</sup>

- Honduras and El Salvador Agreements Finalized—December 2020—The agreements with Honduras and El Salvador were finalized and entered into force by the end of 2020, but no asylum seekers were deported to those countries under the agreements.<sup>605</sup>
- ▶ **Prompt Asylum Case Review (PACR)**—*October 7, 2019*—PACR is a streamlined program to hear claims of asylum seekers from El Salvador, Guatemala, and Honduras and remove those who are deemed ineligible for asylum due to the transit-country asylum ban and who do not meet the requirements for other forms of protection. It began as a pilot program in the El Paso Border Patrol sector, and by February 2020 had expanded to the Rio Grande Valley and Yuma sectors.<sup>606</sup> Migrants in PACR are detained in CBP custody with limited access to counsel prior to their fear screening interview. If they do not meet the higher fear standard required to receive protections other than asylum, they have the option to appeal their case to an immigration judge via phone and are otherwise removed. The program was suspended on March 20, 2020, due to the CDC order requiring the expulsion of unauthorized arrivals at U.S. borders following the onset of the pandemic.<sup>607</sup> (For more on this order, see Section 2.B.)
- ▶ **Humanitarian Asylum Review Process (HARP)**—*October 28, 2019*—HARP is a program whose aim is to quickly remove Mexicans who do not pass their initial asylum screenings.<sup>608</sup> While other deterrent measures, such as MPP and the transit-country asylum ban, cannot be applied to Mexicans, HARP targets this population. It began as a pilot program operating in El Paso, TX in January 2020, then expanded to Yuma, AZ; Rio Grande Valley, TX; Laredo, TX; and Del Rio, TX by February.<sup>609</sup> The program was suspended on March 20, 2020, due to the CDC order requiring the expulsion of unauthorized arrivals at U.S. borders following the onset of the pandemic.<sup>610</sup> (For more on this order, see Section 2.B.)

602 Camila DeChalus, “Guatemala Suspends US Flights Carrying Asylum-Seekers,” CQ Roll Call, March 17, 2020.

603 Democratic Staff of the U.S. Senate Committee on Foreign Relations, *Cruelty, Coercion, and Legal Contortions: The Trump Administration’s Unsafe Asylum Cooperative Agreements with Guatemala, Honduras, and El Salvador* (Washington, DC: U.S. Senate, 2021), 23.

604 Sonia Pérez D., “US Sends First Non-Guatemalan Migrant Families to Guatemala,” Associated Press, December 12, 2019; Mica Rosenberg, “U.S. Implements Plan to Send Mexican Asylum Seekers to Guatemala,” Reuters, January 6, 2020.

605 DHS, “Asylum Cooperative Agreement with Honduras Finalized” (news release, December 18, 2020); DHS, “DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement” (news release, December 29, 2020).

606 *Las Americas Immigrant Advocacy Center v. Chad Wolf*, Case No. 1:19-cv-3640-KBJ (U.S. District Court for the District of Columbia, memorandum of law in opposition to plaintiffs’ motion for summary judgment and in support of defendants’ cross-motion for summary judgment, February 7, 2020).

607 DHS OIG, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, 11. By mid-March 2020, 3,180 migrants had been processed through the Prompt Asylum Case Review. See GAO, *Southwest Border: DHS and DOJ Have Implemented Credible Fear Screening Pilot Programs, but Should Ensure Timely Data Entry* (Washington, DC: GAO, 2021), 23.

608 Aleaziz, “The Trump Administration Launched a Secretive Program”; *Las Americas Immigrant Advocacy Center v. Chad Wolf*. By mid-March 2020, 2,110 migrants were processed through the Humanitarian Asylum Review Process. See GAO, *Southwest Border: DHS and DOJ Have Implemented Credible Fear Screening*, 23.

609 DHS OIG, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, 6.

610 DHS OIG, *DHS Has Not Effectively Implemented the Prompt Asylum Pilot Programs*, 37.

- ▶ **Affirmative Asylum Fee**—*August 3, 2020*—USCIS issued a final rule that largely focused on routine fee increases for immigration benefits, and would also impose a \$50 fee on affirmative asylum applicants.<sup>611</sup> The United States had never before charged a fee for asylum applications, and it would join only three other countries in the world that do so.<sup>612</sup> In September 2020, a federal judge temporarily blocked the changes from taking effect, and in December the government dropped its appeal in the case.<sup>613</sup> The proposed changes never took effect.
- ▶ **Reducing Likelihood of Receiving Work Authorization**—*August 2020*—Two final rules that went into effect in August 2020 made it more difficult for asylum seekers to receive authorization to work while their applications are pending. In December 2020, a collection of advocacy organizations sued to stop both rules.<sup>614</sup> The suit remained pending at the end of the administration. However, a preliminary injunction in a separate lawsuit prevented parts of the rules from being applied to members of the two organizations who brought the suit.<sup>615</sup>
  - *August 21, 2020*—The first rule eliminates a requirement that the government either approve or deny asylum seekers’ work authorization applications within 30 days of filing.<sup>616</sup>
  - *August 25, 2020*—The second rule makes a slew of changes to the process by which asylum seekers apply for work authorization and reduces the likelihood that their applications will be approved. Among other measures, it requires that asylum seekers’ asylum applications be pending for 365 days before they can apply for work authorization.<sup>617</sup> Existing practice was to allow them to apply when an asylum application has been pending for 150 days. The rule also makes ineligible for work authorization most asylum seekers who entered the country illegally, and requires asylum seekers to submit biometric information—and pay the \$85 biometrics fee—when applying for work authorization.
- ▶ **Expanded Criminal Bars to Asylum**—*November 20, 2020*—EOIR and USCIS published a rule that makes ineligible for asylum foreign nationals with various criminal convictions, including driving under the influence, illegally re-entering the country, and any felony.<sup>618</sup> The rule dramatically expands the criminal bars to asylum, which as of January 2020 blocked people who had engaged in persecution, those convicted of a “particularly serious crime,” and those who had committed a serious nonpolitical crime outside of the United States.<sup>619</sup> Before it went into effect, a federal district court in

611 USCIS, “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,” *Federal Register* 85 no. 149 (August 3, 2020): 46788–829.

612 Those countries are Australia, Fiji, and Iran.

613 AILA, “Timeline of ILRC v. Wolf Litigation Related to USCIS Fee Final Rule,” accessed July 16, 2021.

614 *AsylumWorks et. al., v. Chad Wolf, et. al.* (U.S. District Court for the District of Columbia, complaint for declaratory and injunctive relief, December 22, 2020).

615 *Casa de Maryland, et. al., v. Chad Wolf, et. al.*, No. 8:20-cv-02118-PX (U.S. District Court for the District of Maryland, September 11, 2020).

616 USCIS, “Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications,” *Federal Register* 85, no. 120 (June 22, 2020): 37502–46.

617 DHS, “Asylum Application, Interview, and Employment Authorization for Applicants,” *Federal Register* 85, no. 124 (June 26, 2020): 38532–628.

618 EOIR and USCIS, “Procedures for Asylum and Bars to Asylum Eligibility,” *Federal Register* 85, no. 204 (October 21, 2020): 67202–60.

619 USCIS, “Asylum Bars,” updated April 1, 2011.

California enjoined the rule on November 19, 2020, and the injunction remained in place at the end of the Trump administration.<sup>620</sup>

- ▶ **Changes to Asylum Process and Eligibility for Humanitarian Protection**—*December 11, 2020*—EOIR and USCIS published a rule that would make a number of changes.<sup>621</sup> The rule would place individuals who pass credible-fear screenings in asylum-and-withholding-only proceedings as opposed to standard removal proceedings and apply all mandatory bars to asylum at the credible-fear stage, rather than later in the process. It also would codify and expand the transit-country asylum ban, narrow the grounds on which applicants may base an asylum claim, make illegal entry a “significantly adverse” factor in asylum adjudications, and broaden the definition of firm resettlement in a third country—a determination that, in certain circumstances, an asylum seeker’s previous presence in another country indicates protection in the United States is unnecessary. All of these changes would make more people ineligible for asylum in the United States. On January 8, 2021, three days before it was scheduled to take effect, the rule was enjoined in its entirety by a federal court.<sup>622</sup>
- ▶ **Expanded “Danger to Security” Bar to Asylum and Withholding of Removal**—*December 23, 2020*—USCIS and EOIR issued a rule that would bar migrants from eligibility for asylum and withholding of removal if they were coming from a place where a contagious or infectious disease is prevalent by classifying them as a danger to the security of the United States.<sup>623</sup> Such migrants would still have the opportunity to apply for protection under the Convention Against Torture, but the proposed rule would also allow DHS to remove people applying for such protection to third countries to pursue relief there. The rule was scheduled to go into effect on January 22, 2021.
- ▶ **Accelerated Timeline for Certain Asylum Proceedings**—*January 15, 2021*—A final EOIR rule was scheduled to go into effect that would have set tighter timelines for adjudicating applications for asylum and withholding of removal for the limited population of applicants in asylum-and-withholding-only proceedings.<sup>624</sup> The rule would have required, among other provisions, that applications for relief be filed within 15 days of an applicant’s first hearing in immigration court, set a timeline of 30 days for applicants to remedy applications that were rejected for incompleteness, and expanded the applications that may be deemed incomplete. It would also have allowed immigration judges to submit additional evidence for consideration in an asylum decision. However, it was enjoined by a federal district court judge the day before it would have gone into effect.<sup>625</sup>
- ▶ **Automated Fraud Review of Applications**—*unknown date*—The USCIS Asylum Office began using an online document review program known as Pangaea Text, which looks for indicators of fraud,

620 *Pangea Legal Services v. U.S. Department of Homeland Security*, No. 20-cv-07721-SI (U.S. District Court Northern District of California, November 19, 2020).

621 DHS and EOIR, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” *Federal Register* 85, no. 239 (December 11, 2020): 80274–401.

622 *Pangea Legal Services, et al. v. U.S. Department of Homeland Security, et al.*, No. 20-cv-09253-JD (U.S. District Court Northern District of California, January 8, 2021).

623 USCIS and EOIR, “Security Bars and Processing.”

624 EOIR, “Procedures for Asylum and Withholding of Removal,” *Federal Register* 85, no. 242 (December 16, 2020): 59692–700. Asylum-and-withholding-only proceedings are immigration court evaluations of credible- or reasonable-fear determinations for certain asylum applicants who are not entitled to standard removal proceedings such as foreign crewmembers, stowaways, individuals admitted under the Visa Waiver Program, and other specific cases as outlined in 8 *Code of Federal Regulations* § 208.2

625 *National Immigrant Justice Center, et al. v. EOIR, et al.*, No. 21-56 (RBW) (U.S. District Court for the District of Columbia, January 14, 2021).

national security, or public safety concerns within asylum applications.<sup>626</sup> The results of the automatic analysis are reviewed by fraud detection specialists who may provide a report of the findings to asylum officers for use in their adjudications.

- ▶ **Detention of Arriving Families, Children, and Asylum Seekers**—*multiyear*—Under several laws and a legal settlement in the case *Flores v. Reno*, the U.S. government is prevented from detaining all families and children while they are in immigration proceedings. The Trump administration moved to increase detention of these immigrants, many of whom seek asylum after reaching the U.S.-Mexico border, as well as asylum seekers more broadly, but it was still prevented from doing so under current laws. It also tried to limit avenues for adult asylum seekers to be released from detention into the country by denying more parole requests. However, as a result of a July 2018 court ruling, in a lawsuit alleging that five ICE field offices were issuing blanket parole denials to detained asylum seekers, officials at those five offices—Detroit, El Paso, Los Angeles, Newark, and Philadelphia—must make individualized parole decisions based on the facts of each case.<sup>627</sup>
  - *June 20, 2018*—In his executive order ending family separations (see Section 3.A.), Trump mandated that instead all families be held together while they have immigration proceedings pending. He ordered the attorney general to ask a federal judge to relax a ruling that prevents lengthy detention of children to allow for the detention of families. The court rejected that petition on July 9, 2018.<sup>628</sup>
  - *April 16, 2019*—In *Matter of M-S-*, Barr ruled that immigration judges do not have the authority to hold bond hearings for arriving asylum seekers.<sup>629</sup> In July 2019, a U.S. district judge in Washington State enjoined this decision.<sup>630</sup> (For more, see Section 4.B.)
  - *August 23, 2019*—The administration issued a rule implementing the *Flores* legal settlement that allowed DHS to indefinitely detain families. The rule constituted an attempt to eliminate the likelihood that adults arriving at the border with children would be quickly released, one of the pull factors that had drawn migrants to travel as families.<sup>631</sup> The rule also loosened the standards for detention of unaccompanied child migrants. The rule was blocked by a federal district court before going into effect.<sup>632</sup> However, the Ninth Circuit Court of Appeals in December 2020 allowed most of the provisions related to the care of unaccompanied minors to go into effect, determining they were sufficiently consistent with the conditions for care outlined in the *Flores* settlement.<sup>633</sup>

626 DHS, *Privacy Impact Assessment for the Pangaea: Pangaea Text* (Washington, DC: DHS, 2021).

627 *Ansly Damus v. Kirstjen Nielsen*, Civil Action No. 18-578 (JEB) (U.S. District Court for the District of Columbia, July 2, 2018). A ruling in September 2019 similarly requires the Louisiana ICE field office to make individualized parole decisions. See *Heredia Mons v. Kevin K. McAleenan*, Civil Action No. 19-1593 (JEB) (U.S. District Court for the District of Columbia, September 5, 2019).

628 *Jenny L. Flores v. Jefferson B. Sessions, III*, Case No. CV 85-4544-DMG (U.S. District Court Central District of California, July 9, 2018).

629 *Matter of M-S-*, 27 I&N Dec. 509 (Attorney General, April 16, 2019).

630 *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 2:18-cv-00928-MJP (U.S. District Court Western District of Washington at Seattle, July 2, 2019).

631 ICE, CBP, and ORR, "Apprehension, Processing, Care, and Custody of Alien Minors."

632 *Jenny L. Flores v. William P. Barr*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, order re plaintiffs' motion to enforce settlement [516] and defendants' notice of termination and motion in the alternative to terminate the *Flores* settlement agreement [639], September 27, 2019).

633 *Flores v. Rosen*, Case No. 19-56326 (U.S. Court of Appeals for the Ninth Circuit, December 29, 2020).

- *September 23, 2019*—Then Acting Secretary of Homeland Security Kevin McAleenan announced that families who crossed into the United States illegally would no longer be released into the country.<sup>634</sup> They would either be deported or, if they chose to seek asylum, placed in MPP.
- *Spring 2020*—In March, the federal district judge overseeing the *Flores* case ordered ICE and ORR, the two agencies holding migrant children in their custody, to promptly release those with a suitable sponsor available.<sup>635</sup> In response, ICE asked parents who were being held with their children in family detention centers whether they wished for their children to be released without them or to remain in detention with them, essentially giving them the choice of family separation or indefinite detention.<sup>636</sup>
- *June 26, 2020*—The federal judge overseeing the case ordered ICE and ORR to release all minors in the agencies' custody for more than 20 days by July 17, later extended to July 27.<sup>637</sup> On July 27, more than 100 children remained in ICE custody.<sup>638</sup>
- ▶ **Steps to Reduce the Affirmative Asylum Backlog**—*multiyear*—At the beginning of the Trump administration, the backlog of affirmative asylum cases (individuals who present themselves to USCIS to request asylum, rather than doing so defensively in court during a removal proceeding) was 233,389.<sup>639</sup> Concerned that many applicants were filing for asylum to get work authorization, which may be granted when an application has been pending for six months or more, and concerned that some were filing asylum applications to trigger removal proceedings in order to get immigration benefits only granted by immigration courts (cancellation of removal), the administration enacted strategies to reduce the backlog and inflow of affirmative asylum applications. At the end of FY 2020, the backlog was 386,014, though the rate of increase had slowed dramatically compared to the previous administration.<sup>640</sup>
  - **Interview Waiver Pilot Program**—*Late 2017 to August 2018*—USCIS conducted a pilot program offering certain asylum applicants (those who likely filed applications to trigger removal proceedings) the opportunity to waive their asylum interviews and be directly placed into removal proceedings.<sup>641</sup> In August 2018, USCIS issued a second round of waiver offers. Of the 1,500 waivers offered in the first round, 22 percent were accepted, and of the 2,500 offered

634 DHS, "Acting Secretary McAleenan Announces End to Widespread Catch and Release" (press release, September 23, 2019).

635 *Jenny L. Flores v. William P. Barr*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, in chambers - order re: plaintiffs' *ex parte* application for restraining order and order to show cause re: preliminary injunction, March 28, 2020).

636 Camilo Montoya-Galvez, "ICE Asked Migrant Parents Whether They Wanted to Be Separated from Their Children, Agency Tells Court," CBS News, May 17, 2020.

637 *Jenny L. Flores v. William P. Barr*, No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, in chambers - order re: updated juvenile coordinator reports, June 26, 2020); *Flores v. Barr*, No. CV 85-4544-DMG (AGRx) (U.S. District Court of the Central District of California, order extending deadline to complete compliance with paragraph 1 of the court's June 26, 2020 order, July 16, 2020).

638 Camille Squires, "ICE Has to Release Kids from Detention. It Refuses to Let Their Parents Join Them," Mother Jones, July 27, 2020.

639 Affirmative asylum is a process before USCIS, available to individuals already in the United States and not in removal proceedings. See USCIS, "Affirmative Asylum Statistics" (Asylum Division Quarterly Stakeholder Meeting, USCIS, April 18, 2017).

640 USCIS, "Number of Service-Wide Forms Fiscal Year to Date by Quarter and Form Status. Fiscal Year 2020," accessed August 24, 2021.

641 Applicants selected for participation are removable foreign nationals who filed their asylum applications more than ten years after their last entry into the United States. See USCIS, "Agenda" (Asylum Division Quarterly Stakeholder Meeting, USCIS, November 16, 2018).



in the second, 27 percent were accepted.<sup>642</sup> USCIS did not run further pilots but allowed individual asylum offices the discretion to offer waivers.

- “Last in, First out” Processing—January 31, 2018—In an attempt to stem the growth of its asylum backlog and deter nonmeritorious claims, USCIS started scheduling asylum interviews for recent applicants ahead of older filings.<sup>643</sup> Between FY 2015 and FY 2020, the average length of time between an applicant’s interview and completion of the case dropped from 82 to 18 days.<sup>644</sup>
- Allowing Applicants to Request Placement in Removal Proceedings—June 28, 2018—USCIS announced it would allow immigrants whose asylum applications were denied while they held lawful immigration status to request placement in removal proceedings once they fall out of legal immigration status.<sup>645</sup> In “limited and extraordinary circumstances,” USCIS may also place a removable foreign national in removal proceedings even before asylum adjudication, if requested by the foreign national.

### ► Pending at end of administration

- Changes to Asylum Adjudications—On April 29, 2019, the president issued a memorandum proposing a series of changes to asylum adjudications.<sup>646</sup> Almost all the proposed changes were in effect or in progress by the end of the administration, with the exception of a provision that would have eliminated asylum seekers’ ability to apply for work authorization.

## C. Unaccompanied Children

Federal law and legal precedent require the United States to accept unaccompanied child migrants from noncontiguous countries (i.e., all but Canada and Mexico) and to release such children to a parent or guardian during processing. The Trump administration expressed the view that this practice encourages minors to attempt to cross the border without authorization,<sup>647</sup> and in the absence of congressional changes to the statutory requirements, federal agencies worked within existing statutes to ensure that fewer could be released. These efforts involved trying to authorize officials at more steps of the adjudication process to determine whether an immigrant no longer meets the legal definition of an unaccompanied child, placing more children in secure detention facilities, and creating more occasions in which standards for conditions

642 USCIS, “Agenda” (Asylum Division Quarterly Stakeholder Meeting, USCIS, May 20, 2019).

643 USCIS, “USCIS to Take Action to Address Asylum Backlog” (news release, January 31, 2018).

644 USCIS Ombudsman, *Annual Report 2020*, 48.

645 USCIS, “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens” (policy memorandum, June 28, 2018).

646 Memorandum from the president, *Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System*, April 29, 2019.

647 See, for example, Testimony of Richard M. Hudson, Deputy Chief, Operational Programs, Law Enforcement Operations Directorate, U.S. Border Patrol, before the Senate Judiciary Committee, Subcommittee on Border Security and Immigration, *Trafficking Victims Protection Reauthorization Act (TVPRA) and Exploited Loopholes in Regards to Unaccompanied Alien Children*, 115th Cong., 2d sess., May 23, 2018, characterizing the *Trafficking Victims Protection Reauthorization Act* as a “loophole” that allows migrants to exploit U.S. immigration laws. See also Testimony of Kirstjen Nielsen, Secretary, DHS, before the House Homeland Security Committee, *Oversight of the Department of Homeland Security*, 115th Cong., 2d sess., December 20, 2018, stating, “This crisis is the direct result of loopholes created by federal law and adverse federal court rulings that prevent the detention and repatriation of illegal unaccompanied alien children and family units.”

in detention can be waived. In several instances, the administration moved to require more information during the vetting of individuals who came forward as potential sponsors for unaccompanied children, which advocates argued led to a chilling effect that made unauthorized immigrants less likely to seek to gain custody of the children. The Trump administration also made it more difficult to obtain immigration relief, particularly through one of the most common avenues for unaccompanied children—Special Immigrant Juvenile status.

- ▶ **Removal of Unaccompanied Child Designations**—*February 20, 2017*—After the president issued his January 25, 2017, executive order on border security, DHS published a related implementing memo in which it advised that the department establish procedures to confirm that minors initially determined to be “unaccompanied alien children” continue to fall within the legal definition as they move through removal processes.<sup>648</sup>
  - *September 2017*—The Justice Department published a legal opinion ruling that immigration judges are not bound by ICE’s or CBP’s original determination that a minor is an unaccompanied child and can take away the designation during the minor’s immigration court proceedings.<sup>649</sup>
  - *December 2017*—The chief immigration judge issued a memo instructing immigration judges to root out fraud and evaluate whether a child continues to meet the definition of an unaccompanied alien child.<sup>650</sup>
  - *May 31, 2019*—USCIS instructed all asylum officers, beginning June 30, 2019, to make independent findings of whether people filing asylum applications with USCIS met the legal definition of an unaccompanied alien child in cases where applicants were also in removal proceedings before the immigration courts.<sup>651</sup> Previous policy guidance had instructed asylum officers to adopt prior determinations made by CBP or ICE.<sup>652</sup>
    - *August 2, 2019*—A federal judge temporarily blocked USCIS from continuing to implement this policy and required USCIS to retract any negative decisions on migrants’ status as unaccompanied children that it had made prior to the court ruling.<sup>653</sup>
  - *August 23, 2019*—A regulation published jointly by DHS and HHS would obligate officers in both agencies to assess whether a minor continues to merit the designation each time they

648 Memorandum from John Kelly, Secretary of Homeland Security, to Kevin McAleenan, Acting Commissioner of CBP, et al., *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies*, February 20, 2017.

649 Memorandum from Jean King, General Counsel of EOIR, Justice Department, to James McHenry, Acting Director of EOIR, *Legal Opinion Re: EOIR’s Authority to Interpret the Term Unaccompanied Alien Child for Purposes of Applying Certain Provisions of TVPRA*, September 19, 2017.

650 Memorandum from MaryBeth Keller, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles*.

651 Memorandum from John Lafferty, Chief, Asylum Division, USCIS, to all Asylum Office staff, *Updated Procedures for Asylum Applications Filed by Unaccompanied Children*, May 31, 2019.

652 Memorandum from Ted Kim, Acting Chief, Asylum Division, USCIS, to all Asylum Office staff, *Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children*, May 28, 2013.

653 *J.O.P. v. U.S. Department of Homeland Security*, Case No.: GJH-19-1944 (U.S. District Court for the District of Maryland, August 2, 2019).

interact with the minor's case.<sup>654</sup> It was scheduled to take effect on October 22, but a federal district judge in the Central District of California permanently blocked the administration from implementing the regulation.<sup>655</sup>

→ *December 29, 2020*—The ICE acting director issued a memo instructing ICE officers to review whether migrants still qualify as unaccompanied minors every time the officers encounter the individuals or review records about them.<sup>656</sup>

- ▶ **Making it More Difficult for Minors in Custody to Access Abortions**—*March 4, 2017 to September 29, 2020*—A new policy required the director of ORR, the office within HHS that cares for unaccompanied children, to sign off if any unaccompanied child in ORR custody was seeking an abortion.<sup>657</sup> Under the previous two administrations, the director's approval was required only if federal funds were being requested to pay for the abortion, which was allowed if the pregnancy was a result of rape.
  - *March 24, 2017*—ORR Director Scott Lloyd reportedly directed shelter staff to take a girl requesting an abortion first to a crisis pregnancy center, then require parental consent to proceed with an abortion, and prevent her from seeking legal assistance to get a judicial order to bypass the parental consent requirement.<sup>658</sup>
  - *September 29, 2020*—ORR released a policy update explicitly stating that department staff cannot prevent unaccompanied children in their custody from accessing abortion care.<sup>659</sup> The issuance of the new policy was a condition of the American Civil Liberties Union's agreement to dismiss a lawsuit it filed challenging the abortion restrictions in October 2017.<sup>660</sup>
- ▶ **Increased Number of Unaccompanied Children in Staff Secure Facilities**—*August 16, 2017*—ORR announced that it had begun placing all children with any gang-related history in staff secure detention, whether or not they had ever been arrested or charged with a crime.<sup>661</sup> The policy also made all such children ineligible for release to sponsors, though this was enjoined by a federal district court on November 20, 2017, and the injunction remained in place at the end of the administration.<sup>662</sup>

654 ICE, CBP, and ORR, "Apprehension, Processing, Care, and Custody of Alien Minors."

655 *Jenny L. Flores v. William P. Barr*, Case No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, in chambers - order re: plaintiffs' motion to enforce settlement [516] and defendants' notice of termination and motion in the alternative to terminate the *Flores* settlement agreement [639], September 27, 2019).

