



# Dismantling and Reconstructing the U.S. Immigration System

A Catalog of Changes under the Trump Presidency

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Migration Policy Institute

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# Contents

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<b>1</b>	<b>Introduction</b>	<b>1</b>
A.	What Has Changed?	1
B.	Driving Reform through Layered Changes	4
C.	Pushback and the Search for Alternatives	6
D.	Cataloging a Period of Intense Change	7
<b>2</b>	<b>Pandemic Response</b>	<b>7</b>
A.	Travel Bans and Visa Processing	9
B.	Border Security and Asylum Processing at the U.S.-Mexico Border	13
C.	Interior Enforcement	16
D.	The Immigration Court System	19
E.	Immigration Benefits	21
<b>3</b>	<b>Immigration Enforcement</b>	<b>24</b>
A.	Border Security	26
B.	Interior Enforcement	36
<b>4</b>	<b>U.S. Department of Justice</b>	<b>49</b>
A.	Instructions to Immigration Judges	56
B.	Attorney General Referral and Review	60
<b>5</b>	<b>Humanitarian Flows</b>	<b>63</b>
A.	Refugees	64
B.	Asylum Seekers	68
C.	Unaccompanied Children	77
D.	Temporary Protected Status Recipients	82
E.	Victims of Trafficking and Other Crimes	84
<b>6</b>	<b>U.S. Department of State</b>	<b>85</b>
<b>7</b>	<b>U.S. Citizenship and Immigration Services and U.S. Department of Labor</b>	<b>93</b>
A.	Deferred Action for Childhood Arrivals	102
B.	Immigrant Visas	104
C.	Nonimmigrant Visas	107
D.	Parole	114
<b>8</b>	<b>Other Actions</b>	<b>116</b>
<b>9</b>	<b>Conclusion</b>	<b>119</b>
	<b>About the Authors</b>	<b>121</b>
	<b>Acknowledgments</b>	<b>122</b>

# 1 Introduction

Into its fourth year, the administration of President Donald J. Trump has dramatically transformed the U.S. immigration system, in bold-brush, sweeping ways but also in small technical details across the immigration portfolio. After pledging to take one of the most activist agendas on immigration in modern times, the administration has delivered on nearly everything the president promised on the campaign trail, almost exclusively via executive fiat, ignoring a Congress he had originally pledged to work with on systemic reform. Lawmakers, who remained gridlocked on immigration, sat by as the administration reshaped the system in ways unseen in decades, executing—with methodical detail—a plan to drastically narrow humanitarian benefits, increase enforcement, and decrease legal immigration.

The arrival of the COVID-19 pandemic during Trump's fourth year in office turbocharged many of these efforts. It gave the administration an opening—in the name of public health and concern for the growing economic crisis—to finish off many of the remaining items on its agenda, including suspending the issuance of visas to certain categories of immigrants and nonimmigrants, and effectively ending asylum at the southern border.

Because the Trump administration has pursued these reforms unilaterally, successor administrations could, in theory, undo each change. However, by working at a rapid-fire pace to accomplish more than 400 policy changes on immigration—as documented in this report—they may have guaranteed some longevity.

It is unlikely that a future administration will have the political will and resources to undo all of these changes at anywhere near a similar pace. Thus, regardless of whether the pendulum swings in the direction of policies that favor revived immigration, the restoration of humanitarian protections, and more targeted enforcement, the Trump presidency will have lasting effects on the U.S. immigration system long after his time in office.

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## A. What Has Changed?