656 Hamed Aleaziz, "A New ICE Policy as Trump Is about to Leave Office Could Make It Harder for Immigrant Children to Get Asylum," BuzzFeed News, January 7, 2021.

657 Renuka Rayasam, "Trump's Abortion Policy Sheds Light on Ad Hoc Decision-Making," Politico, February 28, 2018.

658 Rayasam, "Trump's Abortion Policy."

659 ORR, "Policy Memorandum: Medical Services Requiring Heightened ORR Involvement" (policy memorandum, ORR, Washington, DC, September 29, 2020).

660 Ema O'Connor and Zoe Tillman, "The Trump Administration Is Giving up Its Fight to Prevent Undocumented Teens from Getting Abortions," BuzzFeed News, September 29, 2020; *J.D., on Behalf of Herself and Others Similarly Situated, et al. v. Alex M. Azar, et al.*, No. 17-cv-02122-TSC (U.S. District Court for the District of Columbia, joint stipulation of dismissal without prejudice, September 29, 2020).

661 Memorandum from HHS, Administration for Children and Families, ORR, to Domestic Policy Council, *Community Safety Initiative for the Unaccompanied Alien Children Program*, August 16, 2017, 3.

662 *Ilsa Saravia v. Jefferson B. Sessions*, No. 3:17-cv-03615-VC (U.S. District Court Northern District of California, November 20, 2017).

- *June 12, 2017*—ORR changed its policy to require that the office’s director personally sign off on the release of any unaccompanied child from a secure or staff secure facility.<sup>663</sup> This policy was preliminarily enjoined in June 2018, and the injunction remained in place at the end of the administration.<sup>664</sup>
- ▶ **Denial of Special Immigrant Juvenile (SIJ) Status Applications Based on Age—February 2018**—In the first half of 2018, USCIS began systematically denying applications for SIJ status to applicants who were age 18 or older when the applicants received state court orders, despite being eligible until they are 21, due to discrepancies between state and federal laws.<sup>665</sup> The status is available to children who were abused, neglected, or abandoned by one or both parents. In April 2018, a USCIS spokesperson said that roughly 260 cases had been denied based on February USCIS guidance, which was not made public.<sup>666</sup>
  - *October 24, 2018*—A federal district court judge in California issued a preliminary injunction, prohibiting USCIS from using the policy to deny SIJ status to 18-to-20-year-olds in California.<sup>667</sup> In December 2019, the lawsuit concluded with a settlement, wherein USCIS agreed to no longer apply this policy in California.<sup>668</sup>
  - *April 8, 2019*—Following a summary judgement ruling that the administration’s new policy was violating federal law, a federal district court judge in New York ordered the administration to refrain from using the policy to deny SIJ status to 18-to-20-year-olds in New York State.<sup>669</sup>
  - *October 15, 2019*—USCIS stopped applying this policy nationwide.<sup>670</sup> By this time, the SIJ status denial rate had already started to decrease.<sup>671</sup>
  - *October 5, 2020*—A district court in Washington State issued a permanent injunction and said USCIS could not deny SIJ status to 18-to-20-year-olds in Washington simply based on age. It also ordered the agency to adjudicate SIJ petitions within 180 days of filing, including issuance of requests for further evidence, a move to prevent USCIS from delaying adjudication or arguing applications were incomplete.<sup>672</sup>
- ▶ **Increased Vetting and Immigration Enforcement against Potential Sponsors—April 13, 2018**—ORR finalized a memorandum of agreement with ICE and CBP outlining policies and procedures for sharing information and conducting background checks on potential sponsors for unaccompanied

663 Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Oversight of the Care of Unaccompanied Alien Children* (Washington, DC: U.S. Senate, 2018), 50.

664 *L.V.M. v. Scott Lloyd*, No. 18-cv-01453 (U.S. District Court for the Southern District of New York, June 27, 2018).

665 Austin Rose, “For Vulnerable Immigrant Children, a Longstanding Path to Protection Narrows,” *Migration Information Source*, July 25, 2018.

666 Ted Hesson, “Travel Ban at SCOTUS,” *Politico*, April 25, 2018.

667 *J.L. v. Cissna*, No. 5:18-cv-04914 (U.S. District Court for the Northern District of California, October 24, 2018).

668 *J.L. v. Cuccinelli*, Case No. 18-cv-04914-NC (U.S. District Court for the Northern District of California, order granting final approval of the settlement agreement, December 18, 2019).

669 *R.F.M. v. Nielsen*, No. 1:18-cv-05068 (U.S. District Court for the Southern District of New York, April 8, 2019).

670 USCIS, “USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection” (press release, October 15, 2019).

671 USCIS, “Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status, Fiscal Year 2010-2019,” updated October 2019.

672 *Galvez v. Cuccinelli*, No. C19-0321RSL (U.S. District Court for the Western District of Washington, order granting plaintiffs’ motion for summary judgement and permanent injunction, October 5, 2020).

minors, including ICE running potential sponsors' information through its database to check their immigration status.<sup>673</sup> A subsequent *Federal Register* notice clarified that the new vetting and information-sharing procedures would apply to potential sponsors as well as other adult members of a potential sponsor's household.<sup>674</sup>

- *December 2018*—ICE stated that 170 potential sponsors had been arrested from July through November 2018, 109 of whom had no criminal record.<sup>675</sup>
  - *December 2018*—After the population of unaccompanied children in ORR custody grew alarmingly, hitting a high of almost 15,000 children in December, ORR announced that it would no longer fingerprint all adults in the household of potential sponsors. Instead, only potential sponsors would be fingerprinted.<sup>676</sup>
  - *February 15, 2019*—The law providing DHS with appropriations for FY 2019 prevents congressionally appropriated funds from being used to detain, remove, or begin removal proceedings against any unaccompanied minor's sponsor, potential sponsor, or member of the sponsor's household based on information DHS received from ORR.<sup>677</sup>
  - *April 9, 2019*—Testifying before Congress, Commander Jonathan White, a career public-health official at HHS, explained that ORR conducts fingerprint background checks on parents only if there is a specific concern with their case.<sup>678</sup>
  - *June 14, 2019*—HHS further reduced barriers to releasing unaccompanied children to sponsors, suspending a May 2018 policy of doing immigration records checks on potential sponsors, in addition to FBI background checks.<sup>679</sup> Before this change, HHS staff had to spend time reconciling the two screenings.
  - *July 2019*—Lynn Johnson, the assistant secretary of the Administration for Children and Families, which oversees ORR, said during congressional testimony that ORR no longer required fingerprints for grandparents or adult siblings acting as potential sponsors of unaccompanied children.<sup>680</sup>
- **Changes to Detention Standards**—*August 23, 2019*—The administration issued a final regulation, effective October 22, 2019, expanding family detention (see Section 5.B.). The regulation also affected

673 ORR, ICE, and CBP, "Memorandum of Agreement Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters," April 13, 2018.

674 DHS, "Privacy Act of 1974; System of Records," *Federal Register* 83, no. 89 (May 8, 2018): 20844–50.

675 Tal Kopan, "ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children," *San Francisco Chronicle*, December 10, 2018.

676 Robert Moore, "Thousands of Migrant Children Could Be Released with Trump's Major Policy Reversal," *Texas Monthly*, December 18, 2018.

677 *Consolidated Appropriations Act, 2019*.

678 Testimony of Commander Jonathan White, Deputy Director for Children's Programs, HHS Office of Assistant Secretary for Preparedness and Response, before the Senate Committee on the Homeland Security and Governmental Affairs, *Unprecedented Migration at the U.S. Southern Border: Perspectives from the Frontline*, 116th Cong., 1st sess., April 9, 2019.

679 Kristina Cooke, "Trump Administration Moves to Release Migrant Children Faster from U.S. Custody," Reuters, June 10, 2019.

680 Testimony of Lynn Johnson, Assistant Secretary, Administration for Children and Families, before the House Committee on Appropriations, Labor, Health and Human Services, Education, and Related Agencies Subcommittee, *Oversight of the Unaccompanied Children Program: Ensuring the Safety of Children in HHS Care*, 116th Cong., 1st sess., July 24, 2019.



conditions for unaccompanied minors in government custody.<sup>681</sup> For example, with a general focus on expediency and operational welfare, the regulation expanded the custody standards for unaccompanied children that the government can ignore in an emergency situation; previously, an emergency only waived the requirement that children be transferred to HHS custody within three to five days.

- *September 27, 2019*—A federal district judge in the Central District of California permanently blocked the administration from implementing the regulation.<sup>682</sup>
- *December 29, 2020*—The Ninth Circuit ruled that the parts of the regulation regarding conditions for unaccompanied minors could take effect, with the exception of two provisions: one that broadened the circumstances in which a minor could be placed in a secure facility, and another that stated that minors in secure facilities would only be provided with a hearing if they requested one.<sup>683</sup>
- ▶ **Increased Evidence Requirements for SIJ Status**—*October 15, 2019*—When determining SIJ status eligibility, USCIS began considering whether state court proceedings showed that applicants had received relief due to parental abuse or neglect, or whether they had received only the factual findings from the court that are required to apply for SIJ status—and began requiring the former, with the idea that the latter showed that an applicant had pursued state court proceedings for the primary purpose of receiving an immigration benefit.<sup>684</sup>
- ▶ **Limits on the Role of Advocates in Immigration Court Proceedings**—*November 2019*—In two policy memos, EOIR Director James McHenry clarified the role that individuals other than legal representatives play in the legal proceedings of unaccompanied child migrants.<sup>685</sup> While previously, certain non-legal representatives were permitted to make appearances in a child’s court proceedings, these memos clarify that anyone aside from the child’s legal counsel or authorized representative may not actively participate in proceedings.
- ▶ **Adjudicating Cases Faster**—*January 2020*—EOIR reportedly told assistant chief immigration judges in an email that court cases of unaccompanied children in ORR custody should be completed within 60 days (see Section 4.A.).<sup>686</sup>
  - *Unknown date*—ICE prosecutors in Houston and Phoenix began filing notices to appear for unaccompanied children within days of their arrival in the United States, whereas they previously waited a month or more to begin court proceedings.<sup>687</sup> According to the Vera

681 ICE, CBP, and ORR, “Apprehension, Processing, Care, and Custody of Alien Minors.”

682 *Jenny L. Flores v. William P. Barr*, Case No. CV 85-4544-DMG (AGRx) (U.S. District Court for the Central District of California, in chambers - order re: plaintiffs’ motion to enforce settlement [516] and defendants’ notice of termination and motion in the alternative to terminate the *Flores* settlement agreement [639], September 27, 2019).

683 *Flores v. Rosen*, Case No. 19-56326 (U.S. Court of Appeals for the Ninth Circuit, December 29, 2020).

684 USCIS, “USCIS Clarifies Special Immigrant Juvenile Classification.”

685 Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Child Advocates in Immigration Proceedings*, November 15, 2019; Memorandum from James McHenry, Director of EOIR, Justice Department, to all EOIR, *Legal Advocacy by Non-Representatives in Immigration Court*, November 21, 2019.

686 Alvarez, “Trump Administration Puts Pressure on Completing Deportation Cases of Migrant Children.”

687 Kriel, “New Trump Administration Policies”; Vera Institute of Justice, “Express Injustice: Expedited Immigration Hearings Pose Danger to Detained Children’s Right to a Fair Process,” updated July 2020.

Institute of Justice, as of May 24, 2020, 15 courts had expedited dockets for unaccompanied children.<sup>688</sup>

- ▶ **Fingerprinting Minors in ORR Custody**—*January 2020*—ICE issued field guidance instructing its juvenile coordinators to begin fingerprinting minors older than 13 in ORR custody, maintaining that doing so is necessary to combat trafficking and smuggling.<sup>689</sup>
- ▶ **Court Hearings Conducted through Video Teleconference (VTC)**—*March 9, 2020*—The administration launched a pilot program in Houston to hear all immigration court cases of unaccompanied minors in ORR custody via VTC (see Section 4).<sup>690</sup>
- ▶ **Decreased Access to Counsel**—*unknown date*—ORR stopped transporting children in custody to meetings with their lawyers.<sup>691</sup>
- ▶ **Pending at end of administration**
  - **Codification of Heightened Evidentiary Requirement for SIJ Status**—On October 16, 2019, USCIS reopened the comment period on a proposed rule originally published in 2011 that, among other things, would write into regulations the policy of considering whether applicants pursued state court proceedings primarily to gain relief from parental abuse or neglect, or whether they were primarily seeking an immigration benefit.<sup>692</sup> The comment period ended November 15, 2019; a final rule was not published during the Trump administration.
  - **Sponsor Application Changes**—On January 5, 2021, the administration published a request for comments on proposed changes to the Sponsor Verification Application and Sponsor Care Agreement, which potential sponsors fill out in order to have unaccompanied minors released to their care.<sup>693</sup> The changes would impose a 45-day deadline for potential sponsors to complete the paperwork, allow them to voluntarily submit DNA in support of their application to prove a biological relationship to the child, and require sponsors to enroll in post-release services including regular in-home visits and phone calls.
  - **Mental Health Care Management Services**—On January 7, 2021, ORR published a request for comments on several new forms that would facilitate the provision of mental health care services to unaccompanied children.<sup>694</sup> The forms include a mental health evaluation form, a suicide risk assessment, and forms to refer children to community-based mental health providers, among others.

688 Vera Institute of Justice, “Express Injustice.”

689 Hamed Aleaziz, “ICE Is Now Fingerprinting Immigrants as Young as 14 Years Old,” BuzzFeed News, February 6, 2020.

690 Kriel, “New Trump Administration Policies.”

691 Kriel, “New Trump Administration Policies.”

692 USCIS, “Special Immigrant Juvenile Petitions,” *Federal Register* 84, no. 200 (October 16, 2019): 55250–51.

693 ORR, “Proposed Information Collection Activity; Sponsor Review Procedures for Unaccompanied Alien Children (OMB #0970-0278),” *Federal Register* 86, no. 3 (January 5, 2021): 308–10.

694 ORR, “Proposed Information Collection Activity; Mental Health Care Services for Unaccompanied Alien Children (New Collection),” *Federal Register* 86, no. 4 (January 7, 2021): 1114–15.

## D. *Temporary Protected Status Recipients*

Temporary Protected Status (TPS) is a temporary form of humanitarian protection offered to nationals of certain countries who are present in the United States and unable to return to their countries due to violent conflict or natural disaster. The Trump administration took issue with repeated extensions of the time-limited protection and, as such, tried to end TPS protections for nationals of six countries, which covered a total of more than 300,000 people.<sup>695</sup> The administration also took steps to make it more difficult for TPS recipients to apply for green cards.

- ▶ **End of TPS Designations for Nationals of Six Countries**—*September 2017 to June 2018*—The administration moved to end TPS designations for nationals of Sudan (expired November 2, 2018), Nicaragua (was set to expire January 5, 2019, later enjoined), Nepal (was set to expire June 24, 2019, later enjoined), Haiti (was set to expire July 22, 2019, later enjoined), El Salvador (was set to expire September 9, 2019, later enjoined), and Honduras (was set to expire January 5, 2020, later enjoined).<sup>696</sup>
  - *October 3, 2018*—A federal district court judge in California issued a preliminary injunction temporarily stopping DHS from terminating TPS for nationals of El Salvador, Haiti, Nicaragua, and Sudan.<sup>697</sup> That preliminary injunction remained in place through the Trump administration.
  - *March 12, 2019*—In a different case before the U.S. District Court in the Northern District of California, the administration agreed to put on hold plans to end TPS for nationals of Honduras and Nepal and instead link their fate to the outcome of the separate case on TPS for nationals of El Salvador, Haiti, Nicaragua, and Sudan described above.<sup>698</sup>
  - *April 11, 2019*—A third federal district court, in New York, issued a second injunction against the termination of TPS for nationals of Haiti. The injunction remained in place through the Trump administration.<sup>699</sup>
  - *November 4, 2019*—DHS announced that, if the preliminary injunction on the termination of TPS for nationals of El Salvador is lifted, the termination will not take effect until a year later.<sup>700</sup> This would give Salvadorans with TPS an extra 245 days to plan to leave the country or adjust their status, whereas the termination for nationals of the other countries would take effect 120 days after the injunction is lifted.

695 Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2020), 5.

696 Wilson, *Temporary Protected Status* (2020), 5.

697 *Crista Ramos v. Kirstjen Nielsen*, No. 3:18-cv-01554-EMC (U.S. District Court for the Northern District of California, October 3, 2018).

698 *Keshav Bhattarai v. Kirstjen Nielsen*, No. 3:19-cv-00731-EMC (U.S. District Court for the Northern District of California, March 12, 2019).

699 *Patrick Saget v. Donald Trump*, No. 18-CV-1599 (WFK) (ST) (U.S. District Court for the Eastern District of New York, April 11, 2019).

700 USCIS, "Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan," *Federal Register* 84, no. 213 (November 4, 2019): 59403–10.

- *December 9, 2020*—DHS announced that, in order to comply with injunctions from several courts, TPS beneficiaries from each of the six countries would have their status automatically extended for nine months, through October 4, 2021.<sup>701</sup>
- ▶ **Extension of TPS Designations for Nationals of Four Countries**—*March 2018 to November 2020*—The administration extended TPS designations for nationals of Syria twice (most recently extended through March 31, 2021),<sup>702</sup> Yemen twice (through September 3, 2021),<sup>703</sup> Somalia twice (through September 17, 2021),<sup>704</sup> and South Sudan three times (through May 2, 2022).<sup>705</sup>
- ▶ **End of Deferred Enforced Departure for Liberians**—*March 27, 2018*—The administration announced that it would end Deferred Enforced Departure (DED), a TPS-like benefit, for Liberians on March 31, 2019.<sup>706</sup> Liberians had had DED since 2007.
  - *March 28, 2019*—In a memo, Trump announced that he would extend DED for Liberians until March 30, 2020, explaining the extension was based on the fact that the “overall situation in West Africa remains concerning.”<sup>707</sup>
  - *December 20, 2019*—A provision of the FY 2020 military funding bill made Liberians with DED eligible to apply for permanent resident status in the United States, as long as they had not been convicted of certain crimes.<sup>708</sup> The program is known as Liberian Refugee Immigration Fairness (LRIF).
  - *March 30, 2020*—Trump extended the DED wind-down period for Liberians through January 10, 2021, to allow those eligible to apply for permanent residence an uninterrupted period of work authorization.<sup>709</sup>
  - *December 27, 2020*—The deadline for Liberians with DED to apply for permanent residence was extended to December 20, 2021.<sup>710</sup> By the end of 2020, USCIS had received 3,211 LRIF applications, 666 of which had been approved, 111 of which had been denied.<sup>711</sup> The remainder were still pending.

701 USCIS, “Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,” *Federal Register* 85, no. 237 (December 9, 2020): 79208–15.

702 USCIS, “Extension of the Designation of Syria for Temporary Protected Status,” *Federal Register* 84, no. 184 (September 23, 2019): 49751–57.

703 USCIS, “Extension of the Designation of Yemen for Temporary Protected Status,” *Federal Register* 85, no. 41 (March 2, 2020): 12313–19.

704 USCIS, “Extension of the Designation of Somalia for Temporary Protected Status,” *Federal Register* 85, no. 48 (March 11, 2020): 14229–235.

705 USCIS, “Extension of the Designation of South Sudan for Temporary Protected Status,” *Federal Register* 85, no. 212 (November 2, 2020): 69344–51.

706 USCIS, “DED Granted Country – Liberia,” updated April 7, 2020.

707 Memorandum from the President, *Memorandum on Extension of Deferred Enforced Departure for Liberians*, March 28, 2019.

708 USCIS, “Liberian Refugee Immigration Fairness,” updated April 7, 2020.

709 White House, “Extending the Wind-Down Period for Deferred Enforced Departure for Liberians,” *Federal Register* 85, no. 64 (April 2, 2020): 18849–51; USCIS, “Continuation of Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Eligible Liberians During the Period of Extended Wind-Down of Deferred Enforced Departure,” *Federal Register* 85, no. 67 (April 7, 2020): 19496–500.

710 USCIS, “Liberian Refugee Immigration Fairness (LRIF) Extended” (stakeholder message, 2020).

711 Jill H. Wilson, *Applications for Liberian Refugee Immigration Fairness (LRIF): Fact Sheet* (Washington, DC: Congressional Research Service, 2021).

- ▶ **TPS Grant Does Not Qualify Beneficiaries to Apply for Green Cards—July 31, 2019**—USCIS adopted a decision of the agency’s Administrative Appeals Office (AAO) finding that a grant of TPS does not constitute a grant of admission or cure a failure to maintain lawful status prior to the grant of TPS.<sup>712</sup> That means that a migrant who entered the United States without inspection cannot rely on a grant of TPS to meet the eligibility requirements for a green card (i.e., lawful permanent resident, or LPR, status) before USCIS. In November 2020, the BIA ruled similarly for cases before the immigration courts (see Section 4).
  - *October 6, 2020*—USCIS updated its policy manual to reflect that TPS holders in the Sixth and Ninth Circuits are eligible to adjust to LPR status due to federal court decisions in those circuits holding that a grant of TPS counts as admission.<sup>713</sup> The Third, Fifth, and Eleventh Circuits have ruled that a grant of TPS does *not* constitute an admission.<sup>714</sup> Later that month, on October 27, 2020, the Eighth Circuit Court of Appeals also ruled that a grant of TPS is a grant of admission.<sup>715</sup>
  
- ▶ **Limits on Opportunities for TPS Recipients with Advance Parole to Apply for Green Cards—December 20, 2019**—DHS updated its policy manual to reflect that TPS holders who receive permission to travel outside the United States and re-enter (known as advance parole) remain in the same immigration status upon return as when they left the country, including unauthorized status for individuals who originally entered without inspection.<sup>716</sup> Prior to this change, re-entering on advance parole would count as a lawful entry and allow the applicant an opportunity to apply for a green card based on, for example, marriage to a U.S. citizen. As a result of this change, USCIS offices began denying green-card applications to TPS holders who traveled after receiving removal orders from immigration courts and some offices began denying green-card applications regardless of whether the TPS holder had a removal order.<sup>717</sup>
  - *August 20, 2020*—USCIS adopted an AAO decision that found that a TPS holder’s entry into the United States following a period of TPS-authorized travel does not satisfy the requirement that green-card applicants from within the United States be “inspected and admitted or paroled” into the country.<sup>718</sup> Adopting this decision reinforced the policy already in effect, though the decision applies only to TPS holders who left and returned to the country after it was issued.

712 USCIS, “*Matter of H-G-G-, Adopted Decision 2019-01 (AAO July 31, 2019)*” (policy memorandum, July 31, 2019).

713 USCIS, “*Temporary Protected Status and Eligibility for Adjustment of Status under Section 245(a) of the Immigration and Nationality Act*” (policy alert, October 6, 2020).

714 *Serrano v. U.S. Attorney General*, No. 10-12990 (U.S. Court of Appeals for the Eleventh Circuit, September 16, 2011); *Melendez v. McAleenan*, No. 18-20341 (U.S. Court of Appeals for the Fifth Circuit, June 27, 2019); *Sanchez v. Secretary United States Department of Homeland Security*, No. 19-1311 (U.S. Court of Appeals for the Third Circuit, July 22, 2020).

715 *Leymis Carolina Vasquez v. William Barr*, No. 19-1148 (U.S. Court of Appeals for the Eighth Circuit, October 27, 2020).

716 USCIS, “*Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal*” (policy alert, December 20, 2019). A week prior, AILA had issued a practice advisory noting that some USCIS offices had started denying the green-card applications of Temporary Protected Status (TPS) holders who had reentered on advance parole on the basis that reentering on advance parole did not override their prior status as having entered the country without inspection. See AILA and American Immigration Council, “*Adjustment Eligibility of TPS Holders after Return with Advance Parole, Even When Initial Entry without Inspection*” (practice advisory, AILA and American Immigration Council, Washington, DC, December 13, 2019).

717 Bennett Savitz, USCIS Committee Update, 2020 AILA Spring CLE Conference, March 6, 2020.

718 USCIS, “*Matter of Z-R-Z-C-, Adopted Decision 2020-02 (AAO Aug. 20, 2020)*” (policy memorandum, August 20, 2020).



- *October 6, 2020*—USCIS updated its policy manual to state that TPS holders returning to the United States with advance parole documents are not considered inspected and paroled into the country, pursuant to the AAO decision.<sup>719</sup>
- ▶ **Deferred Enforced Departure for Venezuelans**—*January 19, 2021*—Trump granted DED to Venezuelans who were present in the United States as of January 20, 2021.<sup>720</sup> The grant would protect an estimated 200,000 eligible Venezuelans from deportation for 18 months and make it possible for them to obtain work permits during that time.<sup>721</sup>
- ▶ **Individual Work Permit Extension Letters**—*multiyear*—When USCIS is unable to process TPS renewals before the status' expiration date, the agency issues automatic extensions of the beneficiaries' work permits to allow extra time for processing. Historically, USCIS announced automatic work permit extensions through notices in the *Federal Register*. The Trump administration began issuing individual notices, mailed to TPS holders affected by the processing delays.<sup>722</sup> In some cases, the individual notices did not have an accompanying *Federal Register* notice announcing the extension. The USCIS handbook does not list the individual notices as official means of communicating an automatic extension of work eligibility, and there were reports that the letters led to disruptions in employment and confusion among TPS beneficiaries.<sup>723</sup>

## E. *Victims of Trafficking and Other Crimes*

Victims of certain crimes and victims of trafficking who assist with law enforcement investigations into those crimes can be eligible for U and T nonimmigrant statuses, respectively. The Trump administration took steps to make it more difficult to obtain certifications from law enforcement agencies that allow a victim to pursue lawful status. It also opened the possibility of removing unauthorized immigrants who have pending U visa applications.

- ▶ **Restricting Department of Labor Certifications for U and T Visas**—*July 1, 2019*—New policy guidance for the Labor Department's Wage and Hour Division (WHD) limited the circumstances in which WHD could certify U and T visa applicants' cooperation with a law enforcement investigation into a crime committed against them or a trafficking situation, respectively.<sup>724</sup> (For more, see Section 7.)
- ▶ **Encouraging Law Enforcement Agencies to Use Discretion When Certifying Visas**—*July 31, 2019*—USCIS revised its guidance for law enforcement agencies on certifying U visa applications for victims of crime. Many of the changes emphasized local agencies' ability to set their own certification policies,

719 USCIS, "Temporary Protected Status and Eligibility for Adjustment of Status."

720 White House, "Memorandum of January 19, 2021: Deferred Enforced Departure for Certain Venezuelans," *Federal Register* 86, no. 14 (January 25, 2021): 6845–46.

721 Sabrina Rodriguez, "Trump Grants Venezuelans Temporary Legal Status on His Way Out," Politico, January 19, 2021.

722 GAO, *Temporary Protected Status: Steps Taken to Inform and Communicate Secretary of Homeland Security's Decisions* (Washington, DC: GAO, 2020), 36–39.

723 GAO, *Temporary Protected Status; CLINIC, "USCIS Processing Delays and the Resulting Consequences to TPS Holder and their Families"* (policy brief, Washington, DC, June 28, 2019).

724 Memorandum from Cheryl Stanton, Administrator, Wage and Hour Division, U.S. Department of Labor, to Regional Administrators and District Directors, Wage and Hour Division, *Certification of Supplement B Forms of U Nonimmigrant and T Nonimmigrant Visa Applications*, July 1, 2019; Ben Penn, "Trump Wage Chief Adds Visa Hurdles for Trafficking Victims (2)," Bloomberg Law, July 1, 2019.

such as setting time limits, conducting their own background checks on applicants, and withdrawing submitted certifications if new information comes to light. Other changes reminded agencies that they were under no obligation to issue certifications.<sup>725</sup>

- ▶ **Enforcement Actions against U Visa Applicants**—*multiyear*—Over the course of the administration, ICE broadened its ability to remove unauthorized immigrants with pending U visa applications.
  - *October 26, 2017*—ICE informed the American Immigration Lawyers Association that it will take enforcement action against noncitizens with final orders of removal, even if they have pending U visa applications.<sup>726</sup> After encountering such an immigrant, ICE will contact USCIS to get a recommendation on whether the U visa application will likely be approved. If USCIS does not respond within five days, ICE will initiate removal proceedings.
  - *August 2, 2019*—ICE removed a requirement that, for U visa applicants in removal proceedings, USCIS make an initial determination of whether they appeared to be eligible for the status before ICE approves or denies a stay of removal.<sup>727</sup> The revised policy leaves that decision entirely to ICE’s discretion.
- ▶ **Pending at end of administration**
  - Work Authorization for U Visa Applicants—USCIS announced that it planned to propose a rule that would define “bona fide” U visa applications.<sup>728</sup> In order to qualify for work authorization, a U visa applicant must have a bona fide application pending.

## 6 U.S. Department of State

The U.S. Department of State plays a critical role in determining who is permitted to enter the country by adjudicating visa applications and disseminating visa stamps to foreign nationals seeking to enter the United States. As such, the State Department was central to the Trump administration’s efforts to increase vetting or all-out ban the arrival of certain groups of foreign nationals.

The most prominent changes carried out by the State Department were implementation of the president’s travel bans, including those due to the COVID-19 pandemic (see Section 2), efforts to deny visa issuance to low-income immigrants likely to rely on public benefits, and to add steps to the visa application process and require additional information from applicants—moves that purported to increase security vetting, but that also made it more difficult for some foreign nationals to get visas. A presidential proclamation

*The State Department was central to the Trump administration’s efforts to increase vetting or all-out ban the arrival of certain groups of foreign nationals.*

725 DHS, “U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies” (resource guide, DHS, Washington, DC, 2019); CLINIC, “U Visa Updates: New U Visa Law Enforcement Resource Guide and ICE Stay of Removal Policy for U Visa Petitioners,” updated August 9, 2019.

726 AILA, “AILA/ICE Liaison Meeting Minutes” (unpublished meeting notes, October 26, 2017).

727 ICE, “Revision of Stay of Removal Request Reviews for U Visa Petitioners” (fact sheet, ICE, August 2, 2019).

728 USCIS, “Discretionary Employment Authorization for U Nonimmigrants” (proposed rule 1615-AC53, Spring 2020).

decreeing that foreign nationals could be denied entry unless they prove they can obtain eligible health insurance or will have sufficient resources to pay for medical costs had the potential to block two-thirds of those applying for legal permanent residence from abroad, though in the end legal challenges prevented it from going into effect before the end of the administration.

The various changes to State Department policies may have contributed to a decline in visa issuance. The number of applicants who received “inadmissible” determinations on public-charge grounds spiked, from 1,076 in FY 2016 to 20,941 in FY 2019.<sup>729</sup> Immigrant visa issuance fell from 560,000 in FY 2017 to 460,000 in FY 2019.<sup>730</sup> In FY 2020, when COVID-19 led to travel bans and embassy closures around the world, the trend accelerated; just 240,000 immigrant visas were issued that year.

- ▶ **Travel Ban—January 27, 2017**—After the administration issued three versions of the travel ban (the first in January 2017) and faced multiple court injunctions along the way, the Supreme Court on June 26, 2018, upheld the third iteration of the ban, which was issued on September 24, 2017.<sup>731</sup> Under this ban, nationals of seven countries (Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen) were prevented from entering the United States, to varying degrees.<sup>732</sup> Chad was included in the upheld ban, but after announcing that the country had raised its security standards, the president terminated its entry restrictions in April 2018.<sup>733</sup>
  - **February 21, 2020**—The president signed a proclamation adding travel restrictions for six new countries on January 31, 2020.<sup>734</sup> The ban went into effect on February 21, 2020, restricting new permanent immigration from Eritrea, Kyrgyzstan, Myanmar (also known as Burma), and Nigeria and restricting nationals from Sudan and Tanzania from participating in the Diversity Visa Lottery. Nationals of all of the newly designated countries were still permitted to enter the United States on nonimmigrant visas, for example as tourists or temporary workers. The president also announced his decision to maintain the entry restrictions established in the September 2017 travel ban.

729 Because of a 2019 change in the State Department’s reporting methodology for inadmissibility determinations, which fails to report inadmissibility determinations that are overruled in the same fiscal year, the number of public-charge inadmissibility determinations in FY 2019 is likely much higher. See State Department, “Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2019,” accessed March 10, 2020; State Department, “Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2016,” accessed March 10, 2020.

730 State Department, “Table I: Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts, Fiscal Years 2016–2020,” accessed September 10, 2020.

731 President of the United States, “Proclamation 9645 of September 24, 2017: Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” *Federal Register* 82, no. 186 (September 27, 2017): 45161–72; Muzaffar Chishti, Sarah Pierce, and Laura Plata, “In Upholding Travel Ban, Supreme Court Endorses Presidential Authority while Leaving Door Open for Future Challenges,” *Migration Information Source*, June 29, 2018.

732 President of the United States, “Proclamation 9645”; Muzaffar Chishti and Jessica Bolter, “The Travel Ban at Two: Rocky Implementation Settles into Deeper Impacts,” *Migration Information Source*, January 31, 2019.

733 White House, “Proclamation 9723 of April 10, 2018: Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” *Federal Register* 83, no. 72 (April 13, 2018): 15937–40.

734 President of the United States, “Proclamation 9983 of January 31, 2020: Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” *Federal Register* 85, no. 24 (February 5, 2020): 6699–707.

- ▶ **Suspension of the Visa Interview Waiver Program**—*January 27, 2017*—In the president’s initial January 2017 executive order issuing the travel ban, and the subsequent March 6 executive order that revoked and replaced the prior order, the administration included near identical provisions directing the State Department to immediately suspend the Visa Interview Waiver Program.<sup>735</sup> The change was implemented in the department’s *Foreign Affairs Manual* in July 2017.<sup>736</sup> This Obama-era program allowed certain low-risk travelers to renew their travel authorization without an in-person interview. The order allowed interview waivers to continue for specific statutory exceptions, including certain diplomats and anyone applying to renew a nonimmigrant visa less than 12 months after the prior visa expired.<sup>737</sup>
  - *May 14, 2019*—The U.S. embassy in Nigeria announced an immediate indefinite suspension of all interview waivers for those renewing visas.<sup>738</sup> The announcement came less than a month after the president issued a memorandum aimed at curbing visa overstays from countries with overstay rates higher than 10 percent, according to DHS’s *Entry/Exit Overstay Report* for FY 2018 (see more under “Pending at end of administration,” later in this section).<sup>739</sup> In that report, DHS described an overstay rate of 14.8 percent for Nigerian nonimmigrants and 18.6 percent for Nigerian nonimmigrant students.
  - *August 25, 2020*—The Departments of State and Homeland Security announced the temporary expansion of the Visa Interview Waiver Program through December 31, 2020, in response to COVID-19.<sup>740</sup> On December 29, 2020, the departments extended this expansion through March 31, 2021.<sup>741</sup> (For more on the pandemic’s impact on this program, see Section 2.A.)
- ▶ **Slowed Pace of Nonimmigrant Visa Interviews**—*June 21, 2017*—Trump issued an executive order eliminating a goal put in place under the Obama administration that the State Department interview 80 percent of nonimmigrant visa applicants within three weeks of receiving their applications.<sup>742</sup>
- ▶ **Increased Information Requirements for Some Applicants**—*August 3, 2017*—In a new form (DS-5535), the State Department mandates that any visa applicant that officers decide “warrants additional scrutiny” provide 15 years of travel, housing, and employment history, among other things.<sup>743</sup>
- ▶ **Changes to the 30-/60-Day Rule**—*September 16, 2017*—For a certain period after nonimmigrants enter the country, the State Department can declare their application to have included a material misrepresentation if the individuals engage in activities inconsistent with the terms of their

735 White House, “Executive Order 13769 of January 27, 2017: Protecting the Nation from Foreign Terrorist Entry into the United States,” *Federal Register* 82, no. 20 (February 1, 2017): 8977–82; White House, “Executive Order 13780.”

736 State Department, “9 Foreign Affairs Manual 403.5: (U) NIV Interview by Consular Officer,” updated July 27, 2017.

737 State Department, “9 Foreign Affairs Manual 403.5.”

738 U.S. Embassy and Consulate in Nigeria, “Indefinite Suspension of ‘Dropbox’ Process for Renewals” (news release, May 14, 2019).

739 Memorandum from the president, *Presidential Memorandum on Combating High Nonimmigrant Overstay Rates*, April 22, 2019; DHS, *Fiscal Year 2018 Entry/Exit Overstay Report* (Washington, DC: DHS, 2019).

740 U.S. Department of State, Bureau of Consular Affairs, “Expansion of Interview Waiver Eligibility” (news release, August 25, 2020).

741 U.S. Department of State, Bureau of Consular Affairs, “Expansion of Interview Waiver Eligibility” (news release, December 29, 2020).

742 White House, “Executive Order 13802 of June 21, 2017: Amending Executive Order 13597,” *Federal Register* 82, no. 121 (June 26, 2017): 28747–48; White House, “Executive Order 13597 of January 19, 2012: Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness,” *Federal Register* 77, no. 15 (January 24, 2012): 3373–75.

743 State Department, “60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants,” *Federal Register* 82, no. 148 (August 3, 2017): 36180–82.

nonimmigrant status.<sup>744</sup> While previously the period in which this could be done was 30 or 60 days after admission, the State Department extended it to 90 days.

- ▶ **Public-Charge Vetting**—*January 3, 2018*—The State Department changed its *Foreign Affairs Manual* to instruct employees to consider an affidavit of support as just one potential factor when deciding if an applicant for a green card or a temporary visa is likely to become a public charge; in the past, an affidavit of support was on its own sufficient evidence to pass the test.<sup>745</sup> Officers are now instructed to consider the applicant’s “age, health, family status, assets, resources, financial status, education, and skills,” regardless of whether an affidavit of support was filed.
  - *February 24, 2020*—The State Department on October 11, 2019, published an interim final rule to implement public-charge standards consistent with those implemented by USCIS (see Section 7).<sup>746</sup> However, the department delayed the rule’s implementation while it sought approval for a new public-charge questionnaire and waited for the resolution of the litigation against DHS’s public-charge rule.<sup>747</sup> After the Supreme Court allowed USCIS to proceed with its regulation, the State Department sought and received emergency approval to begin using its public-charge questionnaire on February 24, 2020, for six months through August 31, 2020.<sup>748</sup> On July 29, 2020, a nationwide injunction halted the agency’s enforcement of the rule.<sup>749</sup>
- ▶ **Limit Nonimmigrant Visa Validity**—*January 26, 2018*—The State Department revised its consular manual to empower officers to limit the validity period of nonimmigrant visas.<sup>750</sup> Previously, officers were encouraged to issue visas for the full available validity period, typically ten years.<sup>751</sup> After the revision, officers were instructed to limit the validity period, or to provide foreign nationals with a limited number of entries, if they felt it was warranted, for example, if they had concerns about the foreign national potentially overstaying the visa.<sup>752</sup>
- ▶ **Establishment of a National Vetting Enterprise**—*February 6, 2018*—Trump issued a presidential memo that gave DHS and other agencies six months to establish a National Vetting Enterprise, which administration officials said was intended to streamline vetting of would-be immigrants and nonimmigrants and to improve the flow of information between various federal agencies.<sup>753</sup> In August

744 State Department, “Change to INA 212(a)(6)(C)(i) and Introduction of 90 Day Rule” (policy update, State Department, Washington, DC, September 16, 2017).

745 State Department, “9 Foreign Affairs Manual 302.8–2: (U) Public Charge,” updated January 3, 2018.

746 State Department, “Visas: Ineligibility Based on Public Charge Grounds,” *Federal Register* 84, no. 198 (October 11, 2019): 54996–5015.

747 State Department, Bureau of Consular Affairs, “Information on Public Charge,” accessed February 21, 2020; State Department, “60-Day Notice of Proposed Information Collection: Public Charge Questionnaire,” *Federal Register* 84, no. 206 (October 24, 2019): 57142–43.

748 Office of Information and Regulatory Affairs, “View ICR - OIRA Conclusion; OMB Control No: 1405-0234,” accessed February 21, 2020.

749 *Make the Road New York, et al., v Pompeo, et al.*, No. 1:19-cv-11633-GBD (U.S. District Court for the Southern District of New York, July 29, 2020).

750 Memorandum from Secretary of State, *Update to 9 FAM 403.9-4 Validity of Nonimmigrant Visas*, January 26, 2018.

751 State Department, “9 Foreign Affairs Manual 403.9-4(B) (U) Validity of Nonimmigrant Visas,” accessed June 22, 2017. (“Posts are encouraged to issue full-validity visas. The routine issuance of limited validity visas runs contrary to that policy.”)

752 State Department, “9 Foreign Affairs Manual 403.9-4(B) (U) Validity of Nonimmigrant Visas,” accessed February 24, 2020.

(“Department regulations at 22 CFR 41.112(c) authorize you to issue a nonimmigrant visa valid for a period, or provide a number of applications for admission (‘entries’), less than that prescribed on the basis of reciprocity, if warranted in an individual case.”)

753 Memorandum from the president to the vice president et al., *Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise*, February 6, 2018.



2018, DHS finalized a plan that, among other things, described the intention to begin operations in December 2018 and consolidated existing processes that support vetting of foreign nationals as part of the Visa Waiver Program.<sup>754</sup>

- ▶ **Heightened Nonimmigrant Intent Requirements for E Visa Holders**—*April 6, 2018*—The State Department raised the level of scrutiny of E visa applicants' intent to depart; while previously the department instructed immigration officers to consider asking applicants for this visa (treaty traders and investors) about their plans to leave the country after it expires, starting in April 2018 they were required to do so.<sup>755</sup>
- ▶ **Additional Screenings for Chinese Nationals in Sensitive Fields**—*June 11, 2018*—The State Department began conducting additional screenings of Chinese nationals applying for visas to study or work in certain "sensitive" fields.<sup>756</sup> There is no public guidance on what constitutes a "sensitive" field. In some cases, if these applicants do receive a visa, it may be limited to one year.
- ▶ **Denials of Visas to Same-Sex Domestic Partners of Foreign Diplomats**—*July 2018*—The administration began denying visas to same-sex domestic partners of foreign government officials and international organization personnel traveling to the United States.<sup>757</sup> On October 1, 2018, same-sex foreign domestic partners of diplomats based in the United States were given until December 31, 2018, to provide the State Department proof of marriage or leave the country.
- ▶ **Visa Restrictions on International Criminal Court (ICC) Staff**—*March 15, 2019*—In response to plans in the ICC to investigate possible war crimes by U.S. forces or allies in Afghanistan, the U.S. secretary of state announced "visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel."<sup>758</sup> Less than a month later, in April 2019, the State Department revoked the visa of the ICC's chief prosecutor, Fatou Bensouda.<sup>759</sup> On June 12, 2020, the secretary of state announced an expansion of the visa restrictions to include the family members of sanctioned officials.<sup>760</sup>
- ▶ **Terrorist Organization Designation for the Islamic Revolutionary Guard**—*April 15, 2019*—The State Department designated the Islamic Revolutionary Guard Corps (IRGC) a foreign terrorist organization.<sup>761</sup> The IRGC is a branch of the Iranian military, which has compulsory service requirements, and the ban would prevent anyone who served in the IRGC from being granted a U.S.

754 DHS, *Plan to Implement the Presidential Memorandum on Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise* (Washington, DC: DHS, 2018).

755 State Department, "9 Foreign Affairs Manual 402.9–4(c): Treaty Traders, Investors, and Specialty Occupations–E Visas—Intent to Depart upon Termination of Status," updated April 6, 2018.

756 Testimony of Edward J. Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, State Department, before the Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, *Student Visa Integrity: Protecting Educational Opportunity and National Security*, 115th Cong., 2d sess., June 6, 2018.

757 State Department, "Senior Administration Officials on Visas for Same-Sex Domestic Partners of G-4 and Diplomatic Visa Holders" (news release, October 2, 2018).

758 State Department, "Remarks to the Press" (news release, March 15, 2019).

759 Marlise Simons and Megan Specia, "U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes," *New York Times*, April 5, 2020.

760 State Department, "This Week at State: June 12, 2020" (news release, June 12, 2020).

761 State Department, "In the Matter of the Designation of the Islamic Revolutionary Guard Corps (and Other Aliases) as a Foreign Terrorist Organization," *Federal Register* 84, no. 72 (April 15, 2019): 15278.

visa.<sup>762</sup> It is the first time the United States has issued this type of designation to a part of another nation's government.<sup>763</sup>

- ▶ **More Detailed Applicant Disclosures**—*May 2019*—The State Department increased the required disclosures for all visa applicants to include social media usernames, previous email addresses, and phone numbers for the prior five years.<sup>764</sup>
- ▶ **Tightened Restrictions for the Diversity Visa Program**—*June 5, 2019*—The State Department issued an interim final rule mandating that applicants for the Diversity Visa Program provide the number, country of issuance, and expiration date of their valid, unexpired passport on their petition form or be disqualified from the lottery for that year.<sup>765</sup>
- ▶ **Iranian Students Deemed Inadmissible**—*August 2019 to about January 2020*—At least 17 Iranian nationals with student visas were turned away upon arrival to airports in the United States.<sup>766</sup> CBP officials appeared to question if their work history or future careers were subject to U.S. sanctions against Iran, as well as the political and religious leanings of the students. At least 11 of the students were turned away at Boston Logan Airport, where some reported aggressive screening and questioning processes.<sup>767</sup> About 20 additional students from Iran were barred from boarding flights to the United States, despite holding valid student visas.<sup>768</sup>
- ▶ **Restrictions on the Travel of Iranian Government Officials**—*September 30, 2019*—The president issued a proclamation indefinitely restricting the entry into the United States of Iranian senior government officials and their immediate family members.<sup>769</sup>
- ▶ **Required Proof of Health-Care Coverage**—*October 4, 2019*—In October 2019, the president issued a proclamation stating that all new immigrants could be denied entry into the country unless they prove they can obtain eligible health insurance within 30 days of arrival or will have sufficient resources to pay for foreseeable medical costs.<sup>770</sup> On November 2, one day before the proclamation was to take effect, a district court judge issued a temporary restraining order, preventing its implementation.<sup>771</sup> While that judge's decision was later reversed with the Ninth Circuit Court of Appeals ruling that

762 Ortega, "Huge Trump-Era and Pandemic Immigrant Visa Backlog."

763 Edward Wong and Eric Schmitt, "Trump Designates Iran's Revolutionary Guards as a Foreign Terrorist Group," *New York Times*, April 8, 2019.

764 Associated Press, "US Now Seeking Social Media Details from All Visa Applicants," Associated Press, June 1, 2019; Office of Management and Budget (OMB) Office of Information and Regulatory Affairs, "OMB Control Number History: 1405-0182," accessed February 19, 2020; OMB Office of Information and Regulatory Affairs, "OMB Control Number History: 1405-0185," accessed February 19, 2020.

765 State Department, "Visas: Diversity Immigrants," *Federal Register* 84, no. 108 (June 5, 2019): 25989–91.

766 Caleb Hampton and Caitlin Dickerson, "Demeaned and Humiliated: What Happened to These Iranians at US Airports," *New York Times*, January 25, 2020; Catherine Shoichet, "The Number of Iranian Students Turned Back at US Airports Is Growing. And Universities Are Worried," CNN, January 31, 2020.

767 Shoichet, "The Number of Iranian Students Turned Back."

768 Caleb Hampton and Simon Campbell, "Iranian Students Barred from US: Lost Money, Broken Dreams, No Answers," *The Guardian*, October 14, 2019.

769 White House, "Proclamation 9932 of September 25, 2019: Suspension of Entry as Immigrants and Nonimmigrants of Senior Officials of the Government of Iran," *Federal Register* 84, no. 189 (September 30, 2019): 51935–36.

770 White House, "Proclamation 9945 of October 4, 2019: Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect Availability of Healthcare Benefits for Americans," *Federal Register* 84, no. 196 (October 9, 2019): 53991–94.

771 *John Doe #1 v. Donald Trump*, Case No. 3:19-cv-01743 (U.S. District Court for the District of Oregon, November 2, 2019).

the president did have the authority to bar the entry of immigrants without health-care coverage, a preliminary injunction issued in a separate case remained in place, barring the government from implementing the rule.<sup>772</sup>

- ▶ **Poland Added to Visa Waiver Program**—*November 11, 2019*—In coordination with the State Department, DHS announced Poland’s addition to the Visa Waiver Program.<sup>773</sup> The program permits citizens of 39 countries to travel to the United States for business or tourism for up to 90 days without a visa, in exchange for certain travel and security commitments from those countries.
- ▶ **Visa Restrictions on Individuals Undermining Peace in South Sudan**—*December 12, 2019*—Secretary of State Pompeo announced visa restrictions against anyone who undermines or impedes the peace process in South Sudan.<sup>774</sup> In doing so, Pompeo invoked a section of U.S. immigration law that allows the executive to block the entry of foreign nationals if the secretary of state has reasonable grounds to believe their entry would have serious adverse foreign policy consequences.
- ▶ **Ban on Entry of Certain Iranians**—*January 10, 2020*—Trump issued an executive order imposing sanctions on Iran and suspending the entry of Iranians who work in, sell to, or otherwise support the construction, mining, manufacturing, or textile sectors in the country.<sup>775</sup>
- ▶ **Efforts to Prevent “Birth Tourism”**—*January 24, 2020*—The State Department issued a final regulation that attempts to prevent foreign nationals from coming to the United States to give birth.<sup>776</sup> The regulation explicitly states that coming into the United States strictly for the purpose of obtaining U.S. citizenship for a child by giving birth in the country, a practice dubbed “birth tourism,” is not a permissible purpose for a B-2 visa (for tourism, to visit family, and other non-business purposes).
- ▶ **Retaliatory Visa Restrictions against Chinese Nationals**—*May to December 2020*—As tensions flared between China and the United States over the pandemic and China’s policies in Hong Kong and Tibet, the administration banned foreign nationals traveling from China and imposed a series of retaliatory visa restrictions. (For pandemic-related restrictions, see Section 2.A.)
  - **Chinese Journalists**—*May 8, 2020*—DHS published a final regulation tightening admission guidelines for Chinese journalists, limiting their stays in the United States to 90 days at a time.<sup>777</sup>
  - **Certain Chinese Students and Researchers**—*May 29, 2020*—The president issued a proclamation banning the entry of Chinese nationals on F visas (for students) and J visas (for exchange visitors) to pursue graduate study or research if the nationals are associated with

772 *John Doe #1, et al., v. Donald Trump, et al.*, Case No. 19-36020 (United States Court of Appeals for the Ninth Circuit, December 31, 2020); *Make the Road New York, et al., v. Pompeo, et al.*, No. 1:19-cv-11633-GBD (U.S. District Court for the Southern District of New York, July 29, 2020).

773 DHS, “Acting Secretary McAleenan Announces Designation of Poland into the Visa Waiver Program” (news release, November 6, 2019).

774 State Department, “Visa Restrictions on South Sudan Peace Process Spoilers” (news release, December 12, 2019).

775 White House, “Executive Order 13902 of January 10, 2020: Imposing Sanctions with Respect to Additional Sectors of Iran,” *Federal Register* 85, no. 9 (January 14, 2020): 2003–06.

776 State Department, “Visas: Temporary Visitors for Business or Pleasure,” *Federal Register* 85, no. 16 (January 24, 2020): 4219–25.