Consistent with the president's strong rhetoric on enforcement, the administration has considerably reduced illegal entries at the United States' southern border and renewed efforts on interior enforcement. After advancing myriad policy options to address surging arrivals at the U.S.-Mexico border unseen in more than a decade, in 2019 the U.S. Department of Homeland Security (DHS) instituted a combination of interlocking policies that significantly limited asylum at the border, and, jointly with increased immigration enforcement in Mexico, appeared to reduce illegal entries. 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 Cooperation Agreements with Central American countries allowing the United States to send asylum seekers abroad, and a ramping up of the Migrant Protection Protocols (MPP), requiring migrants, mainly asylum seekers, to wait in Mexico for their adjudications. Together, the policy regime blocked asylum access or eligibility for the vast majority of asylum seekers. And even though southern border apprehensions

in fiscal year (FY) 2019 hit the highest annual level in 12 years—with most happening during the spring and summer months—starting in June 2019, monthly apprehensions fell sharply.<sup>1</sup> By January 2020, apprehensions had decreased for the eighth month in a row, the longest stretch of declining apprehensions since April–December 2008.<sup>2</sup>

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 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, monthly apprehensions were halved between March and April, and asylum applications plummeted, as the few who did arrive were expelled without the opportunity to seek refuge.<sup>3</sup>

The crisis at the southern border in 2018 and 2019 stymied the administration's initial push on interior enforcement, which began with a January 2017 executive order that effectively made every unauthorized immigrant a priority for arrest. 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 both decreased between FY 2018 and FY 2019, from 158,581 to 143,099 arrests and from 95,360 to 85,958 removals.<sup>4</sup> Yet the broader net cast by the administration's enforcement efforts shows through. The noncriminal share of immigrants arrested by ICE has more than doubled over the course of the Trump administration: in FY 2019, 36 percent of those arrested had no criminal record compared to 14 percent in FY 2016.<sup>5</sup>

With the freedom to refocus resources away from the southern border and back to the interior, the administration began 2020 by doing just that, assigning 100 Border Patrol agents and 500 ICE security investigations officers to ten “sanctuary” jurisdictions<sup>6</sup> across the United States to support ICE's immigration operations, and beginning 24-hour-a-day surveillance operations around the homes and workplaces of unauthorized immigrants.<sup>7</sup> However, the renewed ramp-up stalled as the pandemic hit and ICE pledged to narrow its enforcement priorities in the interest of public safety.<sup>8</sup>

1 U.S. Customs and Border Protection (CBP), “[Southwest Border Migration FY 2020](#),” updated June 12, 2020.

2 CBP, “[Southwest Border Migration FY 2020](#)”; U.S. Border Patrol, “[Total Illegal Alien Apprehensions by Month \(FY 2000 – FY 2019\)](#),” accessed July 14, 2020.

3 CBP, “[Southwest Border Migration FY 2020](#)”; Migration Policy Institute (MPI) analysis of U.S. Citizenship and Immigration Services (USCIS), “[Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions](#),” updated June 22, 2020.

4 U.S. Immigration and Customs Enforcement (ICE), *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report* (Washington, DC: ICE, 2019); ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, 2016); Randy Capps et al., *Revving Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, DC: MPI, 2018).

5 ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*; ICE, *Fiscal Year 2016 ICE Enforcement and Removal Operations Report*.

6 There is no legal definition of “sanctuary” cities or jurisdictions, but they are generally understood as jurisdictions that restrict cooperation with federal immigration authorities in some way, some more severely than others.

7 Caitlin Dickerson, Zolan Kanno-Youngs, and Annie Correal, “[Flood the Streets: ICE Targets Sanctuary Cities with Increased Surveillance](#),” *New York Times*, March 5, 2020.

8 ICE, “[ICE Guidance on COVID-19](#),” updated June 24, 2020. (“ICE Enforcement and Removal Operations (ERO) will focus enforcement on public-safety risks and individuals subject to mandatory detention based on criminal grounds. For those individuals who do not fall into those categories, ERO will exercise discretion to delay enforcement actions until after the crisis or use alternatives to detention, as appropriate.”)