777 DHS, “Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking to Enter the United States,” *Federal Register* 85, no. 91 (May 11, 2020): 27645–49.

the Chinese military.<sup>778</sup> The same proclamation encouraged the secretary of state to consider revoking visas of such nationals already in the United States. As of September 8, 2020, the proclamation resulted in the revocation of more than 1,000 visas.<sup>779</sup>

- Chinese Officials Involved in Undermining Hong Kong's Autonomy—June 26, 2020—The secretary of state announced indefinite visa restrictions on current and former Chinese officials believed to be responsible for, or complicit in, undermining Hong Kong's autonomy.<sup>780</sup>
  - o *July 14, 2020*—The president issued an executive order similarly blocking the entry of any foreign nationals who undermine democratic processes or institutions or the peace and stability of Hong Kong, as well as their family members and employees.<sup>781</sup>
- Chinese Officials Involved in Restricting Foreigners' Access to Tibet—July 7, 2020—The secretary of state announced indefinite visa restrictions against Chinese officials determined to be “substantially involved in the formulation or execution of policies related to access for foreigners to Tibetan areas.”<sup>782</sup>
- Certain Chinese Technology Company Employees—July 15, 2020—The secretary of state announced indefinite visa restrictions on “certain employees of Chinese technology companies that provide material support to regimes engaging in human rights abuses globally.”<sup>783</sup> It includes employees of Huawei Technologies Co., Ltd., a Chinese multinational technology company that had become entangled in several U.S. foreign policy issues.
- Chinese Communist Party Members—December 3, 2020—The State Department issued restrictions on B-1 business and B-2 tourist visas for members of the Chinese Communist Party—about 92 million people—and their families. The restrictions limit the validity period to 30 days, allow only one entry on the visa, and require visa holders to enter the United States within one month of issuance.<sup>784</sup>
- Chinese Officials Involved in Human Rights Abuses—December 21, 2020—Secretary of State Pompeo imposed sanctions on Chinese officials believed to be involved in human rights abuses, including the oppression of members of ethnic minority groups, dissidents, human rights defenders, journalists, peaceful protestors, and others.<sup>785</sup> Their family members are also subject to the restrictions.

778 White House, “Proclamation 10043 of May 29, 2020: Suspension of Entry as Nonimmigrants of Certain Students and Researchers From the People’s Republic of China,” *Federal Register* 85, no. 108 (June 4, 2020): 34353–55.

779 Humeyra Pamuk, David Brunnstrom, and Ryan Woo, “U.S. Cancels Visas of More Than 1,000 Chinese Nationals Deemed Security Risks,” Reuters, September 15, 2020.

780 State Department, “U.S. Department of State Imposes Visa Restrictions on Chinese Communist Party Officials for Undermining Hong Kong’s High Degree of Autonomy and Restricting Human Rights” (news release, June 26, 2020).

781 White House, “Executive Order 13936.”

782 State Department, “Implementing Visa Restrictions under the Reciprocal Access to Tibet Act” (news release, July 7, 2020).

783 State Department, “U.S. Imposes Visa Restrictions on Certain Employees of Chinese Technology Companies that Abuse Human Rights” (news release, July 15, 2020).

784 Paul Mozur and Raymond Zhong, “U.S. Tightens Visa Rules for Chinese Communist Party Members,” *New York Times*, December 3, 2020; Michele Kelemen and John Ruwitch, “U.S. Imposes Severe Travel Restrictions on Chinese Communist Party Members,” NPR, December 3, 2020.

785 State Department, “Additional Restrictions on the Issuance of Visas for People’s Republic of China Officials Engaged in Human Rights Abuses” (news release, December 21, 2020).

- ▶ **Visa Restrictions on Individuals Undermining Democracy in Guyana**—*July 15, 2020*—After a contested national election in Guyana, Secretary of State Pompeo announced visa restrictions against “individuals who have been responsible for, or complicit in, undermining democracy in Guyana,” as well as their immediate family members.<sup>786</sup>
- ▶ **Visa Restrictions on Individuals Undermining Democratic Transition in Sudan**—*August 13, 2020*—After the Sudanese president was removed from power by the military, Secretary of State Pompeo implemented visa restrictions on certain individuals working to undermine Sudan’s civilian-led transitional government, as well as their family members.<sup>787</sup>
- ▶ **Visa Restrictions on Ugandans Involved in Adoption Scheme**—*August 17, 2020*—The State Department imposed visa restrictions on four Ugandan individuals who participated in a scheme to arrange fraudulent adoptions of Ugandan children to families in the United States.<sup>788</sup>
- ▶ **Visa Restrictions on Individuals Undermining Democracy in Belarus**—*October 2, 2020*—The State Department imposed visa restrictions on 24 individuals involved in the 2020 Belarusian presidential election and related human rights violations.<sup>789</sup>
  - *December 23, 2020*—Visa restrictions were imposed on an additional 39 individuals related to their involvement in the Belarusian presidential election and subsequent violence in the country.<sup>790</sup>
- ▶ **Moratorium on Growth in the Au Pair Program**—*October 9, 2020*—The State Department paused new growth of the Au Pair Program, which allows foreign nationals on J-1 visas to live, work, and engage in cultural exchange in the United States through a sponsor organization, until the department completes a comprehensive review of the program.<sup>791</sup> The moratorium stipulates that the State Department will not accept or review any new applications to become a sponsor organization filed after December 31, 2019, or allow program expansions for existing sponsors.
- ▶ **Visa Reciprocity Fees Removed for Nigeria**—*December 2, 2020*—The State Department announced the removal of reciprocity fees for Nigerians more than a year after the West African country implemented a similar move.<sup>792</sup> Reciprocity fees are imposed on approved visa applications of nationals from particular countries that require fees of U.S. visa applicants. The U.S. government had imposed the reciprocity fees in August 2019 after Nigeria failed to change its fee structure for U.S.-citizen visa applicants despite engagement on the question since early 2018.<sup>793</sup>

786 State Department, “U.S. Department of State Imposes Visa Restrictions on Guyanese Individuals Undermining Democracy” (news release, July 15, 2020).

787 State Department, “The United States Imposes Visa Restrictions on Multiple Individuals Undermining Sudan’s Civilian-Led Transitional Government” (news release, August 13, 2020).

788 State Department, “Financial Sanctions and Visa Restrictions against Ugandan Individuals Involved in Corrupt Adoption Scheme” (news release, August 17, 2020).

789 State Department, “The U.S.’ Action Against Belarusian Individuals Involved in Efforts To Undermine Belarusian Democracy” (news release, October 2, 2020).

790 State Department, “Imposing Sanctions and Visa Restrictions on Additional Individuals and Entities Undermining Belarusian Democracy” (news release, December 23, 2020).

791 State Department, “Exchange Visitor Program - Moratorium on Growth in the Au Pair Program,” *Federal Register* 85 no. 197 (October 9, 2020): 64213–14.

792 U.S. Embassy and Consulate in Nigeria, “Visa Reciprocity Fees Removed for Nigeria” (news release, December 5, 2020).

793 U.S. Embassy and Consulate in Nigeria, “Revised Visa Reciprocity for Nigeria” (news release, August 27, 2019).



- ▶ **Codifying and Narrowing Criteria for Certain Special Immigrant Visas**—December 16, 2020—The State Department published a final regulation in June 2020 codifying criteria already in the department’s practice manual for granting special immigrant status for certain foreign nationals who have been employed by the U.S. government abroad for at least 15 years.<sup>794</sup> The regulation excluded some foreign nationals who previously qualified, including those with high visibility in a sensitive position and service that resulted in the employees losing economic and social ties to their home countries.
- ▶ **Visa Bond Pilot Program**—December 24, 2020—A six-month pilot program went into effect requiring certain travelers on business and tourist visas to pay a bond as a condition of visa issuance.<sup>795</sup> Visa applicants from countries with historically high visa overstay rates could be required to pay bonds of \$5,000, \$10,000, or \$15,000, which would then be cancelled upon their timely departure from the United States.
- ▶ **Limits on Visas for Individuals Involved in Iranian Petroleum Businesses**—January 6, 2021—The State Department imposed sanctions and visa restrictions on five individuals for their involvement with Iranian petroleum companies. The restrictions were backdated, effective October 29, 2020.
- ▶ **Limits on Visas for Nationals of Recalcitrant Countries**—*multiyear*—Pursuant to the president’s January 25, 2017, executive order on interior enforcement, the State Department and DHS cooperated in refusing to grant visas to nationals of recalcitrant countries (those that systematically refuse or delay cooperation on the return of their nationals). The efforts aimed to pressure these countries to accept the return of their nationals when they were subject to removal from the United States. (For more, see Section 3.B.)
- ▶ **Pending at end of administration**
  - **Making it More Difficult for J Visa Holders to Stay in the United States**—The administration indicated it intended to publish a regulation that would make it harder for J visa holders (temporary exchange visitors) to stay in the United States.<sup>796</sup> Certain J visa recipients, including those who receive government funding for research or study, must return to their home countries for two years before returning to the United States with a different nonimmigrant status or as a green-card holder. While most of these nonimmigrants could under existing policies apply to the State Department to request that this two-year home residency requirement be waived, the regulation under consideration would decrease the likelihood that such waivers are granted.
  - **Efforts to Decrease Visa Overstays**—On April 22, 2019, the president issued a memo ordering the Departments of State, Homeland Security, and Justice to initiate steps to reduce the number of nonimmigrants who overstay their permitted time in the United States.<sup>797</sup> The memo drew particular attention to countries that have visitor visa (B-1, B-2) overstay rates

794 State Department, “Visas: Special Immigrant Visas-U.S. Government Employee Special Immigrant Visas for Service Abroad,” *Federal Register* 85, no. 116 (June 16, 2020): 36323–27.

795 State Department, “Visas: Visa Bond Pilot Program,” *Federal Register* 85, no. 227 (November 27, 2020): 74875–83.

796 State Department, “Visas: Two-Year Home-Country Physical Presence Requirement” (proposed rule 1400-AE48, Fall 2017).

797 Memorandum from the president, *Presidential Memorandum on Combating High Nonimmigrant Overstay Rates*.

of 10 percent or more, encouraging the agencies to consider consequences as serious as suspending or limiting the entry of nationals of those countries on visitor visas.

- Collecting Social Media Information—DHS published a 30-day notice on February 10, 2020, inviting comment on its intention to collect applicants’ social media information.<sup>798</sup> CBP planned to request five years of social media information from Visa Waiver Program applicants, among others.
- Increased Biographical Information Collection—On October 21, 2020, the State Department issued a request for comments on changes to the supplemental questions for visa applicants, which are required of certain immigrant and nonimmigrant visa applicants who are determined to warrant additional questions on terrorism or national security grounds.<sup>799</sup> The revised form would collect more information about the applicants’ travel history, including funding sources, along with employment and address history, and family members’ names and birthdays. The form would remove questions related to social media handles, which had been incorporated into the visa application.
- Regulations on Intercountry Adoptions—The State Department introduced a proposed rule that would require adoption service providers to be transparent with accrediting agencies and prospective adoptive parents about adoption fees so as to prevent child buying.<sup>800</sup> The rule would also add a definition of “relative” for cases of familial adoption.
- Federal Preemption Governing Au Pairs—The State Department indicated that it would publish a proposed rule clarifying that federal regulations governing the Au Pair Program preempt state and local laws, including those governing labor rights.<sup>801</sup>

## 7 U.S. Citizenship and Immigration Services and U.S. Department of Labor

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USCIS is the agency within DHS tasked with immigration benefits adjudication, but under the Trump administration, USCIS played an increasingly large role in enforcement. This shift was perhaps most clearly reflected in changes to the agency’s mission statement, from a focus on “customers” and “America’s promise as a nation of immigrants” to “protecting Americans” and “securing the homeland.”<sup>802</sup>

USCIS and the Labor Department, which participates in the administration of the employment visa program, took steps to increase scrutiny of immigrant and nonimmigrant visa petitioners and applicants, including

798 DHS, “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms,” *Federal Register* 85, no. 27 (February 10, 2020): 7573–77.

799 State Department, “60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants,” *Federal Register* 85, no. 204 (October 21, 2020): 67088–89.

800 State Department, “Intercountry Adoptions: Regulatory Changes to Accreditation and Approval Regulations in Intercountry Adoption,” *Federal Register* 85 no. 225 (November 20, 2020): 74492–557.

801 State Department, “Exchange Visitor Program – Au Pair Federal Regulation Preemption of State and Local Law” (proposed rule 1400-AF12, Spring 2020).

802 USCIS, “USCIS Director L. Francis Cissna on New Agency Mission Statement” (news release, February 22, 2018).

increased interviews and application denials. At the same time, however, the Labor Department released several regulations that modernized and streamlined application processes for certain types of temporary workers. USCIS was central in the implementation of the administration’s public-charge initiatives, under which adjudicators were instructed to consider an applicant’s likelihood of relying on public benefits in their decision to approve visas. The agency also implemented an array of policies that increased vetting and required more information of applicants, sought to initiate removal proceedings against foreign nationals, and slowed adjudication of applications.

*USCIS and the Labor Department ... took steps to increase scrutiny of immigrant and nonimmigrant visa petitioners and applicants, including increased interviews and application denials.*

USCIS policies appear to have had a chilling effect on immigration applications. Between FY 2016 and FY 2020, applications for green cards before USCIS dropped by 22 percent to the lowest level in at least seven years.<sup>803</sup> The drop was significant even prior to the pandemic: between FY 2016 and FY 2019, applications dropped by 17 percent.<sup>804</sup>

- ▶ **Continuous Immigration Vetting**—*June 2017*—Through an initiative entitled Continuous Immigration Vetting (CIV), USCIS began vetting information for certain immigration benefit applications throughout the entire application adjudication period as new information is received, rather than only performing point-in-time checks. The initiative is designed to increase national security checks.<sup>805</sup> Using a data platform that has the ability to compare application information against customs, immigration, terrorism, and counterterrorism information held in government databases, USCIS will expand CIV to continue screening and vetting beyond the application period and throughout the duration of the benefit status, until applicants abandon their immigration status or become naturalized U.S. citizens.
- ▶ **Increased Requirements for Congressional Involvement in Immigration Cases**—*December 18, 2017*—USCIS added new requirements for any congressional office inquiring about a constituent’s immigration case.<sup>806</sup> The new requirements include mandating that the request come with a handwritten and notarized signature from the foreign national, even if that individual is outside of the United States.
- ▶ **New USCIS Mission Statement**—*February 22, 2018*—USCIS changed its mission statement to, among other things, remove the phrase “nation of immigrants” and add a focus on protecting Americans.<sup>807</sup>
- ▶ **Destruction of Returned Cards**—*April 2, 2018*—When a USCIS document, such as a green card or employment authorization card, bounces back to USCIS because of a mailing issue, USCIS now only

803 MPI analysis of data from USCIS, “Number of I-485 Applications to Register Permanent Residence or Adjust Status,” multiple quarters, accessed October 5, 2021.

804 MPI analysis of data from USCIS, “Number of I-485 Applications,” multiple quarters.

805 DHS, *Privacy Impact Assessment for the Continuous Immigration Vetting* (Washington, DC: DHS, 2019).

806 Betsy Swan, “Trump Administration Is Set to Add Another Burden on Immigrants,” *The Daily Beast*, December 27, 2017.

807 USCIS, “USCIS Director L. Francis Cissna on New Agency Mission Statement.”

holds on to the document for 60 days before destroying it; previously, the agency held on to such documents for one year.<sup>808</sup>

- ▶ **Denial of Work Authorization Based on Arrest and Conviction Records**—*May 31, 2018*—USCIS revised the form used by certain foreign nationals to apply for work authorization to require them to submit documentation of all of their arrests and/or convictions.<sup>809</sup> The instructions remind applicants that USCIS may deny applications if they have been arrested and/or convicted of any crime.
- ▶ **Creation of a Denaturalization Office**—*June 2018*—USCIS Director L. Francis Cissna announced that he planned to hire several dozen lawyers and immigration officers to work on a team focused on denaturalization in a new Los Angeles office, to launch in 2019.<sup>810</sup> The move was an extension of an effort started under Obama to find hundreds of people who received green cards and citizenship through fraudulent means after their fingerprints were not digitized.<sup>811</sup>
- ▶ **Decrease in Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs), Increase in Denials**—*September 11, 2018*—At their discretion, USCIS officers can now deny applications for any immigration benefits if they lack required information or are obviously ineligible.<sup>812</sup> Previously, officers were obligated to first issue an RFE or NOID, giving the applicant the opportunity to correct or supplement the record.
- ▶ **Increase in Issuance of Notices to Appear (NTAs)**—*October 1, 2018*—USCIS enacted new guidance, issued June 28, 2018, instructing its officers to issue NTAs (the charging documents that initiate removal hearings) to more foreign nationals, including applicants who, upon denial of an application for immigration benefits, would become unauthorized.<sup>813</sup> The policy was not implemented for humanitarian applicants—including applicants for T visas (for victims of human trafficking), U visas (for victims of crime), and SIJ status (for abused or neglected children)—until November 2018, and it was not implemented for employment-based visa applicants by the end of the administration.<sup>814</sup>
- ▶ **Limits on Fast-Track Naturalizations for Spouses of U.S. Citizens**—*October 12, 2018*—USCIS updated the policy manual that governs the adjudication of citizenship applications to clarify that permanent residents who are married to U.S. citizens may only naturalize on an accelerated basis if they have lived with their U.S.-citizen spouse for three years prior to filing and the marriage is not

808 USCIS, “Undeliverable Permanent Resident and Employment Authorization Cards and Travel Documents to Be Destroyed after 60 Days” (news release, April 3, 2018).

809 USCIS, “Instructions for Application for Employment Authorization” (guidance document, May 31, 2018). Among the classes of foreign nationals this change affects are applicants for asylum, TPS, DACA, and adjustment of status.

810 Amy Taxin, “APNewsBreak: US Launches Bid to Find Citizenship Cheaters,” Associated Press, June 11, 2018. The agency did not confirm whether the launch was carried out.

811 DHS OIG, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records* (Washington, DC: DHS, 2016).

812 USCIS, “Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)” (policy memorandum, July 13, 2018).

813 USCIS, “Updated Guidance for the Referral of Cases and Issuance of NTAs,” June 28, 2018. Even leading up to the policy’s implementation, NTAs issued by USCIS rose by 53 percent. See Mike Guo and Ryan Baugh, *Immigration Enforcement Actions: 2018* (Washington, DC: DHS, 2019).

814 USCIS, “USCIS to Continue Implementing New Policy Memorandum on Notices to Appear” (news release, November 8, 2018); USCIS, “Notice to Appear Policy Memorandum,” accessed July 28, 2021.

terminated prior to taking the oath of allegiance for naturalization.<sup>815</sup> Failing these criteria, they must wait five years after receiving permanent residence to file for naturalization.

- ▶ **Clarified Policy on Violations of Federal Controlled Substance Law and Marijuana-Related Activities**—*April 19, 2019*—USCIS issued a memo clarifying that violations of federal controlled substance law, including violations involving marijuana, are generally a bar for receiving citizenship, even if the conduct is not an offence under state law.<sup>816</sup> The guidance also clarifies that applicants involved in certain marijuana-related activities, including work, may be barred from receiving citizenship if they are found to have violated federal law.
- ▶ **Narrowed Criteria for Expediting Requests**—*May 10, 2019*—USCIS issued a policy manual update that narrowed the list of criteria for which officers should consider expediting an immigration benefit application from seven situations down to four and increased the bar for the remaining criteria.<sup>817</sup> For example, rather than simply showing “severe financial loss,” applicants must now prove such loss would be to a company or person and that the need for urgent action is not a result of the applicant’s own failure to file the application in a timely manner. The same update also eliminated the term “customer” from the policy manual, in line with the February 2018 updates to the USCIS mission statement.
- ▶ **Restrictions on Labor Department Certifications for U and T Visas**—*July 1, 2019*—New policy guidance for the Labor Department’s Wage and Hour Division (WHD) limited the circumstances in which WHD could certify U and T visa applicants’ cooperation with a law enforcement investigation into a crime committed against them or a trafficking situation, respectively.<sup>818</sup> Such a certification is a requirement to get a U visa and a positively weighted factor to get a T visa. This policy is a reversal of 2011 changes that allowed WHD to begin certifying U visa applications and 2015 changes that expanded the list of U visa qualifying crimes that WHD could certify and allowed the division to begin certifying T visa applications.<sup>819</sup>
- ▶ **Suspension of Medical Deferred Action**—*August 7, 2019*—After applicants for medical deferred action received denial notices with language suggesting the end of the program, USCIS confirmed that it was no longer administering the program.<sup>820</sup> Medical deferred action is a humanitarian program that allows seriously ill immigrants to remain in the United States for medical treatment. In response, advocacy organizations filed a lawsuit against the suspension of the program, and USCIS officials were

815 USCIS, “Marriage and Living in Marital Union Requirements for Naturalization” (policy alert, October 12, 2018).

816 USCIS, “Controlled Substance-Related Activity and Good Moral Character Determinations” (policy alert, April 19, 2019).

817 USCIS, “USCIS Public Services” (policy alert, May 10, 2019); letter from AILA to the Office of the Director, USCIS, *USCIS Policy Manual, Volume 1: General Policies and Procedures, Part A, Public Services*, May 24, 2019.

818 Memorandum from Cheryl Stanton, *Certification of Supplement B Forms of U Nonimmigrant and T Nonimmigrant Visa Applications*; Penn, “Trump Wage Chief Adds Visa Hurdles.”

819 U.S. Department of Labor, “The Department of Labor Expands Its Support of Victims of Human Trafficking and Other Crimes” (fact sheet, n.d.).

820 In initial announcements of the change, USCIS said ICE was taking over administration of the program. ICE contradicted that, saying it had no program in place to review medical deferral requests. Acting Director of USCIS Ken Cuccinelli later testified to Congress that it had never been the case that ICE would take over the program’s administration. See Shannon Dooling, “I Made the Decision, Alone: Months Later, Clarity around the End of Medical Deferred Action,” *WBUR*, October 30, 2019.



called to testify in Congress.<sup>821</sup> On September 2, 2019, USCIS released a statement saying it would reopen all 791 medical deferred action requests that were pending as of August 7.<sup>822</sup> The agency then announced it would fully reverse the policy change, returning to its adjudication guidelines in place before August 6.<sup>823</sup> Even so, there was a decline in the share of medical deferred action requests approved between 2018 and mid-2020: about 44 percent of requests were approved in 2018, 28 percent were approved in 2019, and just 11 percent of requests were approved in the first half of 2020.<sup>824</sup>

- ▶ **Limits on Appeals of Cuban Adjustment Act Denials**—*August 13, 2019*—USCIS issued updated instructions to adjudicators that will limit the number of Cuban nationals who can appeal denials for permanent residence under the *Cuban Adjustment Act*.<sup>825</sup> Where previously denials were automatically certified to the Office of Administrative Appeals, under the updated instructions they would only be certified for cases involving complex legal issues or unique facts.<sup>826</sup>
- ▶ **Closure of International Offices**—*August 2019 to August 2020*—USCIS closed 16 international offices.<sup>827</sup> While USCIS first announced in March 2019 that it was in preliminary discussions to close all international offices, the agency said in August 2019 that it would maintain operations in seven locations: Beijing and Guangzhou, China; Guatemala City, Guatemala; Mexico City, Mexico; Nairobi, Kenya; New Delhi, India; and San Salvador, El Salvador.<sup>828</sup> Prior to these closures, USCIS had 23 international offices in 20 countries that, among other responsibilities, assisted with refugee applications, family-based immigration, and foreign adoptions, as well as urgent requests for parole and naturalization applications for military members and their family abroad. As part of the reorganization, military naturalization services were to be consolidated to four military bases and the State Department was to take responsibility for processing certain applications.<sup>829</sup>
- ▶ **Increased Vetting of Naturalization Applicants**—*September 17, 2019*—USCIS updated the application for U.S. citizenship and increased the evidentiary requirements for applying, including

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821 Shannon Dooling, “House Hearing on Medical Deferred Action Offers Little Clarity on Why Process Ended,” WBUR, September 11, 2019; Shannon Dooling, “Civil Rights Advocates Sue Trump Administration over Medical Deferred Action,” WBUR, September 5, 2019.

822 Shannon Dooling, “After a Month of Public Outcry, Immigration Officials Resume Medical Deferrals for Deportation,” WBUR, September 19, 2019; Shannon Dooling, “House Hearing on Medical Deferred Action.”

823 Camilo Montoya-Galvez, “Administration Reinstates Protections from Deportation for Sick Immigrants after Massive Uproar,” CBS News, September 19, 2019.

824 Shannon Dooling, “‘It’s Scariest Than Having a Surgery’: A Year Later, Uncertainty around Medical Deferrals Remains,” WBUR, September 24, 2020.

825 USCIS, “Updated Guidance for Adjudication of Cuban Adjustment Act Cases” (policy alert, August 13, 2019).

826 Under both the prior and current instructions, applicants without lawful status are not eligible for appeal if denied. See USCIS, “23.11 Cuban Adjustment Act Cases,” accessed January 9, 2020.

827 USCIS, “USCIS Will Adjust International Footprint to Seven Locations” (news release, August 9, 2019).

828 USCIS, “USCIS Will Adjust International Footprint”; Vanessa Romo, “Trump Administration Seeks to Close International Immigration Offices,” NPR, March 12, 2019.