The backlog of more than 1 million cases in the immigration court system has also haunted the administration's efforts, but by placing a massive amount of pressure on the court—to the point of raising concerns about due process implications—the administration has started to increase the pace of adjudications.<sup>9</sup> Between FY 2018 and FY 2019, the total number of cases adjudicated rose 42 percent, from 195,088 to 276,523, and the total number of deportation orders (including both removal orders and voluntary departures) rose by 49 percent, from 144,171 to 215,421.<sup>10</sup>

Other policy changes have reflected an approach to immigration that sets this administration decidedly apart from its predecessors, both Democratic and Republican. Trump's election brought into mainstream political discourse the previously fringe idea that legal as well as illegal immigration is a threat to the

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United States' economy and security. In office, his administration has tightened the already difficult bureaucratic maze for those wishing to enter the country temporarily or permanently. These policies and accompanying rhetoric seem to be having their intended effect: between 2017 and 2018 the number of noncitizens in the United States declined, with more than half of this drop attributable to Latin American

immigrants, due to both their decreased inflows into the United States and greater outflows from the country.<sup>11</sup> Similarly, between FY 2016 and FY 2019, applications for green cards decreased by 17 percent, to the lowest number in half a decade, and the number of foreign nationals outside of the country applying for temporary visas fell, also by 17 percent over the same period.<sup>12</sup>

Humanitarian forms of admission have been the target of some of the administration's most focused efforts to curtail immigration. Refugee admissions dropped to 22,491 in FY 2018, down from 84,994 in FY 2016, reaching the lowest level since the modern U.S. refugee resettlement program began in 1980.<sup>13</sup> For FY 2020, the administration lowered the refugee admissions ceiling (the maximum number to be admitted in a given year) even further to 18,000.<sup>14</sup> After the pandemic slowed resettlement to a trickle, it seems unlikely refugee admissions will advance past half of the year's already low ceiling; through June 30, 2020, only 7,754 refugees had been admitted this fiscal year.<sup>15</sup>

9 Executive Office for Immigration Review (EOIR), "Pending Cases," updated April 15, 2020; Sarah Pierce, "As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound" (commentary, MPI, Washington, DC, July 2019).

10 MPI analysis of data from EOIR, "New Cases and Total Completions," updated January 23, 2020; Transactional Records Access Clearinghouse (TRAC) Immigration, "Outcomes of Deportation Proceedings in Immigration Court," accessed March 5, 2020.

11 William H. Frey, "US Foreign-Born Gains Are Smallest in a Decade, Except in Trump States," Brookings Institution, The Avenue, October 2, 2019.

12 MPI analysis of data from USCIS, "Number of I-485 Applications to Register Permanent Residence or Adjust Status," multiple quarters, accessed March 10, 2020; U.S. Department of State, "Worldwide NIV Workload by Visa Category FY 2019," accessed March 10, 2020; Department of State, "Worldwide NIV Workload by Visa Category FY 2016," accessed March 10, 2020.

13 MPI analysis of data from Refugee Processing Center, "Arrival Reports," accessed February 10, 2020.

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

15 Refugee Processing Center, "Admissions and Arrivals," accessed July 25, 2020.

And while the administration's attempt to end Deferred Action for Childhood Arrivals (DACA), a program for unauthorized immigrants brought to the United States as children, was thwarted by federal courts in January 2018, the court mandate ordering USCIS to continue adjudications applied only to existing DACA participants, leaving out new applicants. MPI estimates that between September 2017—when the administration stopped accepting new applicants—and July 2020, at most 500,000 young foreign nationals were immediately eligible for DACA benefits but unable to apply, including 66,000 who became eligible during that time. 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>16</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>17</sup>

## B. *Driving Reform through Layered Changes*

The Trump administration has delivered on these 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 U.S. Citizenship and Immigration Services (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. Migration Policy Institute (MPI) analysis found that the “public-charge” regulation puts 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 that are to be weighed negatively under the regulation,<sup>18</sup> with women, the elderly, children, and nationals of Central American countries and Mexico more likely than other applicants to be affected.

But despite the concentrated power of this one regulation, it is only one among a broad set of policies that aim to discourage public benefits use and disproportionately affect lower-income immigrants. Others include:

- ▶ A separate 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).
- ▶ An in-process Justice Department regulation that will allow it to more easily deport immigrants deemed to be public charges (see Section 4).

16 *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).

17 The administration also decided to deny Deferred Action for Childhood Arrivals (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, 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.

18 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).

- ▶ A 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).
- ▶ A 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 proposed regulation by the Department of Housing and Urban Development that, if enacted, will prevent unauthorized immigrants from living in subsidized housing, even if they are in mixed-status families where other members are eligible (see Section 8).
- ▶ A proposed regulation by the Social Security Administration that, if enacted, would mean that lack of English proficiency will no longer be a factor that can help make someone eligible for Social Security disability insurance (see Section 8).

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

This multifaceted strategy and brisk pace also make 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 may have 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 promise 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. Previously, officers were encouraged to issue visas for the full available validity period, typically ten years. This means that nonimmigrants, such as students and tourists, will have visa stamps that expire more quickly and will have to apply for renewals more frequently. As such, foreign nationals will be subject more frequently to other Trump administration changes that have 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 have ever violated the terms of their nonimmigrant status.

The technical nature of many of these changes reflects the administration's knowledge of and willingness to enforce the many immigration laws and regulations in place that have rarely if ever been implemented, but that have the potential to greatly restrict immigration and increase enforcement. The administration has, for example, put into force provisions from the 1996 *Illegal Immigration Reform and Immigrant Responsibility*

Act that were never implemented. As a result, ICE has begun levying fines of up to \$799 per day for unauthorized immigrants who remain in the country in violation of a removal order. The administration has also stretched the application of laws prohibiting the harboring of unauthorized immigrants in an attempt to withhold federal grants from jurisdictions with policies that limit their cooperation with federal immigration enforcement agencies. And it has consistently argued that, out of a responsibility to enforce the law to the fullest extent, ICE should not apply prosecutorial discretion to protect certain immigrants—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 has also ventured into uncharted territory in immigration policymaking, testing the outer bounds of what the executive 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 (also known as "Remain in Mexico"), using 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.

Not hesitating to employ the full breadth of the executive's powers to further their immigration agenda, the administration has taken advantage of a wide range of foreign policy tools. It has banned travel from certain countries to push them to make changes to their internal security and identity-management measures, and it has 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 also convinced Mexico to increase its own enforcement of immigration laws and participate in MPP. Over the course of 2019, DHS also got three of the top five origin countries for those seeking asylum seekers 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 has pushed ahead with its immigration agenda, resistance seems in some ways to be losing 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 has effectively ended asylum at the southern border, public pushback has been more limited. Still, some civil-society groups have 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 have also protested their employers' contracts with federal immigration agencies, though few of these efforts have succeeded in changing the companies' decisions.<sup>19</sup>

<sup>19</sup> 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 has thwarted some of Trump’s legislative goals, his administration has often found ways around these obstacles. After Congress repeatedly refused the president’s outsized spending asks, the administration dredged up 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) twice passing legislation to block the president’s emergency declaration for wall funding, which the president vetoed both times; (2) restricting ICE from using information on sponsors of unaccompanied children for immigration enforcement; and (3) reversing a USCIS policy that made it more difficult for about two dozen children born to U.S. military members serving abroad to receive citizenship. On the hundreds of other policy changes documented in this report, Congress has been effectively silent.

Some states and localities continue to resist the administration’s immigration agenda, and 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). The administration has worked to undermine such efforts to help unauthorized immigrants feel safe by increasing at-large operations in sanctuary communities—arresting immigrants outside of the criminal justice system, including at home, at work, or out in the community. Still, the lack of cooperation with some major state and local governments will likely continue to disrupt the administration’s interior enforcement efforts, which to date have been unable to reach prior arrest and removal levels without the help of local law enforcement agencies.

## *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 hundreds of immigration-related policy changes the Trump administration has made since taking office in January 2017, including during the onset of the COVID-19 pandemic and the start of the president’s re-election campaign.

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; refugees, asylum seekers, and other humanitarian admissions; and changes to vetting and visa processes, which involve the State Department, USCIS, and the Department of Labor.

## **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. The first action was a January 2020 ban on people who are not U.S. citizens or legal permanent residents traveling from China, where the coronavirus outbreak originated. From there, the immigration-related responses grew rapidly. While many have been necessary

and proportionate to this crisis, others have introduced dramatic changes that may do more to advance the administration's longstanding immigration goals than to halt the spread of the virus.