829 USCIS, “USCIS Announces New Locations for Onsite Overseas Military Naturalization Services” (news release, September 30, 2019); USCIS, “USCIS Updates Process for Accepting Petitions for Relatives Abroad” (news release, January 31, 2020); letter from AILA to Samantha Deshommes, Chief of Regulatory Coordination Division, USCIS, *RE: OMB Control Number: 1615-0135—USCIS 60-Day Notice and Request for Comments on Proposed Revisions to Form I-131A, Application for Travel Document (Carrier Documentation)*, February 18, 2020 (recognizing that Form I-131A Application for Travel Document instructions now indicate applications should be filed with the State Department, where previously they were filed with USCIS international offices).

requiring applicants to provide details on arrests abroad, up to a decade of international travel history (instead of five years), and other documents (e.g., tax returns and children’s birth certificates).<sup>830</sup>

- ▶ **Replacement of the Term “Foreign National” with “Alien”**—October 8, 2019—USCIS updated its policy manual to replace all instances of the term “foreign national” with “alien.”<sup>831</sup>
- ▶ **Increased Standards for Fee Waivers**—October 24, 2019—Since 2011, USCIS has offered a streamlined process in which, if an applicant provided proof of receiving a means-tested benefit, a waiver was normally approved for the fee for filing immigration applications or accessing biometric services.<sup>832</sup> In October 2019, USCIS eliminated receipt of a means-tested benefit as criteria to prove eligibility for such a waiver.<sup>833</sup> Applicants could still request a fee waiver if their annual household income was at or below 150 percent of federal poverty guidelines or if they could prove extreme financial hardship. The change was enjoined by a federal district court on December 11, 2019, and the injunction remained in place at the end of the administration.<sup>834</sup>
- ▶ **Redefinition of “Residence” for the Purpose of Citizenship**—October 29, 2019—USCIS issued policy guidance redefining “residence” for the purpose of U.S. citizenship and, in doing so, made it more difficult for children of some U.S. government employees or military service members outside the country to claim U.S. citizenship.<sup>835</sup> Since 2004, USCIS policy provided that such children were in fact “residing in the United States” and thus automatically received citizenship.<sup>836</sup> However, under the new policy these children would have to proactively apply for citizenship. In March 2020, the president signed a bill into law that reversed this policy change and ensures automatic citizenship for these children.<sup>837</sup> In September 2020, USCIS released guidance on implementation of the new law.<sup>838</sup>
- ▶ **Rejection of Forms with Blank Responses**—October 2019 to December 28, 2020—For at least four forms, Form I-918 (for U visas for crime victims), Form I-914 (for T visas for trafficking victims), Form I-589 (for asylum or withholding of removal), and Form I-360 (for widows of U.S. citizens and those seeking protection from an abusive parent, spouse, or child), USCIS added an extra layer of review to its initial intake process.<sup>839</sup> Rather than just ensuring the proper signature, fee, and supporting documents are included, USCIS adjudicators reject the form unless every applicable field is completed. On November 19, 2020, a class action complaint was filed to stop the practice, which USCIS agreed to

830 USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection; Application for Naturalization,” *Federal Register* 83, no. 225 (November 21, 2018): 58781–82; USCIS, “N-400, Application for Naturalization,” accessed July 10, 2020.

831 USCIS, “Policy Manual Updates,” accessed January 28, 2019.

832 USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions,” *Federal Register* 84, no. 108 (June 5, 2019): 26137–40.

833 USCIS, “USCIS Updates Fee Waiver Requirements” (news release, October 25, 2019).

834 *The City of Seattle v. Department of Homeland Security*, No. 3:19-cv-07151 (U.S. District Court for the Northern District of California, Order granting plaintiffs’ motion for nationwide preliminary injunction, December 11, 2019).

835 USCIS, “Defining ‘Residence’ in Statutory Provisions Related to Citizenship” (policy alert, August 28, 2019).

836 Letter from Members of Congress to Kenneth T. Cuccinelli, Acting Director, USCIS, September 4, 2019.

837 *Citizenship for Children of Military Members and Civil Servants Act*, HR 4803, 116th Cong., 2nd sess., *Congressional Record* 166, no. 44, daily ed. (March 5, 2020): S1612.

838 USCIS, “USCIS Implements New Law Related to Citizenship for Children of Military Members and U.S. Government Employees Stationed Overseas” (news release, September 18, 2020).

839 Office of Citizenship and Immigration Services Ombudsman, “Ombudsman Alert: Recent Updates to USCIS Form Instructions,” updated January 23, 2020; AILA, “USCIS’s ‘No Blank Space’ Policy Leads to Capricious Rejections of Benefits Requests” (policy brief, October 22, 2020); *Akhilesh R. Vangala, et al., v USCIS, et al.*, No. 3:20-cv-08143 (U.S. District Court for the Northern District of California, November 19, 2020).

do while a settlement was negotiated.<sup>840</sup> USCIS stopped enforcing the policy effective December 28, 2020.

- ▶ **Limits on Citizenship Eligibility for Foreign Nationals with Criminal Records**—December 10, 2019—USCIS amended its policy manual to implement two self-referred decisions from the attorney general.<sup>841</sup> Under *Matter of Thomas and Thompson*, certain post-sentencing alterations, including orders that vacate the conviction or alter the sentence, are irrelevant when determining citizenship eligibility. Under *Matter of Castillo-Perez*, two or more driving under the influence convictions during the three-to-five-year period prior to filing a citizenship application create a presumption of ineligibility.
- ▶ **Expanded List of Unlawful Acts That Disqualify Applicants from Citizenship**—December 13, 2019—USCIS amended its policy manual to further clarify when an unlawful act disqualifies an applicant from a grant of citizenship and to expand the list of examples of unlawful acts.<sup>842</sup> The amendment specifies that one unlawful act during the three-to-five-year period prior to applying for citizenship can disqualify an applicant if the act “adversely reflects on his or her good moral character.”
- ▶ **Limited Entry for Foreign Nationals Using or Likely to Use Public Benefits**—February 24, 2020—On August 14, 2019, USCIS published a final regulation that, as of its effective date on October 15, 2019, would require USCIS officers to consider whether an applicant for a green card is likely to become a public charge.<sup>843</sup> After several nationwide injunctions were stayed by courts of appeals and the Supreme Court, USCIS designated February 24, 2020, as the new implementation date.<sup>844</sup> To determine whether someone is likely to become a public charge (defined by the rule as someone who receives one or more specified public benefits), the regulation directs USCIS officers to weigh a number of factors, including the applicant’s income, level of education, health, family size, and past benefits use. The rule also allows USCIS officers to consider whether nonimmigrants have used public benefits when they are applying for extension or changes of status.
  - July 29, 2020—The U.S. District Court for the Southern District of New York enjoined the administration from enforcing the rule nationwide during a declared national health emergency, including the COVID-19 pandemic.<sup>845</sup> The following day, USCIS announced it would stop applying the public-charge rule to any adjustment of status application filed

840 AILA, “Featured Issue: USCIS’s Blank Space Policy,” accessed June 18, 2021.

841 USCIS, “Implementing the Decisions on Driving under the Influence Convictions on Good Moral Character Determinations and Post-Sentencing Changes” (policy alert, December 10, 2019).

842 USCIS, “Conditional Bar to Good Moral Character for Unlawful Acts” (policy alert, December 13, 2019).

843 USCIS, “Inadmissibility on Public Charge Grounds,” *Federal Register* 84, no. 157 (August 14, 2019): 41292–508.

844 *State of Washington v. DHS*, No. 4:19-cv-05210-RMP (U.S. District Court Eastern District of Washington, October 11, 2019); *City and County of San Francisco v. USCIS*, No. 4:19-cv-04980-PJH (U.S. District Court Northern District of California, October 11, 2019); *State of New York v. DHS*, No. 1:19-cv-07777-GBD (U.S. District Court Southern District of New York, October 11, 2019); *Cook County, Illinois v. Kevin K. McAleenan*, No. 1:19-cv-06334 (U.S. District Court for the Northern District of Illinois Eastern Division, October 14, 2019); *Casa De Maryland, Inc. v. Donald J. Trump*, No. 8:19-cv-02715-PWG (U.S. District Court for the District of Maryland, October 14, 2019); *City and County of San Francisco v. USCIS*, No. 19-35914 (U.S. Court of Appeals for the Ninth Circuit, December 5, 2019); *Casa de Maryland, Inc. v. Donald J. Trump*, No. 19-2222 (U.S. Court of Appeals for the Fourth Circuit, December 9, 2019); *Department of Homeland Security v. New York*, No. 19A785 (Supreme Court of the United States, January 27, 2020); *Chad Wolf v. Cook County, Illinois*, No. 19A905 (Supreme Court of the United States, February 21, 2020); USCIS, “Public Charge Inadmissibility Final Rule: Revised Forms and Updated Policy Manual” (news release, February 5, 2020).

845 *State of New York, et. al., v. Department of Homeland Security and Make the Road New York, et. al., v. Cuccinelli*, No. 1:19-cv-07777-GBD (U.S. District Court for the Southern District of New York, July 29, 2020).

on or after July 29, 2020.<sup>846</sup> The Appeals Court for the Second Circuit limited the scope of the injunction to just the Second Circuit (Connecticut, New York, and Vermont) and then on September 11, 2020, stayed the injunction altogether, allowing USCIS to resume implementing the rule nationwide.<sup>847</sup>

- *November 2, 2020*—The U.S. District Court for the Northern District of Illinois ruled that the public-charge rule was invalid and prohibited its implementation nationwide.<sup>848</sup> On November 19, 2020, the U.S. Court of Appeals for the Seventh Circuit reversed that decision and allowed USCIS to resume implementing the rule.
- ▶ **Clarified Naturalization Requirements**—*February 26, 2020*—USCIS issued updated policy guidance on one of the requirements for naturalization: continuous U.S. residence.<sup>849</sup> The guidance clarifies the effects of extended stays outside of the United States for six months or more.
- ▶ **Creation of a USCIS Tip Form**—*March 3, 2020*—USCIS launched a tip form to allow members of the public to submit information if they believe someone is committing immigration benefit fraud, including whether they are misrepresenting themselves when applying for an immigration benefit or are violating the terms of their immigration status.<sup>850</sup>
- ▶ **Increasing the Power of the Secretary of Labor**—*April 20, 2020*—The Department of Labor published a final rule giving the secretary of labor the power to review and issue precedential decisions over the Board of Alien Labor Certification Appeals (BALCA).<sup>851</sup> BALCA is an administrative body within the Labor Department that reviews appeals of certain immigration cases within the department’s jurisdiction, including the initial certifications for most employment-based green cards.
  - *January 4, 2021*—The secretary of labor’s discretionary review power was expanded to also include H-2B labor certification cases.<sup>852</sup>
- ▶ **Increasing the Number of Foreign Nationals Barred for Falsely Claiming U.S. Citizenship**—*April 24, 2020*—USCIS issued updated policy guidance clarifying that it is not necessary to show intent in order to find a foreign national ineligible for immigration benefits after having falsely claimed to be a U.S. citizen.<sup>853</sup> This will increase the number of foreign nationals subject to this bar to include, for example, those who unknowingly register to vote while applying for a U.S. driver’s license.
- ▶ **Reduction in Printing Green Cards and Employment Authorization Documents**—*June 2020*—USCIS ended its contract with a company that had printed green cards and employment authorization documents (EADs), and did not follow through with its plan to hire federal employees to take on

846 USCIS, “[Inadmissibility on Public Charge Grounds Final Rule: Litigation](#),” accessed June 17, 2021.

847 USCIS, “[Inadmissibility on Public Charge Grounds Final Rule: Litigation](#).”

848 USCIS, “[Inadmissibility on Public Charge Grounds Final Rule: Litigation](#).”

849 USCIS, “[Effect of Breaks in Continuity of Residence on Eligibility for Naturalization](#)” (policy alert, February 26, 2020).

850 USCIS, “[USCIS Launches New Online Form for Reporting Fraud](#)” (news release, March 3, 2020); USCIS, “[Agency Information Collection Activities; New Collection: USCIS Tip Form](#),” *Federal Register* 84, no. 32 (February 15, 2019): 4518–19.

851 Department of Labor, “[Discretionary Review by the Secretary, NPRM](#),” *Federal Register* 85, no. 45 (March 6, 2020): 13086–104;

Department of Labor, “[Discretionary Review by the Secretary, DFR](#),” *Federal Register* 85, no. 45 (March 6, 2020): 13024–41.

852 Department of Labor, “[Discretionary Review by the Secretary of Labor—Notice of Proposed Rulemaking](#),” *Federal Register* 86, no. 1 (January 4, 2021): 29–32; Department of Labor, “[Discretionary Review by the Secretary of Labor—Direct Final Rule](#),” *Federal Register* 86, no. 1 (January 4, 2021): 1–4.

853 USCIS, “[False Claim to U.S. Citizenship Ground of Inadmissibility and Matter of Zhang](#)” (policy alert, April 24, 2020).

this work due to budget issues, according to the agency.<sup>854</sup> As of July 22, 2020, there was a backlog of 115,000 documents.<sup>855</sup> A class action lawsuit was filed on behalf of immigrants who had been approved for employment authorizations but had not yet received the corresponding documents.<sup>856</sup> On August 19, USCIS announced that individuals who had been approved for a work permit but had not yet received it could temporarily use their EAD approval notice as employment eligibility verification.<sup>857</sup> In late August, a settlement was reached in the lawsuit, and USCIS agreed to print work permits by September 22, 2020, for all class members.<sup>858</sup>

- ▶ **Increasing the Discretion of Immigration Officers**—*July 15, 2020*—USCIS updated policy guidance to encourage officers to deny immigration benefits to applicants who would otherwise qualify if the officer determines the applicant does not merit a favorable exercise of discretion.<sup>859</sup> For many immigration benefits, including applications for lawful permanent residence and employment authorization documents, applicants must not only demonstrate eligibility, but also that they possess positive discretionary factors. The updated guidance encourages officers to consider community service, compliance with immigration laws, employment history, and tax compliance, among other things.
- ▶ **Review of Foreign Employment in Federal Contracts**—*August 3, 2020*—Trump signed an executive order directing the secretaries of labor and homeland security to review federal contracts awarded in FY 2018 and FY 2019 to assess if the contractors used foreign workers and, if so, whether U.S. workers or national security were adversely affected by that hiring.<sup>860</sup> The order also directed the agencies to take steps to protect U.S. workers from negative effects on wages and working conditions caused by the employment of H-1B visa holders (high-skilled temporary workers) at job sites.
- ▶ **Increased Fees for Immigration Benefits**—*August 3, 2020*—USCIS issued a final rule increasing fees for 47 immigration benefit applications, including an 83 percent fee increase for naturalization applications and a new \$50 fee plus \$30 biometric service fee for asylum applications.<sup>861</sup> The rule also dramatically narrowed eligibility for fee waivers. On September 29, 2020, three days before the rule was set to go into effect, it was enjoined by a federal district court in California.<sup>862</sup> A second federal court enjoined the rule on October 9.<sup>863</sup> Both injunctions remained in place at the end of the administration.
- ▶ **Ban on Members of Totalitarian Parties**—*October 2, 2020*—USCIS updated the policy manual to provide stricter instructions for officers determining inadmissibility based on membership or affiliation

854 Email from DHS to stakeholders, *Ombudsman's Alert: Card Production Delays at USCIS*, July 22, 2020.

855 Geneva Sands, "Green Card Backlog due to Budget Issues at Immigration Agency," CNN, July 22, 2020.

856 Suzanne Monyak, "USCIS Faces Suit over Work Permit Printing Delays," Law360, July 23, 2020.

857 Email from DHS to stakeholders, *Ombudsman Alert: USCIS Acts to Mitigate Delays in Production of Employment Authorization Documents*, September 3, 2020.

858 Dave Simpson, "USCIS Must Print Foreign Citizen's Delayed Work Permits," Law360, August 3, 2020; AILA, "District Court Issues Consent Order and Final Statement in Class Action Challenging Delay in Issuance of EADs," August 21, 2020.

859 USCIS, "Applying Discretion in USCIS Adjudications" (policy alert, July 15, 2020); USCIS, "Chapter 8 - Discretionary Analysis," updated July 15, 2020.

860 White House, "Executive Order 13940 of August 3, 2020: Aligning Federal Contracting and Hiring Practices with the Interests of American Workers," *Federal Register* 85, no. 152 (August 6, 2020): 47879–80.

861 USCIS, "U.S. Citizenship and Immigration Services Fee Schedule."

862 *Immigrant Legal Resource Center v. Chad F. Wolf*, no. 20-cv-05883-JSW (U.S. District Court for the Northern District of California, September 29, 2020).

863 *Northwest Immigrant Rights Project v. USCIS*, no. 19-3283 (RDM) (U.S. District Court for the District of Columbia, October 9, 2020).



with the Communist Party or another totalitarian party.<sup>864</sup> Existing law does not allow members of totalitarian parties to be admitted to the United States; the updated guidance provides specificity about making inadmissibility decisions on that basis.

- ▶ **Premium Processing Fee Increase**—*October 19, 2020*—USCIS raised the fee for the request for premium processing (Form I-907) for all petitioners, as required by a section of a FY 2021 appropriations law that was enacted with the goal of increasing revenue and preventing USCIS from having to furlough a majority of its staff.<sup>865</sup> The fee rose from \$1,440 to \$2,500 for all application types except H-2B visas and R-1 visas, for which the fee rose from \$1,440 to \$1,500. Premium processing allows applicants to pay an additional filing fee to expedite the adjudication of their application, usually to be completed within 15 days.
- ▶ **Reinforcing Discretion for Adjudications of Adjustment of Status**—*November 17, 2020*—USCIS updated its policy manual to detail and expand officer discretion in adjustment of status adjudications.<sup>866</sup> The granting of immigration benefits was already discretionary, but the update details factors and circumstances that an officer should review when determining whether to approve an application. The update reinforces that an exercise of discretion requires more than meeting statutory eligibility requirements for lawful permanent residence.
- ▶ **Lawful Admission Requirement for Naturalization**—*November 18, 2020*—USCIS updated its policy manual to clarify that a lawful permanent resident (LPR, aka green-card holder) who is found to have obtained permanent residence erroneously, regardless of whether there was willful misrepresentation, is ineligible for naturalization.<sup>867</sup> USCIS officers may determine that the applicant's LPR status is invalid at the time of the naturalization application and deny the application on that basis.
- ▶ **New Naturalization Exam**—*December 1, 2020*—USCIS announced changes to the naturalization civics exam that would apply to immigrants filing their application on or after December 1, 2020.<sup>868</sup> While applicants taking the previous version of the test, implemented in 2008, were asked up to ten civics questions and had to answer six correctly to pass, applicants taking the new exam must answer 12 out of 20 questions correctly, making the test longer and more difficult. The total number of possible questions an applicant could be asked also increased.
- ▶ **Discretionary Work Authorization**—*January 14, 2021*—USCIS issued an update on the issuance of work permits to people with pending green-card applications and deferred action recipients.<sup>869</sup> The issuance of a work permit to such individuals is discretionary. The update provided guidance on the factors an officer should consider when adjudicating applications for work permits, including economic necessity, medical conditions that would cause financial hardship, and whether the applicant is the primary source of support for a U.S. citizen or LPR, among other things. For applicants

864 USCIS, "Inadmissibility Based on Membership in a Totalitarian Party" (policy alert, October 2, 2020).

865 USCIS, "Premium Processing Fee Increase Effective Oct. 19, 2020" (news release, October 16, 2020).

866 USCIS, "Use of Discretion for Adjustment of Status" (policy alert, November 17, 2020).

867 USCIS, "Prerequisite of Lawful Admission for Permanent Residence under All Applicable Provisions for Purposes of Naturalization" (policy alert, November 18, 2020).

868 USCIS, "USCIS Announces a Revised Naturalization Civics Test" (news release, November 13, 2020).

869 USCIS, "Applications for Discretionary Employment Authorization Involving Certain Adjustment Applications or Deferred Action" (policy alert, January 14, 2021).

with a pending green-card application, the guidance also increased the recommended validity period of work authorization from one to two years.

- ▶ **Slowed Adjudications of Immigration Benefits Applications**—*multiyear*—A mix of changed policies (such as interviewing all employment-based applicants; see Section 7.B.) and new vetting procedures caused adjudications of immigration benefits applications to slow down significantly.<sup>870</sup>
- ▶ **Streamlining Requests for Case Assistance**—*multiyear*—USCIS changed how it interacts with the public in ways that both limit immigrants’ ability to communicate with the agency and decrease the agency’s workload.
  - **Information Services Modernization Program**—*March 2018*—Under USCIS’s InfoPass appointment system, foreign nationals could go online to self-schedule appointments with a USCIS officer, at which they could inquire about a delayed case, provide key updates after filing, request emergency document services, and submit other urgent requests. In March 2018, USCIS began moving away from the self-scheduling system and to the Information Services Modernization Program (InfoMod), which gave USCIS the discretion to decide whether such an appointment is warranted.<sup>871</sup> USCIS had transferred all field offices to the new system by the end of August 2019.<sup>872</sup>
  - **Discontinuation of Service Center Email for Case-Specific Questions**—*January 21, 2019*—USCIS Service Centers no longer manage email inboxes to address case-specific questions.<sup>873</sup> Instead, foreign nationals have the option of submitting an online request or calling a central USCIS call center.
  - **Withdrawal of “First Contact Resolution” Goal**—*May 10, 2019*—USCIS removed from its policy manual the goal of “giving an accurate and complete answer the first time to eliminate the need for subsequent inquiry about the same issue.”<sup>874</sup>
- ▶ **Moving Forms Online**—*multiyear*—USCIS accelerated the process of transitioning from paper applications to digital forms. During FY 2018 and FY 2019, the administration introduced eight online forms, bringing the total number of online forms to ten.<sup>875</sup>

870 Muzaffar Chishti, Sarah Pierce, and Jessica Bolter, “Even as Congress Remains on Sidelines, the Trump Administration Slows Legal Immigration,” *Migration Information Source*, March 22, 2018; AILA, “USCIS Processing Delays Have Reached Crisis Levels under the Trump Administration” (policy brief, AILA, Washington, DC, January 30, 2019); testimony of Marketa Lindt, President, AILA, before the House Judiciary Committee, Subcommittee on Immigration and Citizenship, *Policy Changes and Processing Delays at USCIS*, 116th Cong., 1st sess., July 16, 2019. As of the end of March 2020, the backlog of pending cases at USCIS had grown by more than 1.18 million since the start of the Trump administration. MPI analysis of data from USCIS, “Number of Service-Wide Forms by Fiscal Year to-Date,” multiple years, accessed July 25, 2020.

871 USCIS, “USCIS to Expand Information Services Modernization Program to Key Locations” (news release, October 30, 2018).

872 USCIS, *USCIS Response to the Citizenship and Immigration Services Ombudsman’s (CISOMB) 2019 Annual Report to Congress* (Washington, DC: DHS, 2020), 5.

873 USCIS, “Update on Case Assistance by Service Centers” (news release, December 21, 2018).

874 USCIS, “USCIS Public Services”; letter from AILA to the Office of the Director, USCIS, *USCIS Policy Manual, Volume 1: General Policies and Procedures, Part A: Public Services*.

875 USCIS, “USCIS Expands Online Filing” (news release, May 25, 2018); USCIS, “USCIS Makes Another Form Available for Online Filing” (news release, October 30, 2019); USCIS, “USCIS Makes Two More Applications Available for Online Filing” (news release, January 29, 2019); USCIS, “Forms,” accessed January 30, 2019.

► **Pending at end of administration**

- Collection of Social Media Information—On September 4, 2019, DHS published a notice of its intention to collect applicants’ social media information.<sup>876</sup> DHS planned to add the request for five years of social media information to 12 forms—three CBP and nine USCIS forms—including applications for naturalization, legal permanent residence, asylum, and refugee status.
- Reforms to the Appeals Process—USCIS published a proposed revision to the form for filing an appeal or motion on December 6, 2019, and an update on March 17, 2020.<sup>877</sup> The form revision, among other things, limits the issues considered on appeal.<sup>878</sup>
- Reforms to Provisional Unlawful Presence Waivers—USCIS planned to propose a rule that would change the process for unauthorized immigrants who are spouses or children of U.S. citizens or permanent residents and who need to leave the country to finalize their green-card applications.<sup>879</sup>
- Expanded Biometrics Collection—On September 11, 2020, USCIS proposed a rule that would significantly change how DHS agencies collect biometrics from immigrants.<sup>880</sup> Under existing policy, DHS agencies collect photographs, fingerprints, and signatures for individuals requesting immigration benefits or for enforcement purposes, but this rule would expand biometric collection to include iris images, palm prints, and voice prints, as well as DNA results in some cases. The rule would require any applicant or individual associated with a certain benefit, including U.S. citizens, regardless of age, to submit biometrics and would require any immigrant who has been approved for a benefit to continue submitting biometrics until they become a U.S. citizen.
- Benefit-Granting Agency Reporting Requirements—On November 12, 2020, DHS and USCIS issued a request for comments on a proposal to create a new form (Form G-1558) to be used by benefit-granting agencies to report noncitizens who request or receive certain benefits to the federal government.<sup>881</sup>
- Eliminating Work Authorization for Immigrants Temporarily Released from DHS Custody—On November 19, 2020, DHS proposed a rule that would bar immigrants who have final orders of

876 DHS, “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information,” *Federal Register* 84, no. 171 (September 4, 2019): 46557–61.

877 USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion,” *Federal Register* 84, no. 235 (December 6, 2019): 66924–27; USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion,” *Federal Register* 85, no. 52 (March 17, 2020): 15222–23.

878 Letter from American Immigration Council, et al., to Samantha Deshommes, Chief, Regulatory Coordination Division, USCIS, *USCIS-2008-0027; OMB Control Number 1615-0095; Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion*, February 4, 2020; letter from ASISTA and CLINIC, to OMB USCIS Desk Officer, OMB, *OMB Control Number 1615-0095: USCIS Agency Information Collection Activities; Revision of a Currently Approved Collection: Notice of Appeal or Motion (Form I-290B)*, April 16, 2020.

879 USCIS, “Revision of Provisional Unlawful Presence Waiver of Inadmissibility” (proposed rule 1615-AC50, Spring 2020).

880 USCIS, “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services,” *Federal Register* 85, no. 177 (September 11, 2020): 56338–422.

881 USCIS, “Agency Information Collection Activities; New Collection: Report of Request/Receipt of Benefits by Aliens,” *Federal Register* 85, no. 219 (November 12, 2020): 71936.

removal but are temporarily released from DHS custody on an order of supervision from being granted work authorization.<sup>882</sup> The rule would exempt those for whom DHS is unable to obtain travel documents and who demonstrate an economic need for employment, but it would limit the employment authorization validity period to one year.

- Revisions to the Citizenship Application—On January 15, 2021, USCIS proposed changes to the application form for citizenship (known as the N-400).<sup>883</sup> The proposed changes expanded on information requested related to names, birth dates, or Social Security numbers previously used by the applicant; required more extensive address and travel history information; and expanded the questions related to criminal history, among other changes.