The pandemic response has touched each part of the U.S. immigration system and includes some of the administration's boldest actions on immigration to date: 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 it to expel asylum seekers without first hearing their claims. The White House has also negotiated agreements with Mexico and Canada that limit travel

*The pandemic response has touched each part of the U.S. immigration system.*

across shared borders to essential traffic and threatened visa sanctions if countries fail to accept their nationals when they are deported from the United States, despite evidence that many of these deportees test positive for the virus and, thus, their movement may be furthering its spread.<sup>20</sup>

Three particular actions have allowed the administration to accomplish goals it has been working toward. After two years of the administration making it more difficult to apply for asylum and narrowing the eligibility criteria for the few who are 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 come from family-based categories.<sup>21</sup> It also effectively ends the Diversity Visa Lottery, another program the administration had pushed Congress to quash. And the June proclamation suspending some temporary work programs includes visas—such as the H-1B—that the administration has spent years scrutinizing, as illustrated by the fact that denials of H-1Bs have more than doubled under the Trump administration.<sup>22</sup>

Thus, rather than diverting the administration's focus to the dire public-health and economic crises affecting communities across the country, the pandemic has supercharged the president's immigration agenda. It has presented opportunities, in the name of the pandemic, to unilaterally accomplish policy goals few predicted possible.

While the Trump administration's efforts to restrict travel and immigration during the pandemic have been quick and aggressive, its management of response policies affecting immigrants and their communities inside the United States has been uneven at best. ICE continued its routine enforcement operations until March 18—weeks after the virus was first detected in the United States—when it shifted away from randomized enforcement and instead began to focus on individuals who pose a public safety risk and those with serious criminal records. Despite extending these priorities to its policies on detention as well, the agency has been slow to reduce its detained population, which as of late June 2020 stood at

20 See, for example, Juan Montes, "U.S. Fails to Prevent Deportation of Migrants Infected with Covid-19, Guatemalan Officials Say," *Wall Street Journal*, June 24, 2020.

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 The percent of H-1B petitions denied has increased from 7 percent at the end of fiscal year (FY) 2017 to 15 percent at the end of FY 2019. See USCIS, "Nonimmigrant Worker Petitions by Case Status and Request for Evidence (RFE)" (data table, USCIS, Washington, DC, March 31, 2020).

more than 23,000 people, 50 percent of whom had never been convicted of a crime.<sup>23</sup> And in spite of the agency's stated efforts to detect and slow the spread of the virus in detention facilities, as of June 25, 2020, approximately 2,600 ICE detainees had tested positive in 66 facilities across 16 states and the District of Columbia.<sup>24</sup>

U.S. immigration courts have also continued their operations during the pandemic. Despite repeated calls from immigration judges, attorneys, and even ICE prosecutors to completely shut down the courts, the Executive Office for Immigration Review (EOIR) refrained from doing so, and instead on March 18 limited hearings to foreign nationals currently held in detention.

While the enforcement arms of the U.S. immigration system have pressed forward through the pandemic, USCIS temporarily suspended in-person services and left legal immigrants in the United States with limited options. As travel shut down worldwide, many countries suspended all incoming international flights, with some even excluding their own nationals. USCIS declined to automatically extend the authorized periods of stay for temporary visitors, instead issuing a vague assurance that adjudicators would be understanding if those who qualified for extensions filed late. This left temporary immigrants in the United States in an uncomfortable predicament as they watched the remaining time on their visas pass, threatening to strand them in unlawful status.

## 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. This decision not only protects consulate and embassy staff and visitors from contracting COVID-19, but it has also discouraged travel and movement, important to preventing the virus's spread.