## A. *Deferred Action for Childhood Arrivals*

The Trump administration announced the rescission of Deferred Action for Childhood Arrivals (DACA) within its first year in office. The attempt to end the program, which provides protection from deportation and work authorization to unauthorized immigrants who arrived in the country as children, was quickly challenged in the courts. Litigation lasted through all four years of the administration, with courts at different points blocking the order, requiring the program to remain active for current recipients, and reopening it to new applicants. Ultimately, in the final months of the administration, a federal court ordered DACA be restored to its status before the initial rescission in 2017.<sup>884</sup> At the end of the administration, 636,390 individuals held active DACA status and an estimated 1,331,000 were eligible to apply.<sup>885</sup>

- ▶ **Rescission of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)**—*June 15, 2017*—The administration officially rescinded Obama’s 2014 memorandum creating a deferred action program for parents of U.S. citizens and permanent residents and expanding the DACA program.<sup>886</sup>
- ▶ **Attempt to Rescind DACA**—*September 5, 2017*—The administration announced a staggered end to the DACA program.<sup>887</sup> Starting immediately on the date of the announcement, USCIS stopped accepting all applications, except for those to renew DACA benefits that would expire on or before March 5, 2018. On October 5, 2017, USCIS stopped accepting all DACA renewal applications.

882 DHS, “Employment Authorization for Certain Classes of Aliens with Final Orders of Removal,” *Federal Register* 85 no. 224 (November 19, 2020): 74196–53.

883 USCIS, “Agency Information Collection Activities; Revision of Currently Approved Collection: Application for Naturalization,” *Federal Register* 86, no. 10 (January 15, 2021): 4110.

884 *Batalla Vidal, et al., v. Chad Wolf, et al., and State of New York, et al., v. Trump, et al.*, No. 1:16-CV-04756-NGG-VMS (U.S. District Court for the Eastern District of New York, December 4, 2020).

885 USCIS, “Active DACA Recipients – December 31, 2020,” accessed September 10, 2021; MPI Data Hub, “Deferred Action for Childhood Arrivals (DACA) Data Tools,” accessed September 10, 2021.

886 Memorandum from John F. Kelly, Secretary of Homeland Security, to Kevin K. McAleenan, Acting Commissioner of CBP, et al., *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)*, June 15, 2017.

887 Memorandum from Elaine C. Duke, Acting Secretary of Homeland Security, to James W. McCament, Acting Director of USCIS, et al., *Rescission of the June 15, 2012 Memorandum Entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children”*, September 5, 2017.

- *September 6, 2017*—U.S. Border Patrol issued guidance that if an agent encounters an individual who claims to have DACA, they should be temporarily held to confirm that status.<sup>888</sup> If the individual has active DACA or a pending DACA application and no negative information against them, they should be allowed to leave CBP custody. If officers are unable to determine the status of the individual, they are instructed to process that individual for removal.
- *January 9, 2018*—Three federal district courts blocked the DACA program’s termination.<sup>889</sup> A federal appeals court upheld one of these injunctions.<sup>890</sup> Another federal appeals court overturned a lower court ruling that the rescission was valid, finding the decision illegal.<sup>891</sup>
- *June 18, 2020*—The Trump administration appealed the appeals court cases to the Supreme Court, which held in June 2020 that the decision to end DACA was made in violation of federal law on administrative decision-making, thus obligating DHS to continue the program at least until it could terminate the program lawfully.<sup>892</sup>
- *July 17, 2020*—A district court ordered the administration to restore the DACA program to its status before the September 5, 2017, rescission, thus requiring USCIS to process new applications, not just renewals.<sup>893</sup>
- *July 24, 2020*—In a hearing, the same district court judge that ordered the administration to restore DACA criticized the administration for failing to update the website to reflect the program’s status and for rejecting some new applicants for DACA.<sup>894</sup> Lawyers for the administration argued that a decision on the future of the program had not yet been made and that new applications were being held but not adjudicated. The judge gave them until July 31, 2020, to propose next steps.
- *July 28, 2020*—DHS issued a memo that once again limited DACA benefits while Acting Secretary Chad Wolf considered whether to fully rescind the program.<sup>895</sup> Under the new policy, all initial applicants were to be denied, as were all applications for advance parole (allowing for international travel) absent extraordinary circumstances. While renewal applications could be approved, grants would allow for only one year of work authorization and protection from

888 Memorandum from Carla Provost, Acting Chief of U.S. Border Patrol, to All Chief Border Patrol Agents and All Directorate Chiefs, *Guidance on the Acting Secretary’s Rescission of the Memorandum of June 15, 2012, Establishing DACA*, September 6, 2017; memorandum from Manuel Padilla Jr., Chief Border Patrol Agent, Rio Grande Valley Sector, to Patrol Agents in Charge, Rio Grande Valley Sector, *DACA Re-Encounters*, December 26, 2017.

889 *Regents of the University of California v. U.S. Department of Homeland Security*, No. 3:17-cv-05211-WHA (U.S. District Court for the Northern District of California, January 9, 2018); *Batalla Vidal v. Nielsen, and State of New York v. Donald Trump*, No. 1:16-cv-04756-NGG-JO (U.S. District Court for the Eastern District of New York, February 13, 2018); *National Association for the Advancement of Colored People v. Trump and Trustees of Princeton University v. United States of America*, No. 1:17-cv-02325-JDB (U.S. District Court for the District of Columbia, April 24, 2018).

890 *Regents of the University of California v. U.S. Department of Homeland Security*, No. 18-15068 (U.S. Court of Appeals for the Ninth Circuit, November 8, 2018).

891 *Casa de Maryland v. Department of Homeland Security*, No. 18-1521 (U.S. Court of Appeals for the Fourth Circuit, May 17, 2019).

892 *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (Supreme Court of the United States, June 18, 2020).

893 *Casa de Maryland, et al., v. U.S. Department of Homeland Security, et al.*, No. PWG-17-2942 (U.S. District Court for the District of Maryland, July 17, 2020).

894 Josh Gerstein, “Judge Faults Trump Administration’s Response to DACA Ruling,” Politico, July 24, 2020.

895 Memorandum from Wolf to Morgan, Albence, and Edlow.



deportation, rather than two. USCIS subsequently issued a memo providing guidance on implementing the new policy.<sup>896</sup>

- *November 11, 2020*—A federal judge ruled that the July 28 memo was invalid because Wolf was not serving lawfully in his position when he issued it.<sup>897</sup> On December 4, the same judge ordered DHS to restore DACA to its status before the September 2017 rescission, and to post notice within three days of its restoration.<sup>898</sup>
- ▶ **Denying Housing Loans for DACA Recipients**—*August 30, 2018*—According to reports, in August 2018, the U.S. Department of Housing and Urban Development (HUD) decided to exclude DACA recipients from Federal Housing Administration (FHA) loans.<sup>899</sup> HUD later confirmed the policy existed but maintained that there was no new decision to exclude DACA recipients, and that since at least October 2003 FHA has maintained a policy that noncitizens without lawful residency in the United States are not eligible for FHA-insured mortgages.<sup>900</sup>
  - *January 19, 2021*—The FHA announced that DACA recipients would be eligible to apply for federally insured mortgages.<sup>901</sup> The agency removed language from its handbook that barred people without lawful residency from applying for FHA-insured mortgages.
- ▶ **Reopening DACA Recipients' Removal Cases**—*October 2019*—ICE began to request that immigration courts reopen the removal cases of immigrants protected by the DACA program.<sup>902</sup> (For more, see Section 3.B.)

## B. Immigrant Visas

Immigrants, as opposed to nonimmigrants (see next subsection), are foreign nationals who come to the United States to reside permanently. Though it would require an act of Congress to change the number of permanent residence grants (i.e., green cards) each year, through increasing vetting of immigration applications, stretching processing times, and various measures to discourage foreign nationals from applying for green cards, the Trump administration made it more difficult to access immigrant visas. For example, USCIS made interviews mandatory for all green-card applicants within the United States and employment-based visa applicants, and recommended officers interview more refugees and asylees applying for green cards.

896 Memorandum from Joseph Edlow to Associate Directors and Program Office Chiefs, *Implementing Acting Secretary Chad Wolf's July 28, 2020 Memorandum, "Reconsideration of the Jun 15, 2012 Memorandum 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'*, August 21, 2020.

897 *Batalla Vidal, et al., v. Chad Wolf, et al. and State of New York, et al., v. Donald Trump, et al.*, No. 1:16-CV-04756-NGG-VMS (U.S. District Court for the Eastern District of New York, November 14, 2020).

898 *Batalla Vidal, et al., v. Chad Wolf, et al., and State of New York, et al., v. Trump, et al.*, No. 1:16-CV-04756-NGG-VMS (U.S. District Court for the Eastern District of New York, December 4, 2020).

899 Nidhi Prakash and Hamed Aleaziz, "The Trump Administration Said It Didn't Change Policy To Deny Housing Loans To DACA Recipients. Emails Show Otherwise," BuzzFeed News, June 4, 2020.

900 Letter from U.S. Department of Housing and Urban Development to Representative Pete Aguilar, June 11, 2019.

901 U.S. Department of Housing and Urban Development, "FHA to Permit DACA Status Recipients to Apply for FHS Insured Mortgages" (news release, January 20, 2021).

902 Ortega, "ICE Reopening Long-Closed Deportation Cases against Dreamers."

- ▶ **Mandatory Interviews for Certain Visa Applicants**—*October 1, 2017*—USCIS mandated that all applicants for employment-based permanent residency attend an in-person interview.<sup>903</sup> The interview requirement was also extended to relatives of refugees and asylees who are petitioning to join the principal asylee/refugee in the United States. Previously, face-to-face interviews were only required if there was a specific concern related to the foreign national's application.
- ▶ **Mandatory Interviews for All Adjustment of Status Applicants**—*May 15, 2018*—USCIS updated its policy manual to clarify that all applicants for adjustment of status must go through face-to-face interviews, unless waived by USCIS.<sup>904</sup> The update also removed employment-based and fiancé(e)-based adjustment cases from the list of types of applications for which USCIS might waive the interview. Now, USCIS officers may, on a case-by-case basis, only waive interviews for applicants who are clearly ineligible, certain minor children of U.S. citizens or legal permanent residents, parents of U.S. citizens, and asylees and refugees who were previously interviewed.<sup>905</sup>
- ▶ **Fewer Interview Waivers for Certain Green-Card Applicants**—*November 30, 2018*—USCIS issued a memo limiting instances in which applicants to remove conditions on permanent residence may request that their interview be waived.<sup>906</sup> Foreign nationals applying for permanent residence through a qualifying marriage that is less than two years old at the time of the application are granted lawful permanent resident status on a conditional basis. To avoid having their status terminated after two years, conditional permanent residents must request that USCIS remove the conditions on their status. As part of that request, the applicant must appear for an interview. While USCIS may waive the interview requirement, this 2018 memo narrows the instances in which USCIS officers may consider such a waiver.
- ▶ **Increased Scrutiny for Marriage Petitions Involving Minors**—*February 15, 2019*—USCIS published new guidance instructing adjudicators to pay special attention to marriage petitions involving minors.<sup>907</sup> Adjudicators must ensure that the marriage was lawful where it was celebrated and is legal in the U.S. state where the applicants will live.
  - *April 12, 2019*—USCIS supplemented the guidance, instructing officers to conduct an additional interview for certain spousal petitions involving a minor.<sup>908</sup> Such applicants will generally have to interview in person twice before being approved.
- ▶ **Enforcement of Financial Commitments of Immigrant Sponsors**—*May 23, 2019*—When applying for permanent residency in the United States, since 1997, certain immigrants must submit an affidavit of support, in which their sponsor pledges financial support in the event that the foreign national applies for or receives means-tested public benefits. These contracts have rarely been enforced, if at all. On May 23, 2019, the president issued a memorandum that directs the Department of Agriculture, HHS, and the Social Security Administration to create infrastructure that allows the agencies to notify

903 USCIS, "USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants" (news release, August 28, 2017).

904 USCIS, "Adjustment of Status Interview Guidelines and Waiver Criteria" (policy alert, May 15, 2018).

905 USCIS, "Policy Manual: Chapter 5 – Interview Guidelines," updated January 31, 2020.

906 USCIS, "Revised Interview Waiver Guidance for Form I-751, Petition to Remove Conditions on Residence" (policy memorandum, November 30, 2018).

907 USCIS, "Marriage Involving Minor(s)" (policy alert, February 15, 2019).

908 USCIS, "Marriage Involving Minor(s)" (policy alert, April 12, 2019).

sponsors of and enforce reimbursement obligations, and to issue guidance on other consequences for sponsors, including limiting their ability to sponsor additional immigrants.<sup>909</sup>

- *August 23, 2019*—The Centers for Medicare and Medicaid Services, which is part of HHS, issued guidance to state health officials, advising them how to consider the resources of an immigrant’s sponsor when weighing the immigrant’s eligibility for public benefits and how to collect repayment from sponsors.<sup>910</sup>
- *August 23, 2019*—The Department of Agriculture issued a memo strongly encouraging Supplemental Nutrition Assistance Program (SNAP) state agencies to request reimbursement from the sponsors of foreign nationals who receive SNAP benefits.<sup>911</sup>
- *September 10, 2020*—USCIS launched a new form for the Systematic Alien Verification for Entitlements (SAVE) program, which allows federal, state, and local benefit-granting agencies to verify a benefit applicant’s immigration status.<sup>912</sup> The new form allows USCIS to collect information on whether agencies are contacting sponsors to request reimbursement and, if they are, whether sponsors have complied and if the agencies have initiated any collection actions.<sup>913</sup>
  - *Pending at end of administration*—In October 2019, USCIS published for comment an updated version of the form financial sponsors must fill out that, among other things, would require bank account information and details about any previously submitted pledges of support for immigrants they have sponsored.<sup>914</sup>
- ▶ **Increased Minimum Investment Amount for EB-5 Applications**—*November 21, 2019*—USCIS issued a final rule that, among other things, updated the minimum amount an EB-5 visa applicant would have to invest from \$1 million to \$1.8 million (for investments in most parts of the United States) and from \$500,000 to \$900,000 (for investments in targeted employment areas, or TEAs).<sup>915</sup> The rule, which was released as a draft regulation under the Obama administration, also creates a new process for determining which areas qualify as TEAs. The EB-5 Immigrant Investor Program provides permanent

909 Memorandum from the president, *Presidential Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens*, May 23, 2019.

910 Letter from Calder Lynch, Acting Deputy Administrator and Director, Centers for Medicare and Medicaid Services, HHS, to state health officials, *Sponsor Deeming and Repayment for Certain Immigrants*, August 23, 2019.

911 Letter from Lizbeth Silberman, Director, Program Development Division, Supplemental Nutrition Assistance Program to all state agencies, *State Enforcement of the Legal Responsibilities of Sponsors of Non-Citizens: SNAP Non-Citizen Guidance Addendum*, August 23, 2019.

912 USCIS, “Agency Information Collection Activities; New Collection: Sponsor Deeming and Agency Reimbursement,” *Federal Register* 84, no. 243 (December 18, 2019): 69386–87; In May 2020, USCIS submitted the updated form for clearance with OMB. USCIS, “Agency Information Collection Activities; New Collection: Sponsor Deeming and Agency Reimbursement,” *Federal Register* 85, no. 88 (May 6, 2020): 26984–85; USCIS, “SAVE Launches Sponsor Deeming and Agency Reimbursement Initiative” (news release, September 10, 2020).

913 USCIS, “Sponsor Deeming and Agency Reimbursement - Proposed Screens” (form preview, May 6, 2020).

914 USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: Affidavit of Support Under Section 213A of the Act,” *Federal Register* 85, no. 70 (April 10, 2020): 20292-94; letter from AILA to Samantha Deshommes, Chief Regulatory Coordination Division, Office of Policy and Strategy USCIS, “Re: OMB Control Number: 1615-0075, USCIS 60-Day Notice and Request for Comments: Affidavit of Support under Section 213A of the Act, Revision of a Currently Approved Collection,” December 16, 2019.

915 USCIS, “EB-5 Immigrant Investor Program Modernization,” *Federal Register* 84, no. 142 (July 24, 2019): 35750–810.

residence to a foreign national who invests in a commercial project in the United States that creates at least ten U.S. jobs.

- ▶ **Slower Processing for EB-5 Applications**—*January 29, 2020*—Due to annual per country limits on employment visas, there are significant backlogs of EB-5 investor visas for applicants from India, Vietnam, and especially China.<sup>916</sup> For example, in January 2020, the United States was granting EB-5 green cards to Chinese nationals who applied in November 2014. USCIS announced in January 2020 that due to these backlogs, it will prioritize the processing of petitions by applicants from countries for which visas are immediately or imminently available.<sup>917</sup> Applications from backlogged countries, such as China, will not be adjudicated until visas are imminently available or USCIS has available resources.
- ▶ **Clarifying Rules on Investment Deployment for Immigrant Investors**—*July 24, 2020*—USCIS published a policy update clarifying guidance on how foreign nationals can keep their investments of capital active and “at risk” during the two-year probationary period to continue to qualify for the EB-5 Immigrant Investor Program.<sup>918</sup>
- ▶ **Asylum Termination at Adjustment of Status**—*August 21, 2020*—USCIS expanded and updated guidance regarding the termination of asylum status in cases where an asylee is applying for adjustment of status and the officer adjudicating the case finds that the individual should not have been granted asylum in the first place or is no longer eligible for asylum.<sup>919</sup> USCIS can only terminate asylum cases where the initial grant was made by USCIS, not the immigration court.<sup>920</sup> The updated policy clarifies that the Asylum Office can issue a notice of intent to terminate (NOIT) and a notice to appear to ICE simultaneously, beginning proceedings in the immigration court, or can issue the NOIT and provide the applicant time to respond before USCIS. The policy also clarifies that USCIS can terminate asylee status for derivative applicants when USCIS made the initial grant, even when the principal applicant was granted asylum by an immigration judge.
- ▶ **Child Status Determinations**—*November 13, 2020*—USCIS issued a policy alert clarifying its guidance on child status determinations, which are used to calculate a child’s age for immigration visa purposes and to prevent a child from losing eligibility for a visa due to aging during the immigration adjudication process, known as the Child Status Protection Act (CSPA) age.<sup>921</sup> It provides guidance on CSPA age determinations when a petitioning parent passes away and on the requirement that a family- or employment-based visa applicant apply for permanent residence within one year of visa availability in order to qualify for CSPA coverage.
- ▶ **Job Transfers for Employment-Based Visa Holders**—*November 17, 2020*—Since 2000, certain applicants for employment-based adjustment of status have had flexibility to transfer to similar jobs or

916 State Department, “*Visa Bulletin for January 2020*,” *Visa Bulletin X*, no. 37 (December 9, 2019).

917 USCIS, “*USCIS Adjusts Process for Managing EB-5 Visa Petition Inventory*” (news release, January 29, 2020).

918 USCIS, “*Clarifying Guidance for Deployment of Capital in Employment-based Fifth Preference (EB-5) Category*” (policy alert, July 24, 2020).

919 USCIS, “*Clarifying Procedures for Terminating Asylum Status in Relation to Consideration of an Application for Adjustment of Status*” (policy alert, August 21, 2020).

920 Except in the Ninth Circuit, where asylum termination cases must be referred to the immigration court. See *Nijjar v. Holder*, 689 F.3rd 1077 (U.S. Court of Appeals, Ninth Circuit, August 1, 2012).

921 USCIS, “*Age and ‘Sought to Acquire’ Requirement under Child Status Protection Act*” (policy alert, November 13, 2020).

employers while their adjustment applications are pending. On November 17, 2020, USCIS updated its policy guidance on determining eligibility for and adjudication of those transfers.<sup>922</sup>

- ▶ **Mandatory Interviews for Follow-to-Join Petitioners**—*November 18, 2020*—USCIS started a phased process of requiring in-person interviews for refugees and asylees petitioning to have their spouse or child receive refugee or asylee status in the United States.<sup>923</sup> In the past, petitioners were only required to appear for an interview when their spouse or child resided in the United States, rather than abroad, and there were eligibility concerns that needed to be addressed with the petitioner.
- ▶ **Interview Criteria for Refugees and Asylees**—*December 15, 2020*—USCIS updated its policy manual to remove asylees, refugees, and their derivative family members from the categories of adjustment of status applicants for whom an interview may generally be waived, and expanded the scenarios in which these applicants should be interviewed, adding eight new criteria to the list.<sup>924</sup> The new criteria recommend officers conduct interviews when the applicant’s identity or admissibility is in question, and where there are concerns about terrorism or fraud.
- ▶ **Increased Scrutiny for EB-5 Regional Centers**—*multiyear*—The administration began a compliance review program for regional centers and began terminating regional centers on an accelerated basis. Regional centers allow EB-5 investors (foreign nationals who invest in commercial projects in the United States in order to receive permanent residence) to pool their resources into a larger project coordinated by the center. The vast majority of EB-5 immigrant visa applicants apply using regional centers. The Trump administration terminated 486 regional centers.<sup>925</sup> To compare, during the entirety of the two-term Obama administration, 73 regional centers were terminated.
- ▶ **Pending at end of administration**
  - Slowing the Green-Card Application Process—USCIS indicated that it would eliminate the option to concurrently file an immigrant visa petition and an application to adjust to permanent residence status.<sup>926</sup> This would change the practice of allowing green-card applicants who have an immigrant visa immediately available (such as immediate relatives of U.S. citizens) to file both their petition for the immigrant visa and the green-card application (i.e., an adjustment of status) at the same time, allowing USCIS to efficiently process one after the other. Ending concurrent filing would make the green-card application process slower and more burdensome for applicants. After filing to adjust status, applicants qualify to apply for work and travel authorization; thus, eliminating concurrent filing would also delay the receipt of these benefits.
  - Affidavit of Support Changes—On October 2, 2020, USCIS published a proposed rule that increases the burden on U.S. citizens and lawful permanent residents who wish to sponsor a family member for a green card.<sup>927</sup> Individuals wishing to sponsor a family member for a green

922 USCIS, “Job Portability after Filing Application to Adjust Status” (policy alert, November 17, 2020).

923 USCIS, “Expanding Interviews to Refugee/Asylee Relative Petitions” (policy memorandum, November 18, 2020).

924 USCIS, “Refugee and Asylee Adjustment of Status Interview Criteria and Guidelines” (policy alert, USCIS, December 15, 2020).

925 USCIS, “Regional Center Terminations,” updated June 16, 2020.

926 DHS, “Updating Adjustment of Status Procedures for More Efficient Processing of Immigrant Visa Usage” (proposed rule 1615–AC22, Fall 2018).

927 DHS, “Affidavit of Support on Behalf of Immigrants,” *Federal Register* 85, no. 192 (October 2, 2020): 62432–81.



card must complete an affidavit of support demonstrating their ability to financially support the immigrant without relying on government benefits. Under the proposed rule, potential sponsors would have to submit more financial documentation, including three years of tax returns, credit reports, credit scores, and bank account information. The new rule would also require a co-sponsor if the intending sponsor has used any means-tested benefit in the prior three years, regardless of their income level at the time of application.

### C. *Nonimmigrant Visas*

Nonimmigrant visas allow foreign nationals to enter the United States temporarily for specific purposes, such as education or work. Under the Trump administration, USCIS and the Labor Department increased the scrutiny with which new employment visa applications were processed and intensified efforts to ensure that nonimmigrants already inside the United States were adhering to the terms of their visas, measures instigated by the president's April 2017 "Buy American and Hire American" executive order, which aimed to protect American workers.<sup>928</sup>

Much of the increased scrutiny focused on the H-1B visa, the most popular visa for employers bringing in high-skilled foreign workers. H-1B applications overall faced rising denials. The denial rate for initial H-1B applications more than doubled between FY 2016 and FY 2019, from 10 percent to 21 percent.<sup>929</sup> The denial rate for initial H-1B applications fell to 13 percent in FY 2020, possibly due to applicants and petitioners adjusting to the stricter scrutiny and changes to the H-1B lottery that prioritized applicants who had advanced degrees and thus stronger applications.<sup>930</sup> Student visas also became the target of increased scrutiny. The administration increased enforcement of students' lawful status and slowed visa issuance, leading to the first decline in the number of international students in a decade during the 2019–20 school year.<sup>931</sup> Pandemic-related travel restrictions led to a further decrease in the number of international students studying at U.S. institutions starting in 2020.

- ▶ **Disqualification of Some Computer Programmers from H-1B Visas**—*March 31, 2017*—USCIS issued a memo rescinding prior guidance that recognized "computer programmer" as a position eligible for the H-1B visa program for professionals in certain high-skilled occupations.<sup>932</sup> USCIS advised adjudicators that an entry-level computer programmer position would generally not qualify for an H-1B visa.
- ▶ **Ensuring Wages Are Consistent with H-1B Positions**—*March 31, 2017*—USCIS reminded adjudicators to ensure that the wage level offered corresponds to the proposed position.<sup>933</sup> On March 9, 2018, USCIS leadership sent out internal guidance titled "Additional Guidance Regarding Wage Level

928 White House, "Executive Order 13788 of April 18, 2017: Buy American and Hire American," *Federal Register* 82, no. 76 (April 21, 2017): 18837–39.

929 MPI analysis of data from USCIS, "H-1B Employer Data Hub," accessed March 10, 2020.

930 MPI analysis of data from USCIS, "H-1B Employer Data Hub," accessed October 7, 2021.

931 Emma Israel and Jeanne Batalova, "International Students in the United States," *Migration Information Source*, January 14, 2021.

932 USCIS, "Rescission of the December 22, 2000 'Guidance Memo on H1B Computer Related Positions'" (policy memorandum, March 31, 2017).