The State Department is also responsible for enforcing the president's coronavirus-related travel and immigration restrictions, but the immediate effect of these bans has been overshadowed by the agency's closure. Since the start of the pandemic, the president has banned 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 bans on travel from 31 countries were based on concerns about the transmission of the virus. By contrast, the president justified the ban on certain types of permanent and temporary immigration by citing concerns about the economic fallout from the pandemic, likely guaranteeing that the policies will remain in place long past the immediate public-health crisis and the State Department's suspension of services. While MPI estimated the president is blocking 26,000 permanent immigrants per month in the banned categories,<sup>25</sup> U.S. law allows for unused green-card numbers from these categories to be allotted to other intending immigrants who are not subject to the ban, or for some of these green cards to be rolled over

<sup>23</sup> ICE, "[Detention Management](#)," accessed June 28, 2020.

<sup>24</sup> ICE, "ICE Guidance on COVID-19."

<sup>25</sup> Muzaffar Chishti and Sarah Pierce, "[The U.S. Stands Alone in Explicitly Basing Coronavirus-Linked Immigration Restrictions on Economic Grounds](#)," *Migration Information Source*, May 29, 2020.

for distribution the next year. Thus, overall green-card issuance may not drop significantly. However, the June 22 ban on nonimmigrants—which MPI has estimated could block 167,000 nonimmigrants in the July–December 2020 period covered by the ban—may have a more significant impact, straining businesses that depend on such workers.<sup>26</sup> As written and executed thus far, the nonimmigrant ban has also stranded some nonimmigrant employees and their family members abroad, after they traveled and were unable to receive visa renewals to return.

- ▶ **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 days preceding their intended entry to the United States.<sup>27</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>28</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>29</sup> The State Department exempted people with student visas from this ban on July 16, 2020.<sup>30</sup>
- ▶ **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>31</sup>
  - *May 12, 2020*—The Bureau of Educational and Cultural Affairs suspended all remaining international exchange programs.<sup>32</sup>

26 Post by MPI on Twitter, June 22, 2020.

27 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.

28 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.

29 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.

30 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.

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

32 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).

- ▶ **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>
- ▶ **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>35</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>36</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>37</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>38</sup>
  - **Phased Reopening**—*July 13, 2020*—The State Department announced a phased resumption of routine visa services.<sup>39</sup>
- ▶ **Suspension of Refugee Resettlement**—*March 19, 2020*—The State Department paused refugee arrivals.<sup>40</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>41</sup>

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

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

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

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

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

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

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

- ▶ **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 lottery winners; and nearly all types of employment-based immigrants.<sup>42</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.<sup>43</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 coronavirus transmission, citing the “national interest exemption.”<sup>44</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 preceding their intended entry to the United States.<sup>45</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>46</sup>
- ▶ **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>47</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 is 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>48</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>49</sup>

42 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.

43 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.

44 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).

45 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.

46 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.

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

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

49 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.

- ▶ **Exclusion of Students in Online-Only Programs—ongoing**—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>50</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>51</sup> (For more information, see Section 2.C.)

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

The pandemic has not swayed the Trump administration's steady focus on 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 to issue an order barring the entry of asylum seekers and other unauthorized arrivals at the United States' northern and southern land borders. As of the end of June, 69,210 foreign nationals had been expelled under this order.<sup>52</sup> Under the order, Border Patrol officers are not screening new arrivals for fears of persecution prior to repatriating them to their origin country or Mexico. As a result, claims of asylum at the southern border have plummeted, with just 622 initial asylum screenings in June 2020, compared to 10,847 in June 2019.<sup>53</sup>

The order—and the pandemic itself—has likely accelerated an existing downward trend in apprehensions at the southern border, as well as a change in the demographics of those apprehended. After reaching significant highs in 2019, peaking at nearly 133,000 monthly apprehensions in May 2019, this figure dropped for eight consecutive months before leveling off from January through March 2020, at an average of 30,000 apprehensions per month.<sup>54</sup> Over the same period of time, there was a far more significant drop in the number of arriving families and unaccompanied children (declines of 75 percent and 96 percent from May 2019 to March 2020, respectively) than in the number of single adults (35 percent) as the Trump administration systematically shut off the asylum system at the border.<sup>55</sup> (For a discussion of the administration's other asylum policies, see Section 5.B.)