933 USCIS, "Rescission of the December 22, 2000 'Guidance Memo on H1B Computer Related Positions'"

Analysis” outlining the approach adjudicators should follow when determining whether the listed wage level is “clearly inconsistent” with the proposed position.<sup>934</sup>

- ▶ **Suspension of Premium Processing**—April 3 to September 18, 2017; April 2, 2018 to February 15, 2019; April 1 to June 10, 2019; March 20 to June 22, 2020—USCIS receives an influx of applications during the H-1B cap application period each April. Under the Trump administration, USCIS suspended premium processing multiple times, focusing on this peak period.<sup>935</sup> During 2020, due to the pandemic, this suspension was temporarily extended to other types of applications that qualify for premium processing, such as employment-based immigrant petitions.<sup>936</sup> (For more on pandemic-related policies, see Section 2.) Premium processing allows employers or foreign nationals to pay an extra fee to have their applications adjudicated within 15 days. Without premium processing, H-1B applications may pend for a year or more.
- ▶ **Elimination of Deference to Prior Approvals**—October 23, 2017—USCIS rescinded its policy of deferring to prior approvals of nonimmigrant visas, meaning the process of renewing a visa was often easier than applying for a new one. Under the new policy, renewals are subject to as much scrutiny as new applications.<sup>937</sup>
- ▶ **Restrictions on the TN Visa Category for Economists**—November 20, 2017—USCIS restricted the TN (Treaty National) temporary work visa category for economists, clarifying that individuals in occupations related to the field of economics, such as financial analysts, marketing analysts, and market research analysts, no longer qualify.<sup>938</sup> The TN visa allows some qualified citizens of Canada and Mexico to work in the United States pursuant to the North American Free Trade Agreement (NAFTA).
- ▶ **Changed Processing Order of H-2B Applications**—January 18, 2018 and February 26, 2019—Following a series of problems related to H-2B filings, including having the application website crash, the Labor Department changed how it processes temporary labor certifications for H-2B visas.<sup>939</sup> In the past, the department would process the applications in batches based on the date filed but irrespective of the time of day filed. In January 2018, the Trump administration said it would release the certifications in sequential order based on both the day and time applications were filed.<sup>940</sup> And

934 Email from Stephanie Doumani, Branch Chief, Service Center Operations, USCIS, *Clearly Inconsistent’ Clarifying Guidance*, March 9, 2018.

935 USCIS, “USCIS Will Temporarily Suspend Premium Processing for All H-1B Petitions” (news release, March 3, 2017); USCIS, “USCIS Resumes Premium Processing for Some Categories of Applicants Seeking H-1B Visas” (news release, September 18, 2017); USCIS, “USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H-1B Cap Petitions” (news release, March 20, 2018); USCIS, “USCIS Resumes Premium Processing for Fiscal Year 2019 H-1B Cap Petitions” (news release, January 25, 2019); USCIS, “USCIS Resumes Premium Processing for H-1B Petitions Filed on or before Dec. 21, 2018” (news release, February 15, 2019); USCIS, “USCIS Announces FY 2020 H-1B Cap Season Start, Updates, and Changes” (news release, March 19, 2019); USCIS, “Premium Processing Begins for Remaining H-1B Cap-Subject Petitions on June 10” (news release, June 7, 2019).

936 USCIS, “USCIS Announces Temporary Suspension of Premium Processing for All I-129 and I-140 Petitions due to the Coronavirus Pandemic” (news release, updated March 27, 2020); USCIS, “USCIS Resumes Premium Processing for Certain Petitions” (news release, May 29, 2020).

937 USCIS, “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status” (policy memorandum, October 23, 2017).

938 USCIS, “TN Nonimmigrant Economists Are Defined by Qualifying Business Activity” (policy memorandum, November 20, 2017).

939 Department of Labor, “U.S. Department of Labor Announces Updates to the H-2B Temporary Labor Certification Program” (guidance document, February 26, 2019).

940 Department of Labor, “Labor Certification Process for the Temporary Employment of Aliens in Non-Agricultural Employment in the United States,” *Federal Register* 83, no. 15 (January 23, 2018): 3189–90.

in February 2019, the administration announced that the Labor Department would process the applications in batches based on whether the application was filed within the first three days of the application period and on the work start date designated for the H-2B beneficiaries.

- ▶ **Increased Scrutiny of H-1B Visa Holders Working at Third-Party Worksites**—*February 22, 2018*—USCIS issued a policy change requiring employers applying for H-1B visas to submit contracts covering the entirety of the time requested on an application if the foreign national will be working at third-party worksites.<sup>941</sup> In June 2020, USCIS rescinded this and an Obama-era policy on third-party worksites in order to comply with a legal settlement and lawsuit.<sup>942</sup> As a result of the rescission, employers are no longer required to submit contracts with any third parties.
- ▶ **Limits on Double-Filings of H-1B Cap Petitions**—*March 23, 2018*—USCIS adopted a policy making it more difficult for related companies to file multiple H-1B cap petitions for the same individual, a strategy sometimes used to increase the odds of receiving H-1B visas in the annual lottery.<sup>943</sup>
- ▶ **Accrual of Unlawful Presence for Students**—*August 9, 2018*—USCIS changed how the agency calculates unlawful presence for international students and exchange visitors.<sup>944</sup> Previously, such foreign nationals would start to accrue unlawful presence when USCIS found a status violation or an immigration judge ordered them removed. Under the new policy, they begin accruing unlawful presence on the day they are no longer pursuing their authorized course of study or are otherwise violating the terms of their status. Accruing a certain number of days of unlawful presence can have severe consequences for a foreign national's ability to re-enter the United States in the future. In May 2019, a federal district court judge issued a preliminary nationwide injunction blocking the policy, and in February 2020, the same judge issued a permanent nationwide injunction, finding the development of the policy violated federal law.<sup>945</sup>
- ▶ **Labor Union Participation Allowed in O Visa and P Visa Adjudications**—*September 14, 2018 and February 8, 2019*—In order to receive a temporary O visa (for individuals with extraordinary ability or achievement in sciences, arts, education, business, athletics, or entertainment) or a P visa (for athletes, artists, entertainers, and their essential support personnel), applicants must submit a written advisory opinion from the relevant labor union. Previously, if the applicant never submitted a negative advisory opinion, USCIS would never know it existed. Under this changed policy, labor unions can now submit negative O visa or P visa opinions directly to USCIS.<sup>946</sup>

941 USCIS, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" (policy memorandum, February 22, 2018).

942 USCIS, "Rescission of Policy Memoranda" (policy alert, June 17, 2020); Stuart Anderson, "USCIS Rescinds Policy Memos That Increased H-1B Visa Denials," *Forbes*, June 22, 2020.

943 USCIS, "Matter of S- Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018)" (policy memorandum, March 23, 2018).

944 USCIS, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (policy memorandum, August 9, 2018).

945 *Guilford College v. Kevin McAleenan*, Case No. 1:18-cv-00891-LCB-JEP (U.S. District Court for the Middle District of North Carolina, May 3, 2019); *Guilford College v. Chad Wolf*, Case No. 1:18-cv-00891-LCB-JEP (U.S. District Court for the Middle District of North Carolina, February 6, 2020).

946 USCIS, "USCIS Now Accepting Copies of Negative O Visa Consultations Directly from Labor Unions" (news release, September 14, 2018); USCIS, "USCIS Now Accepting Copies of Negative P Visa Consultations Directly from Labor Unions" (news release, February 8, 2019). In the first six months of implementation, less than 1 percent of O petitions filed contained a negative advisory opinion, resulting in seven denials and three grants being revoked for ineligibility. See [letter from Ken Cuccinelli II, Acting Director, USCIS, to Jennifer Dorning, President, Department for Professional Employees, AFL-CIO, October 16, 2019](#).

- ▶ **End of Iranian Eligibility for E-1 and E-2 Visas**—*October 3, 2018*—The E-1 and E-2 nonimmigrant visas allow foreign nationals whose countries of nationality have trade and investment treaties with the United States to come to the United States for the purposes of engaging in international trade or investment in a U.S. business. On October 3, 2018, the United States withdrew from the 1955 Treaty of Amity, Economic Relations, and Consular Rights with Iran.<sup>947</sup> Because the United States has no other qualifying treaties with Iran, Iranian nationals are no longer eligible for E-1 and E-2 visas, and Iranians already in the United States on such visas are permitted to remain in the country only until their status expires.
- ▶ **Limits on L-1 Visa Applications**—*November 15, 2018*—This policy change limits the ability of foreign nationals to qualify for L-1 intracompany transferee visas if they have worked in the United States under a different visa status prior to their application for an L-1 visa.<sup>948</sup>
- ▶ **Collection of Information on Third-Party Users of H-1B Visa Holders**—*November 19, 2018*—As part of the H-1B application process, the Labor Department now requires employers to name any companies where an H-1B visa holder will perform work on a contract.<sup>949</sup>
- ▶ **Increased Hurdles for Canadian Intracompany Transferees**—*March 2019*—Unlike nationals of other countries, Canadians enjoy some increased privileges when it comes to U.S. immigration, including on-the-spot adjudications with CBP for some visa applications. However, in response to a March 2019 nonpublic directive from its headquarters, CBP ceased adjudicating extensions or renewals for Canadians trying to return to the United States on L-1 visas for intracompany transferees.<sup>950</sup> Such applicants must now first have their applications adjudicated by USCIS before returning to the United States.
- ▶ **Increased Vetting for Nonimmigrants Already in the United States**—*March 22, 2019*—USCIS will require certain nonimmigrants seeking to extend or change their status, as well as that of their dependent spouses and minor children, to each file separate forms and each be fingerprinted, regardless of age.<sup>951</sup>
- ▶ **Changes to the H-1B Visa Lottery**—*April 1, 2019*—In an effort to increase the number of H-1B visa recipients with advanced degrees, USCIS changed how the annual lottery that selects initial H-1B visas works.<sup>952</sup> Starting in April 2019, when the lottery selected applications for processing under the FY 2020 H-1B cap, USCIS first conducted a lottery for the 65,000 general slots, drawing from all H-1B visa applicants, including those with advanced degrees. Afterwards, it conducted a lottery for the 25,000 additional “master’s cap” slots, drawing only from the remaining applicants with advanced degrees.

947 USCIS, “Notice Concerning Termination of Eligibility for E-1 and E-2 Nonimmigrant Classification Based on Treaty of Amity with Iran,” *Federal Register* 85, no. 15 (January 23, 2020): 3938.

948 USCIS, “Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator’s Field Manual (AFM)” (policy memorandum, November 15, 2018).

949 Department of Labor, “Side-by-Side: Major Changes to Labor Condition Application (LCA) ETA Form 9035/9035E” (fact sheet, November 2018).

950 AILA, “Practice Alert: Filing Subsequent L-1 Petitions for Canadian Applicants at Ports of Entry” (unpublished practice alert, April 25, 2019).

951 USCIS, “USCIS to Public Revised Form I-539 and New Form I-539A” (news release, February 11, 2019).

952 USCIS, “Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens,” *Federal Register* 84, no. 21 (January 31, 2019): 888–957.

Previously, the “master’s cap” lottery went first. The change resulted in an 11 percent increase in the number of selected applicants with a master’s or higher degree in FY 2020 over FY 2019.<sup>953</sup>

- ▶ **Improving Recruitment for Guatemalan and Honduran Workers**—*July 30 and September 27, 2019*—The Labor Department signed bilateral cooperative agreements with Guatemala and Honduras to provide additional safeguards for temporary workers traveling to the United States.<sup>954</sup> In both agreements, the foreign governments promised to provide additional safeguards around the recruitment of H-2A farmworkers, in the case of Guatemala, and both H-2A farmworkers and H-2B nonagricultural workers, in the case of Honduras. The agreements were part of larger negotiations with these two countries over Asylum Cooperative Agreements (see Section 5.B).<sup>955</sup>
- ▶ **More Vigilant Enforcement of Optional Practical Training**—*September 27, 2019*—ICE issued a memo instructing school officials to review and retain information about how nonimmigrant students’ Optional Practical Training (OPT) employment relates to their major area of study.<sup>956</sup> OPT is a temporary employment authorization program offered to foreign students, and by regulation any employment pursued under OPT must be related to the foreign student’s major area of study. However, students are not required to have a job offer prior to applying for OPT and can change employment at any time during the OPT period, making this regulation difficult for the government to enforce.
- ▶ **Modernization of H-2B and H-2A Recruiting**—*October 21 and December 16, 2019*—USCIS and the Labor Department published final regulations updating the recruitment requirements for employers applying for H-2A and H-2B visas.<sup>957</sup> Among other things, the regulations rescind the requirement that employers advertise the job opportunity in print newspapers; instead, the Labor Department will advertise the job opportunities on its own website.
- ▶ **H-1B Registration**—*March 1, 2020*—USCIS implemented a new registration process for H-1B petitions, which are subject to an annual cap of 85,000 visas.<sup>958</sup> Rather than have employers file full applications, since March 1, 2020, they only need to file an online registration. Because USCIS received more registrations than the 85,000 visas available—nearly 275,000 registrations—USCIS held a lottery and invited only those chosen to submit full applications, starting April 1, 2020.<sup>959</sup> This prevents thousands of employers from having to file full applications that will never be selected and thus never read. The

953 Rani Molla, “New Immigration Rules Could Prevent Our Next Elon Musk,” *Vox*, April 15, 2019.

954 Department of Labor, “U.S. Department of Labor and Guatemala Sign Joint Memorandum of Agreement to Improve H-2A Nonimmigrant Visa Program Operations” (news release, July 30, 2019); DHS, “U.S. and Honduras Sign More Arrangements to Expand Collaboration to Confront Irregular Migration” (news release, September 27, 2019).

955 DHS, “DHS Agreements with Guatemala, Honduras, and El Salvador” (fact sheet, October 3, 2019).

956 Note, Optional Practical Training (OPT) is run by ICE, not USCIS, but because its participants are all nonimmigrants it was included in this section. See ICE, “Practical Training—Determining a Direct Relationship Between Employment and a Student’s Major Area of Study” (policy guidance, ICE, Washington, DC, September 27, 2019).

957 Department of Labor, Employment and Training Administration, “Modernizing Recruitment Requirements for the Temporary Employment of H-2A Foreign Workers in the United States,” *Federal Register* 84, no. 183 (September 20, 2019): 49439–57; USCIS, DHS, and Department of Labor, Employment and Training Administration, “Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States,” *Federal Register* 84, no. 221 (November 15, 2019): 62431–47.

958 USCIS, “Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens,” *Federal Register* 85, no. 6 (January 9, 2020): 1176–77.

959 USCIS, “FY 2021 H-1B Cap Petitions May Be Filed as of April 1” (news release, April 1, 2020).



agency proposed minor changes to the registration form in October and requested comments by December 31, 2020, a deadline that was then extended until February 16, 2021.<sup>960</sup>

- ▶ **Employment Visa Violation Investigations—July 31, 2020**—USCIS and the Department of Labor entered into an agreement to share information about suspected employer violations in the H-1B program.<sup>961</sup> The agreement empowers USCIS to refer cases to the Labor Department’s Office of Foreign Labor Certification if, during the adjudication process or site visits, USCIS has reason to believe a company is exploiting the program.
- ▶ **Review of International Students’ Employment Status—August 28, 2020**—ICE announced that it would begin a review of employer information for all international students participating in OPT.<sup>962</sup> Students were reminded to report employer information and that failure to do so would result in their visa status being terminated.
- ▶ **Agreement with Guatemala on H-2 Visas—September 17, 2020**—The Labor Department signed an agreement with its Guatemalan counterpart to strengthen cooperation on H-2 temporary work visa programs.<sup>963</sup> The Guatemalan Ministry of Labor committed to registering prospective Guatemalan workers for possible employment in the United States and offering recruitment services for U.S. employers seeking H-2A and H-2B employees.
- ▶ **Expanded Guidance on Extraordinary Ability Visas—September 17, 2020**—USCIS updated its policy manual to include a new section detailing how officers should determine if evidence provided in O-1 nonimmigrant visa applications is sufficient to prove “extraordinary ability.”<sup>964</sup>
- ▶ **Major Reforms of the H-1B Visa—October 8, 2020**—DHS issued an interim final rule, scheduled to go into effect on December 7, 2020, that made a number of changes to the H-1B visa, including redefining “specialty occupation,” redefining “employer-employee relationship,” and instituting consequences for refusing a worksite visit.<sup>965</sup> Simultaneously, the Labor Department issued an interim rule to increase salary requirements for high-skilled visa holders, which went into effect the day it was issued.<sup>966</sup> Three federal judges struck down the Labor Department rule, and one federal judge struck down the DHS rule, preventing both rules from taking effect before the end of the administration.<sup>967</sup>

960 USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: H-1B Registration Tool,” *Federal Register* 85, no. 205 (October 22, 2020): 67366–67; USCIS, “Agency Information Collection Activities; Revision of a Currently Approved Collection: H-1B Registration Tool,” *Federal Register* 86, no. 9 (January 14, 2021): 3168–69.

961 Department of Labor, “U.S. Department of Labor and U.S. Department of Homeland Security Enter into a Memorandum of Agreement” (news release, July 31, 2020); Memorandum of Agreement between DHS USCIS and the Department of Labor, *Employment-Based Petition, Labor Certification, and Labor Condition Application Data*, July 30, 2020.

962 ICE, “SEVP to Mail Notices to OPT Students without Employer Information” (broadcast message, August 28, 2020).

963 Department of Labor, “United States and Guatemala Sign Joint Agreement to Improve H-2 Visa Program Operations” (news release, September 17, 2020).

964 USCIS, “USCIS Updates Policy Guidance on O Petitions” (news alert, September 17, 2020).

965 DHS, “Strengthening the H-1B Nonimmigrant Visa Classification Program,” *Federal Register* 85, no. 196 (October 8, 2020): 63918–65.

966 Department of Labor, “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States—Interim Final Rule,” *Federal Register* 86, no. 196 (October 8, 2020): 63872–915.

967 *Itserve Alliance, Inc., et al., v. Scalia*, No. 2:20-cv-14604-SRC-CLW (U.S. District Court for the District of New Jersey, opinion, December 3, 2020); *Chamber of Commerce et al. v. DHS et al.*, No. 20-cv-07331 (U.S. District Court for the Northern District of California, complaint for declaratory and injunctive relief, October 19, 2020); *Purdue University, et al., v. Scalia*, No. 1:20-cv-03006-EGS (U.S. District Court for the District of Columbia, memorandum opinion, December 14, 2020).

- *January 14, 2021*—The Labor Department published a final rule that increases the salary tiers for high-skilled visa holders.<sup>968</sup> The final rule is a revision of the interim final rule on salary requirements published on October 8, 2020, which had been enjoined by federal courts. Under the revised four-tier structure, baseline salaries for foreign workers would rise slowly over one year (or four years for visa holders who are pursuing adjustment of status), scheduled to begin in July 2021. Increasing salary requirements for foreign workers makes them less desirable to U.S. employers and is intended to protect jobs for U.S. workers. The final rule was scheduled to go into effect on March 15, 2021.
- ▶ **H-2A Wage Rate Determination Changes**—*November 5, 2020*—The Department of Labor published a final rule changing the process of setting minimum wages for agricultural workers on H-2A visas.<sup>969</sup> In order to ensure foreign workers are not replacing U.S. workers, wages for H-2A visa holders are set to be competitive with domestic wages. Historically, this has been done through an annual survey of farmworkers and set state by state based on cost of living. Under the new rule, the 2020 wage rates for the vast majority of workers would be frozen for two years, after which wages will be set nationally, tied to an index of worker pay. The administration estimated that the change would result in farmworkers earning \$170 million less in wages each year.<sup>970</sup>
  - *November 30, 2020*—The United Farm Workers union sued the Department of Labor, alleging that the rule purposely stagnates farmworkers' wages.<sup>971</sup> On December 23, two days after the rule took effect, the court issued a preliminary injunction preventing the Labor Department from implementing the rule.<sup>972</sup>
- ▶ **Prioritizing H-1B Petitions with Higher Wages**—*January 8, 2021*—DHS published a final rule that would change the selection process for H-1B petitions to prioritize those for jobs offering the highest wages.<sup>973</sup> This system would replace the random lottery used to grant H-1B petitions if the number of applications exceeds the numerical limitations for the visa.
- ▶ **Creation of OPT Employment Compliance Unit**—*January 13, 2021*—The Student and Exchange Visitor Program (SEVP) announced the creation of a new unit that will investigate compliance within the OPT, OPT extension, and Curricular Practical Training (CPT) programs.<sup>974</sup> The unit will focus on ensuring that employers are complying with working condition and compensation requirements, as well as the impact of OPT on U.S. workers, and will recommend ICE Homeland Security Investigations investigates workplaces it identifies as being out of compliance.

968 Department of Labor, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," *Federal Register* 86, no. 9 (January 14, 2021): 3608–74.

969 Department of Labor, "Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States," *Federal Register* 85, no. 215 (November 5, 2020): 70445–77.

970 Dan Charles, "Farmworkers Say the Government is Trying to Cut Their Wages," NPR, November 11, 2020.

971 *United Farm Workers, et al., v. Department of Labor, et al.*, No. 1:20-cv-01690 (U.S. District Court for the Eastern District of California, Fresno Division, complaint, November 30, 2020).

972 *United Farmworkers, et al., v. Department of Labor, et al.*, No. 1:20-cv-01690 (U.S. District Court for the Eastern District of California, order granting plaintiffs' motion for a preliminary injunction, December 23, 2020).

973 USCIS, "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," *Federal Register* 86, no. 5 (January 8, 2021): 1676–753.

974 ICE, "New SEVP Unit to Oversee Employment Compliance in the OPT Programs and Report on Impact on U.S. Workers" (broadcast message, January 13, 2021).

- ▶ **Update to Countries Eligible for H-2A and H-2B Visas**—*January 19, 2021*—Nationals of Samoa and Tonga are no longer eligible to receive H-2A and H-2B visas, and nationals of Mongolia are no longer eligible for H-2A visas.<sup>975</sup> The Philippines was added to the list of countries eligible to participate in the H-2B visa program. Eligibility for H-2A and H-2B employment visas is determined by the secretaries of homeland security and state based on factors including the overstay rate of foreign nationals from each country and countries' cooperation with U.S. agencies on immigration matters.
- ▶ **Increased H-2B Cap**—*multiyear*—For FYs 2017, 2018, 2019, and 2020, Congress allowed DHS to decide whether to increase the annual 66,000 cap on H-2B visas for temporary nonagricultural workers and, if so, by how much. For FY 2017 and FY 2018, DHS increased the cap by 15,000 visas.<sup>976</sup> In FY 2019, following increased pressure from Congress, DHS increased the cap by 30,000 visas, but the additional visas were only available to workers who had previously entered the country on H-2B visas.<sup>977</sup> To receive the additional visas, DHS required businesses to show that without foreign workers, they would likely suffer irreparable harm, such as permanent and severe financial loss.
  - Designating H-2B Visas for Nationals of El Salvador, Guatemala, and Honduras—*March 5, 2020*—For FY 2020, DHS announced its intention to increase the H-2B cap by 35,000 visas. While 25,000 of these would only be available to workers who had previously entered the United States on an H-2B visa, DHS reserved the remaining 10,000 for workers from El Salvador, Guatemala, and Honduras.<sup>978</sup> This was the result of broader negotiations with these three countries over the Asylum Cooperative Agreements (see Section 5.B.). However, due to the COVID-19 pandemic, this increase was not implemented (see Section 2).
- ▶ **Detection and Elimination of Fraud and Abuse of Foreign Workers**—*multiyear*—Trump's April 18, 2017, executive order "Buy American and Hire American" sought to protect the economic interests of U.S. workers by, among other things, preventing fraud and abuse within the immigration system.<sup>979</sup> As a result, USCIS and the Labor Department increased their efforts to root out fraud and abuse of foreign workers.
  - Justice Department and USCIS Memorandum of Understanding (MOU) on Protecting U.S. Workers—*May 11, 2018*—The Justice Department and USCIS signed an MOU expanding their collaboration to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign workers to the United States.<sup>980</sup> The MOU improves collaboration by

975 DHS, "Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs," *Federal Register* 86, no. 8 (January 13, 2021): 2689–92.

976 DHS and Department of Labor, "Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," *Federal Register* 82, no. 137 (July 19, 2017): 32987–33000; DHS and Department of Labor, "Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," *Federal Register* 83, no. 105 (May 31, 2018): 24905–19.

977 USCIS and Department of Labor, Employment and Training Administration, "Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program," *Federal Register* 84, no. 89 (May 8, 2019): 20005–21.

978 Michelle Hackman, "Trump Administration to Make 35,000 Additional Seasonal Worker H-2B Visas Available," *Wall Street Journal*, March 5, 2020.

979 White House, "Executive Order 13788."

980 Justice Department, Civil Rights Division and USCIS, "Information Sharing and Case Referrals" (memorandum of understanding, May 11, 2018).

establishing a framework the agencies can use to manage and maintain information sharing and interagency case referrals.

- Justice and Labor Departments MOU on Protecting U.S. Workers—July 31, 2018—The Justice and Labor Departments signed an MOU expanding the range of situations in which the agencies will refer to each other cases of discrimination on the basis of citizenship status or noncompliance with laws and regulations on wages and working conditions, and the procedures for such referrals.<sup>981</sup>
- Targeted Site Visits—multiyear—USCIS implemented a targeted site visit program in 2017, initially focusing on employers of H-1B visa holders, whereas previously, site visits had taken place either randomly or when there were complaints about a specific employer.<sup>982</sup> USCIS has since expanded the program to other visa categories and scaled up the number of targeted visits it is conducting. In FY 2019, it conducted 8,512 targeted site visits, compared to 1,106 in FY 2018.<sup>983</sup> In FY 2020, the agency conducted 4,345 targeted site visits.<sup>984</sup>
  - o H-1B Visas—April 3, 2017—USCIS began targeting site visits of specific employers in the H-1B program.<sup>985</sup> Investigators use site visits to verify information in certain visa petitions. Such investigations now focus more on employers whose basic business information cannot be validated through commercially available data, employers whose staff consist of more than 15 percent H-1B holders, and employers petitioning for H-1B workers who would work offsite.
  - o L-1B, E-2, and H-2B Visas—2018—As part of a pilot program, USCIS began conducting targeted site visits for companies employing workers with L-1B visas (for intracompany transferees with specialty knowledge), E-2 visas (investors), and H-2B visas (temporary nonagricultural workers).<sup>986</sup>
  - o L-1A and CW-1 Visas—2019—Also on a pilot basis, USCIS began conducting targeted site visits for companies employing workers with L-1A visas (for intracompany executive or manager transferees) and CW-1 visas (transitional workers in the Commonwealth of the Northern Mariana Islands).<sup>987</sup>

### ► Pending at end of administration

- Rescission of Employment Authorization for H-4 Visas—DHS indicated it would propose a rule to end an Obama-era program that grants work authorization to certain spouses of H-1B visa

981 Justice Department, Civil Rights Division, Immigrant and Employee Rights Section and Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, “[Information Sharing and Case Referral](#)” (memorandum of understanding, July 31, 2018).

982 Laura D. Francis, “[Trump Immigration Fraud Focus Yields Limited Results \(1\)](#),” Bloomberg Law, November 6, 2018.

983 DHS, *FY 2020 Budget in Brief* (Washington, DC: DHS, 2019), 59; DHS, *FY 2021 Budget in Brief*, 65.

984 DHS, *FY 2022 Budget in Brief* (Washington, DC: DHS, 2021), 74.

985 USCIS, “[Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse](#)” (news release, April 3, 2017).

986 DHS, *FY 2020 Budget in Brief*, 59.

987 DHS, *FY 2021 Budget in Brief*, 65.

holders.<sup>988</sup> The program is only available to spouses of H-1B visa holders who have been in the United States for at least six years and are on track to get a green card.

- Comprehensive Reforms to Practical Training Programs—DHS indicated it would propose a comprehensive regulatory reform to practical training options, including OPT (a temporary employment authorization program offered to foreign students).<sup>989</sup>
- Setting Fixed Terms on Student Visas—On September 5, 2020, USCIS published a proposed rule that would set fixed terms for student visas, instead of regarding visas as valid as long as the recipient remains enrolled in school.<sup>990</sup> Most students would receive four-year visas, but students from certain Middle Eastern, Asian, and African countries would be limited to two-year visas.<sup>991</sup> Students who require longer than the two- or four-year term of their visa would be eligible to apply for an extension.
- Ending “B in lieu of H” Policy—On October 21, 2020, the State Department published a proposed rule that would end the practice of issuing B-1 business visas to certain individuals who are eligible for H-1B or H-3 temporary work visas, unless they independently qualify for a B-1 visa.<sup>992</sup> The policy allowed nonimmigrants who were traveling to the United States to perform short-term work that would qualify for the H-1B or H-3 categories, but who would remain on foreign payroll, to obtain B-1 visas instead.

## D. Parole

The president took aim at programs that allow certain categories of foreign nationals to use a benefit called parole to enter and temporarily stay in the country. In a January 25, 2017, executive order on border security, Trump mandated that parole only be used on a case-by-case basis, rather than as broad programs to grant protection to certain categories of immigrants. The administration then began a review of all categorical parole programs and announced the termination of multiple programs.<sup>993</sup>

- ▶ **End of the Central American Minors (CAM) Refugee and Parole Program**—*August 16 and November 16, 2017*—The administration ended first the parole and later the refugee components of this program for Central American minors (see Section 5.A.).
- ▶ **Denial of Advance Parole If the Applicant Travels**—*November 2018*—Early on in the Trump administration, USCIS began denying applications for advance parole (essentially, advance permission

988 DHS, “Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization” (proposed rule 1615-AC15, Fall 2017).

989 See DHS, “Practical Training Reform” (proposed rule 1653-AA76, Spring 2018).

990 DHS, “Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media,” *Federal Register* 85, no. 187 (September 25, 2020): 60526–98.

991 Michelle Hackman and Melissa Korn, “Trump Administration Proposes Clampdown on Open-Ended Student Visas,” *Wall Street Journal*, September 24, 2020.

992 State Department, “Visas: Temporary Visitors for Business or Pleasure,” *Federal Register* 85, no. 204 (October 21, 2020): 66878–88.

993 Among the programs in audit, USCIS confirmed it is reviewing military “parole in place,” which allows unauthorized immediate family of U.S. service members to receive a lawful entry, making legalizing possible and more easily attainable. See Camilo Montoya-Galvez, “Soldier’s Immigrant Mother Could Be among the Last to Benefit from Program,” CBS NEWS, August 22, 2019.



to depart and return to the United States) if the applicant traveled while the application was pending.<sup>994</sup> After pressure from stakeholders, USCIS eased the policy a little, allowing current advance parole holders to travel on the document while their second advance parole is pending.

- ▶ **End of Categorical Parole Programs for the Commonwealth of the Northern Mariana Islands—December 27, 2018**—The administration announced the immediate termination of parole programs for individuals in the Commonwealth of the Northern Mariana Islands (CNMI).<sup>995</sup> These programs provided parole for immediate relatives of U.S. citizens, certain stateless individuals, and caregivers of individuals with critical medical or special needs. They were created by the Obama administration in 2011 in recognition of the fact that the U.S. commonwealth's incorporation into federal immigration law in 2009 left many in uncertain immigration statuses, without the possibility of legalizing. Following USCIS's termination of the programs, Congress passed a law to provide long-term legal residence status for certain individuals in the CNMI.<sup>996</sup> While USCIS worked to implement the new law, it automatically extended the CNMI parole programs.<sup>997</sup> After the application period, USCIS extended parole and employment authorization to individuals who had applied for resident status in order to avoid lapses in status while their applications were adjudicated.<sup>998</sup>
- ▶ **Limits on Employment Authorization for Parolees—August 19, 2019**—USCIS released guidance encouraging adjudicators to use discretion when determining whether to grant employment authorization to foreign nationals who have been paroled into the United States.<sup>999</sup> The guidance instructs them to weigh certain positive and negative factors; among the factors to be weighed are violations of any immigration laws, the length of time the foreign national has been in the United States, and any grounds for removal that apply to the foreign national, as well as whether the foreign national is a primary caregiver or an immediate relative of a U.S. citizen.<sup>1000</sup>
- ▶ **End of Parole for Russians to Enter Guam and the Northern Mariana Islands—October 3, 2019**—DHS ended a discretionary parole program for Russian nationals seeking to visit Guam or the Commonwealth of the Northern Mariana Islands (CNMI).<sup>1001</sup> DHS will still review and grant applications on a case-by-case basis when there is an urgent humanitarian or public benefit reason for the approval. The program had allowed Russians to enter Guam and the CNMI for up to 45 days.

994 DHS, "Tenacity and Partnership Leads to Change in Advance Parole Processing," updated March 19, 2019.

995 USCIS, "Termination of the Categorical Parole Programs for Certain Individuals Present in the Commonwealth of the Northern Mariana Islands (CNMI)" (news release, December 27, 2018).

996 USCIS, "Northern Mariana Islands Long-Term Legal Residents Relief Act' Guidance for Certain Individuals Present in the Commonwealth of the Northern Mariana Islands (CNMI)" (news alert, June 30, 2019).

997 USCIS, "Northern Mariana Islands Long-Term Legal Residents Relief Act' Guidance"; USCIS, "USCIS Extends Transitional Parole for Certain Aliens Present in the Commonwealth of the Northern Mariana Islands" (news alert, June 17, 2020).

998 USCIS, "USCIS Extends Transitional Parole for CNMI Longer-Term Resident Status Applicants" (news alert, August 11, 2020); USCIS, "USCIS Extends Transitional Parole for CNMI Longer-Term Resident Status Applicants" (news alert, December 30, 2020).

999 USCIS, "Employment Authorization for Parolees" (policy alert, August 19, 2019).

1000 USCIS, "Policy Manual: Chapter 2 – Parolees," accessed January 6, 2019.

1001 DHS, "Rescission of Discretionary Parole Policies Relating to Nationals of the Russian Federation Seeking Entry Into Guam and/ or the Commonwealth of the Northern Mariana Islands for a Temporary Visit for Business or Pleasure," *Federal Register* 84, no. 170 (September 3, 2019): 46029–31.

► **Pending at end of administration**

- End of the International Entrepreneur Parole Program—On May 29, 2018, the Trump administration issued proposed regulations to eliminate the International Entrepreneur Parole program, which grants parole to certain foreign entrepreneurs.<sup>1002</sup> The notice and comment period for the proposed regulation ended on June 28, 2018; a final version was never published.
- End of the Haitian Family Reunification Parole Program and the Filipino World War II Veterans Parole Program—On December 28, 2020, USCIS published notice seeking comment on its plan to end these two categorical parole programs.<sup>1003</sup> Under both programs, foreign nationals with approved family-based immigrant petitions are permitted to enter and work in the United States while waiting for their green cards to become available.

## 8 Other Actions

The Trump administration's efforts on immigration also involved parts of the federal government that are usually less central to immigration policy discussions. While they do not exert direct influence over the immigration system, the Social Security Administration (SSA), the Commerce Department, the Department of Defense, and the Department of Housing and Urban Development (HUD) all announced changes relevant to foreign nationals inside the United States. Additionally, debates over the structure of the DHS bureaucracy and the legitimacy of certain appointees had effects on which immigration policies were allowed to stand.

*The Trump administration's efforts on immigration also involved parts of the federal government that are usually less central to immigration policy discussions.*

- **Disruptions for Foreign Nationals in the U.S. Military—2017**—Citing national security concerns, the Department of Defense and USCIS made it more difficult for foreign nationals recruited to the U.S. military to naturalize (a long-standing incentive for noncitizens to serve) or to even start their basic training.
  - *May 19, 2017*—A Department of Defense memo suggested canceling the enlistment contracts of approximately 4,000 recruits through the Military Accessions Vital to the National Interest (MAVNI) program for noncitizens with certain in-demand skills who had not yet been trained or naturalized.<sup>1004</sup> Subsequently, 502 MAVNI recruits were discharged between July 2017 and

1002 USCIS, "Removal of International Entrepreneur Parole Program," *Federal Register* 83, no. 103 (May 29, 2018): 24415–27.

1003 USCIS, "Agency Information Collection Activities; Revision, of a Currently Approved Collection: Application for Travel Document. Removal of Instructions Regarding the Haitian Family Reunification Program and Filipino World War II Veteran Parole Program," *Federal Register* 85, no. 248 (December 28, 2020): 84362–65.

1004 Memorandum from Tony Kurta, Acting Undersecretary of Defense for Personnel and Readiness, and Todd R. Lowery, Acting Undersecretary of Defense for Intelligence, to the Secretary of Defense, *Military Accessions Vital to the National Interest (MAVNI) Pilot Program*, May 19, 2017, included as Exhibit 23 to Plaintiffs' Memorandum in Support of a Temporary Restraining Order and Motion for a Preliminary Injunction, *Kusuma Nio v. United States Department of Homeland Security et. al.*, No. 1:17-cv-00998-ESH-RMM (U.S. District Court for the District of Columbia, March 16, 2018), 322–24.

July 2018.<sup>1005</sup> After a federal lawsuit challenged the discharges, the Army announced in August 2018 that it had reinstated more than 30 MAVNI soldiers and halted the discharges of an additional 149.<sup>1006</sup>

- *July 7, 2017*—USCIS issued guidance advising that MAVNI naturalization applicants not proceed to interviews until all enhanced Department of Defense security checks are complete.<sup>1007</sup> On May 22, 2019, a federal district court judge found the policy in violation of federal law and vacated it.
- *October 13, 2017*—The Department of Defense issued a series of memos formalizing new vetting standards first put into place under the Obama administration.<sup>1008</sup> The memos also ordered military branches to withhold the “certification of honorable service” form (N-426) needed for citizenship applications from all noncitizen recruits until they complete basic training and a certain number of days of service. Because of this change, as well as changes made by Congress and the administration requiring vetting to be completed prior to basic training, applications for citizenship based on military service have fallen significantly.<sup>1009</sup>

- ▶ **Attempt to Collect Information about Citizenship Status in Connection with the 2020 Decennial Census**—*March 26, 2018 and July 11, 2019*—In March 2018, the Commerce Department announced that a question on citizenship status would be added to the 2020 decennial census.<sup>1010</sup> In January 2019, a federal district court judge in New York issued a preliminary injunction, stopping the Commerce Department from including the question.<sup>1011</sup> Six months later, in July 2019, the Supreme Court ruled against the administration, holding that the case should be remanded back to the Commerce Department to provide a reasoned explanation for adding the citizenship question.<sup>1012</sup> The president announced that they would not add a citizenship question to the census, but would instead order every federal agency to give records to the Commerce Department that detail the numbers of citizens and noncitizens, as well as their addresses.<sup>1013</sup> This is the first time DHS has been asked to share personally identifiable information with the Census Bureau. In addition to addresses,

1005 Ellen Mitchell, “Army Discharged More than 500 Immigrant Recruits in One Year,” *The Hill*, October 12, 2018.

1006 *Lucas Calixto v. United States Department of the Army*, Civil Action No. 1:18-cv-01551 (U.S. District Court for the District of Columbia, declaration of Lin H. St. Clair, August 20, 2018); Garance Burke and Martha Mendoza, “Army Reinstates at Least 36 Discharged Immigrant Recruits,” *Associated Press*, August 20, 2018.

1007 *Kusuma Nio v. United States Department of Homeland Security*, Civil Action No. 17-0998 (ESH) (U.S. District Court for the District of Columbia, May 22, 2019).

1008 Memorandum from A. M. Kurta, Acting Under Secretary of Defense for Personnel and Readiness, to Secretaries of the Military Departments, Commandant of the Coast Guard, *Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization*, October 13, 2017.

1009 Muzaffar Chishti, Austin Rose, and Stephen Yale-Loehr, *Noncitizens in the U.S. Military: Navigating National Security Concerns and Recruitment Needs* (Washington, DC: MPI, 2019).

1010 Memorandum from Wilbur Ross, Secretary of Commerce, to Karen Dunn Kelley, Undersecretary for Economic Affairs, Department of Commerce, *Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire*, March 26, 2018.

1011 *State of New York v. U.S. Department of Commerce, New York Immigration Coalition v. U.S. Department of Commerce*, No. 1:18-cv-02921-JMF (U.S. District Court Southern District of New York, January 15, 2019). Later, two other federal judges ruled against the addition. See *State of California v. Wilbur Ross, City of San Jose v. Wilbur Ross*, Case No: 3:18-cv-01865-RS (U.S. District Court Northern District of California, March 6, 2019); *Kravitz v. U.S. Department of Commerce*, Case No: 8:18-cv-01041-GJH (U.S. District Court for the District of Maryland, April 5, 2019), described in Hansi Lo Wang, “Trump Administration’s Census Citizenship Question Plans Halted by 3rd Judge,” *NPR*, April 5, 2019.

1012 *Department of Commerce v. New York*, Case No. 18-966 (Supreme Court of the United States, June 27, 2019).

1013 White House, “Executive Order 13880 of July 11, 2019: Collecting Information About Citizenship Status in Connection With the Decennial Census,” *Federal Register* 84, no. 136 (July 16, 2019): 33821–25; Seung Min Kim, Tara Bahrapour, and John Wagner, “Trump Retreats on Adding Citizenship Question to 2020 Census,” *Washington Post*, July 11, 2019.

DHS will share information on the demographics and immigration status of people who have applied for immigration benefits. Several states, including Iowa, Nebraska, South Carolina, and South Dakota, also agreed to share state-level data from driver's licenses and other identification cards with DHS for this purpose.<sup>1014</sup> The data sharing will assist in identifying residents who do not have Social Security or tax identification numbers.<sup>1015</sup> U.S. law prohibits the Census Bureau from sharing its data with law enforcement authorities.

- *July 21, 2020*—The president issued a memorandum ordering the exclusion of unauthorized immigrants from the 2020 Census data used to reapportion the 435 seats in the U.S. House of Representatives among the 50 states.<sup>1016</sup> Three courts ruled that the memo was unlawful, unconstitutional, or both.<sup>1017</sup>
  - *August 3, 2020*—An internal memo ordered a Census Bureau task force to explore statistical methods for estimating noncitizens in the country.<sup>1018</sup> The memo is widely seen as an effort to carry out Trump's effort to exclude unauthorized immigrants from population calculations for determining congressional districts.
  - *January 13, 2021*—The Census Bureau announced it was halting all work on efforts to produce a count of unauthorized immigrants, saying it was impossible to produce the numbers by the end of Trump's term.<sup>1019</sup>
- ▶ **Social Security Number “No Match” Letters**—*March 2019*—SSA began sending “informational notifications” to employers and third-party providers who submitted wage and tax statements that contained name and Social Security number combinations that do not match SSA records, known as “no match” letters.<sup>1020</sup> The Obama administration had suspended this practice in 2012, arguing E-Verify, USCIS's web-based employment verification system, provides employers with more timely information.<sup>1021</sup> Unlike previous no-match letters, which were targeted only to employers with at least ten employees with mismatched W-2 information, the new letters are sent to all employers with even one mismatched employee record. In less than three months, the administration sent these letters to more than 570,000 employers, and by the end of 2019, 803,000 notices were sent out.<sup>1022</sup> The number of notices sent out fell slightly to 791,000 in 2020.<sup>1023</sup>

1014 Hansi Lo Wang, “Four States Are Sharing Driver's License Info to Help Find Out Who's a Citizen,” NPR, July 14, 2020.

1015 DHS, *Privacy Impact Assessment for the Department of Homeland Security (DHS) Immigration-Related Information Sharing with U.S. Census Bureau* (Washington, DC: DHS, December 20, 2019).

1016 Memorandum from the President to the Secretary of Commerce, *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, July 21, 2020.

1017 Michel Wines, “Federal Court Rejects Trump's Order to Exclude Undocumented From Census,” *New York Times*, September 10, 2020; Hansi Lo Wang, “Census Bureau Stops Work on Trump's Request for Unauthorized Immigrant Count,” NPR, January 13, 2021.

1018 Michael Wines, “At the Census Bureau, a Technical Memo Raises Alarms Over Politics,” *New York Times*, August 6, 2020.

1019 Wang, “Census Bureau Stops Work on Trump's Request.”

1020 Social Security Administration, “Employer Correction Request Notices,” accessed February 25, 2020.

1021 Social Security Administration, “Program Operations Manual System—RM 01105.027 Educational Correspondence (EDCOR) and Decentralized Correspondence (DECOR) Letters Mailed When Names and SSNs Do Not Match Our Records—DECOR Letters to Employees, Self-Employed Workers, and Employers,” updated March 22, 2019; Muzaffar Chishti and Claire Bergeron, “DHS Rescinds ‘No-Match’ Rule, Moves Forward with E-Verify as It Shifts Enforcement Focus to Employers,” *Migration Information Source*, July 15, 2009.

1022 Miriam Jordan, “Letters from Washington: Your Employees Could Be Undocumented,” *New York Times*, May 16, 2019; Elvia Malagón, “Immigration Advocates Say End of ‘No-Match Letters’ a Victory for Workers,” *Chicago Sun-Times*, April 22, 2021.

1023 Malagón, “Immigration Advocates Say End of ‘No-Match Letters’ a Victory for Workers.”

- **Changes to the DHS Order of Succession—2019**—Secretary of Homeland Security Kirstjen Nielsen, Acting Secretary of Homeland Security Kevin McAleenan, and Acting Secretary of Homeland Security Chad Wolf all made changes to the DHS order of succession during their terms at the helm of DHS.<sup>1024</sup> The *Homeland Security Act* allows DHS secretaries to designate alternative orders of succession to the one outlined in the *Federal Vacancies Reform Act* (FVRA). In April 2019, Nielsen amended the order of succession in cases when the secretary is unable to act during a disaster or catastrophic emergency to include the CBP commissioner and exclude the director of the Cybersecurity and Infrastructure Security Agency (CISA). When she resigned the next day, CBP Commissioner Kevin McAleenan assumed the position of acting secretary, even though the CBP commissioner was not included in the order of succession in cases of the secretary’s resignation. On November 8, 2019, McAleenan added the CBP commissioner and the under secretary for strategy, policy, and plans to the order of succession in the case of a homeland security secretary’s resignation, before resigning on November 13. On November 13, 2019, Wolf, the former under secretary for strategy, policy, and plans who had assumed the position of acting secretary, amended the order of succession for the deputy secretary to include the principal deputy director of USCIS and exclude the CISA director, allowing Ken Cuccinelli, who was the principal deputy director of USCIS, to assume this new role.
- *August 14, 2020*—The Government Accountability Office (GAO) found that the appointments of Kevin McAleenan and, subsequently, Chad Wolf, as acting secretaries of homeland security, and of Ken Cuccinelli as the senior official performing the duties of deputy secretary of homeland security did not follow the lawful order of succession.<sup>1025</sup> Although the GAO’s finding was not legally binding, in anticipation of court challenges, DHS attempted to retroactively delegate authority to these three officials and approve actions they took. Indeed, plaintiffs in various court cases challenging administration policies that these three officials signed off on successfully argued that the policies were invalid because the official who had approved the policy was not lawfully serving in his position.
  - *September 10, 2020*—Federal Emergency Management Agency (FEMA) Administrator Peter Gaynor, whom DHS conceded may have been next in the order of succession upon Acting Secretary Wolf’s nomination to be secretary (because the FVRA prevents acting officials from serving in the position they are nominated for), reissued the November 8, 2019, order of succession that placed Wolf before him.<sup>1026</sup> DHS argued that, under the *Homeland Security Act*, this reissuance superseded the FVRA.
  - *September 17, 2020*—Following Gaynor’s reissuance of the order of succession, Wolf retroactively ratified the policies he had approved as acting secretary in the period before Gaynor’s order, stating that they were legally authorized and proper.<sup>1027</sup>
  - *October 7, 2020*—Wolf retroactively ratified policies approved by his predecessor, Kevin McAleenan, and by USCIS Deputy Director for Policy Joseph Edlow.<sup>1028</sup> Both this order and the

1024 GAO, *Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security* (Washington, DC: GAO, 2020).

1025 GAO, *Matter of Department of Homeland Security*.

1026 DHS, “Ratification of Department Actions,” *Federal Register* 85, no. 185 (September 23, 2020): 59651–54.

1027 DHS, “Ratification of Department Actions” (September 23, 2020).

1028 DHS, “Ratification of Department Actions,” *Federal Register* 85, no. 201 (October 16, 2020): 65653–56.



September 17 ratification were later republished with signature dates of November 16, 2020, and Gaynor’s order of succession was published with a signature date of November 14.<sup>1029</sup>

- ▶ **Ending Social Security Benefits for Deported Foreign Nationals**—*January 19, 2020*—SSA published a notice of a new information-sharing program, under which DHS will disclose information to SSA in order to identify foreign nationals who leave the United States voluntarily or are removed so SSA may determine if suspension, nonpayment, or recovery of retirement or disability benefits is warranted.<sup>1030</sup> Removals on most grounds disqualify foreign nationals from continuing to receive such benefits.<sup>1031</sup>
- ▶ **Removing “Lack of English Proficiency” as a Factor in Disability Benefits Considerations**—*April 27, 2020*—SSA removed lack of English proficiency as a factor that can help make someone eligible for Social Security disability insurance.<sup>1032</sup>
- ▶ **National Day of Remembrance**—*November 1, 2020*—Trump signed a proclamation declaring November 1, 2020, a National Day of Remembrance for Americans killed by “criminal illegal aliens.”<sup>1033</sup>
- ▶ **Pending at end of administration**
  - **Screening Housing-Assistance Residents for Immigration Violations**—On May 10, 2019, HUD published a proposed rule that aims to prevent unauthorized immigrants from living in subsidized housing.<sup>1034</sup> Under the proposal, all HUD-assisted residents under the age of 62 would be screened through DHS’s Systematic Alien Verification for Entitlements (SAVE) program, which helps benefit-granting agencies determine applicants’ eligibility for benefits.

## 9 Conclusion

Over the course of four years, the administration of President Donald J. Trump enacted 472 administrative changes that dismantled and reconstructed many elements of a U.S. immigration system that was last reformed in 1996. Humanitarian protections were severely diminished. The U.S.-Mexico border became more closed off than perhaps any time in U.S. history. Immigration enforcement appeared more random. And legal immigration became out of reach for many, with benefits adjudication increasingly tied to enforcement. All of this was accomplished nearly exclusively by the executive branch, with sweeping presidential proclamations and executive orders, departmental policy guidance, and hundreds of small, technical adjustments. Congress, which has been deadlocked on immigration legislation for years, largely sidelined itself during this period of incredibly dynamic policy change. And the federal judiciary, from

1029 Peter Gaynor, “Order Designating the Order of Succession for the Secretary of Homeland Security,” DHS, November 14, 2020; DHS, “Ratification of Department Actions,” *Federal Register* 85, no. 228 (November 25, 2020): 75223–30.

1030 Social Security Administration, “Privacy Act of 1974; Matching Program,” *Federal Register* 84, no. 241 (December 16, 2019): 68537–38.

1031 Social Security Administration, “Program Operations Manual System—RS 02635.001 Effects of Removal (Deportation) on Retirement or Disability Beneficiaries,” updated December 1, 2017.

1032 Social Security Administration, “Removing Inability to Communicate in English as an Education Category,” *Federal Register* 85, no. 37 (February 25, 2020): 10586–603.

1033 White House, “Proclamation 10115 of October 30, 2020: National Day of Remembrance for Americans Killed by Illegal Aliens, 2020,” *Federal Register* 85, no. 215 (November 5, 2020): 70429–30.

1034 Department of Housing and Urban Development, “Housing and Community Development Act of 1980: Verification of Eligible Status,” *Federal Register* 84, no. 91 (May 10, 2019): 20589–95.

individual district courts through the U.S. Supreme Court, at times blocked administration actions and at other times offered a green light.

While it may be possible for subsequent administrations to rescind many of these changes, others cannot simply be unwound. Rule-making requirements mean some regulations may take months or years to reverse. Court challenges to policy changes may delay or thwart them, especially in a federal court system to which Trump appointed more than 226 out of 816 judges.<sup>1035</sup> And others may simply slip by unnoticed in administrations that prioritize immigration less than Trump's did.

The Trump administration was arguably the first to take full advantage of the executive branch's vast authority on immigration. Despite the relative fragility of executive actions when compared to legislation, the pace and comprehensiveness of the moves taken by Trump and his administration likely ensure that some will have lasting effects on the U.S. immigration system long after his time in office. At the very least, the Trump administration set a precedent for conducting far-reaching immigration changes through executive activism.

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*Despite the relative fragility of executive actions when compared to legislation, the pace and comprehensiveness of the moves taken by Trump and his administration likely ensure that some will have lasting effects on the U.S. immigration system long after his time in office.*

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<sup>1035</sup> John Gramlich, "How Trump Compares with Other Recent Presidents in Appointing Federal Judges," Pew Research Center, January 13, 2021.

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