After the CDC's order came down on March 20, apprehensions dropped further to 16,000 in April but rebounded in the months following, reaching 30,300 in June.<sup>56</sup> Apprehensions of single adults, the vast majority of them Mexicans, account for 88 percent of the increase between April and June.<sup>57</sup> In addition to the deterrent provided by the shut-off of the asylum system at the border and the CDC order, families and unaccompanied children may also be dissuaded by the increased dangers of the journey, as pandemic-

50 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.

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

52 CBP, "Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions," updated July 9, 2020.

53 MPI analysis of data from USCIS, "Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions."

54 CBP, "Southwest Border Migration FY 2020"; CBP, "Southwest Border Migration FY 2019," updated November 14, 2019.

55 CBP, "Southwest Border Migration FY 2020"; CBP, "Southwest Border Migration FY 2019."

56 CBP, "Southwest Border Migration FY 2020"; CBP, "Southwest Border Migration FY 2019."

57 MPI analysis of data from CBP, "U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020," updated July 9, 2020. It is important to note that apprehension data count events, not individuals. For example, if someone was turned back at the border under the CDC order and was apprehended trying to cross again a week later, they would be counted twice in that month's apprehension data.

related mobility restrictions throughout the region have likely made it even more necessary for migrants to take clandestine routes.

In addition to limiting mobility at the southwest land border, DHS has implemented pandemic-related policies that apply to people entering and exiting the country elsewhere.

- ▶ **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>58</sup> Three additional airports were added on February 3. (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, U.S. Customs and Border Protection (CBP) announced that foreign nationals participating in the program who attempt to travel to the United States in violation of the ban will have their visa-free travel authorization cancelled.<sup>59</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>60</sup> Travel deemed essential—and thus exempt from the restrictions—includes 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 later extended several times, through at least August 21.<sup>61</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

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

59 CBP, “Official ESTA Application,” accessed June 29, 2020. (“Any traveler with a valid ESTA who is subject to the proclamation and who attempts to travel the United States in violation of the proclamation will have their ESTA canceled.”)

60 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.

61 CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada,” *Federal Register* 85, no. 78 (April 22, 2020): 22352–53; 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. 78 (April 22, 2020): 22353–54; CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada,” *Federal Register* 85, no. 100 (May 22, 2020): 31059–60; 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. 100 (May 22, 2020): 31057–58; 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. 122 (June 24, 2020): 37745–46; CBP, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada,” *Federal Register* 85, no. 122 (June 24, 2020): 37744–45; CBP, “Notification of Temporary Travel Restrictions Applicable To Land Ports of Entry and Ferries Service between the United States and Canada,” *Federal Register* 85, no. 141 (July 22, 2020): 44185–86; 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. 141 (July 22, 2020): 44183–84.

from designated countries or places in the interest of public health.<sup>62</sup> The same day, the CDC director issued an order requiring the expulsion of unauthorized arrivals at the Mexican or Canadian 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>63</sup> The order was originally effective for 30 days but was extended indefinitely on May 21, 2020.<sup>64</sup>

- **Expulsion of Arriving Unaccompanied Migrants—April 2020**—Media reports and government data have made clear that unaccompanied child migrants are being turned away at the border under the CDC’s order, despite federal law requiring the United States to accept such children.<sup>65</sup> For example, even though CBP encountered 725 unaccompanied child migrants during April 2020, the number of children referred to the Office of Refugee Resettlement (ORR, the agency the government is legally obligated to refer these children to) was far lower, averaging two children per day.<sup>66</sup> Between March and June 2, 2020, 2,175 unaccompanied children were either expelled or set to be expelled to their home countries under the order.<sup>67</sup> There has yet to be an official government statement on which children are being turned away and under what procedures.
- ▶ **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>68</sup> Enrollment centers are closed through at least September 8.<sup>69</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>70</sup> These troops have helped CBP enforce the March 20 CDC order, bolstering their ranks as border agents grapple 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

62 Centers for Disease Control and Prevention (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.

63 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.

64 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.

65 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.

66 CBP, “Southwest Border Migration FY 2020”; HHS, “Latest UAC Data - FY2020,” updated June 25, 2020.

67 Lauren Villagran, “Despite Coronavirus, Children Are Still Arriving at the Border. They’re Being Turned Away,” *El Paso Times*, June 10, 2020.

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

69 CBP, “CBP Extends Closure of Trusted Traveler Programs Enrollment Centers to September 8” (news release, July 20, 2020).

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

the United States (called “satisfactory departure”) may apply for an additional 30-day stay if they are unable to depart because of the pandemic.<sup>71</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>72</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.)

## C. *Interior Enforcement*

While ICE has slightly adjusted and limited immigration enforcement in the interior of the country during the pandemic, it continues to detain tens of thousands of immigrants across the country. In congregate settings, such as prisons and ICE detention centers, social distancing is extremely difficult, and thus, these environments may facilitate the spread of the virus. ICE did not make any moves to release immigrants from detention until a series of lawsuits were filed in March 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 25,000 in June.<sup>73</sup> Among those released were about 500 people freed due to judicial orders.<sup>74</sup>

Those still in detention face considerable risks. DHS’s Office of Inspector General found in a June 2020 report that “DHS will face formidable challenges in identifying and managing individuals who have been exposed to or contracted COVID-19.”<sup>75</sup> Indeed, by the end of June 2020, 2,675 immigration detainees had tested positive for COVID-19, out of a total of 10,513 tested, and the tested population accounted for less than half of the 23,429 noncitizens detained as of June 24.<sup>76</sup>

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

- ▶ **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>77</sup> On July 6, SEVP notified participating schools that it would reduce this flexibility for fall semester 2020 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

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

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

73 ICE, “Detention Management—Detention Statistics,” updated June 24, 2020.

74 ICE, “ICE Guidance on COVID-19—ICE Detainee Statistics,” updated July 8, 2020.

75 Pandemic Response Accountability Committee, *Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts* (Washington, DC: Offices of Inspector General, 2020), 64.

76 ICE, “ICE Guidance on COVID-19—ICE Detainee Statistics.”

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

in the United States.<sup>78</sup> In response to a lawsuit filed by Harvard and the Massachusetts Institute of Technology (MIT) challenging the policy, DHS on July 14 agreed to rescind it, reverting to the policy issued in March.<sup>79</sup> However, the March 9 guidance provides flexibility only for currently enrolled students, meaning that despite the reversion, new students may not enter the United States in Fall 2020 if they have an online course-load of more than one class or three credits.<sup>80</sup>

- ▶ **Social Visits Suspended in Detention Centers**—*March 13, 2020*—ICE stated that it was suspending social visitation at all detention facilities.<sup>81</sup> Legal visitation has 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>82</sup> Specific procedures have varied by field office. The Boston field office, for example, shifted to conduct check-ins by phone.<sup>83</sup>
- ▶ **Limits on ICE Enforcement Operations**—*March 18, 2020*—ICE shifted to focus enforcement actions on people it considers public-safety risks or who have criminal histories,<sup>84</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.
- ▶ **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>85</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 released.<sup>86</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, individuals over 60 years old, and those who are immunocompromised.
- ▶ **Suspension of Physical Presence Requirement for New Hires**—*March 20, May 14, June 16, and July 18, 2020*—If employers are not able to inspect a new hire's identity and employment authorization documents in person due to COVID-19 restrictions on physical proximity, they may do so remotely,

78 Message to all SEVIS Users, "COVID-19 and Fall 2020," July 6, 2020.

79 *President and Fellows of Harvard College and Massachusetts Institute of Technology v. U.S. Department of Homeland Security*, No. 1:20-cv-11283 (Electronic Clerk's Notes for Proceedings, July 14, 2020).

80 Message to all SEVIS users, "Follow-Up: ICE Continues March Guidance for Fall School Term."

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

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

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

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

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

86 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.

such as over video conferencing or email.<sup>87</sup> Once normal operations resume, they will be required to inspect the documents in person. These exceptions have been renewed three times and are set to expire August 19, 2020.

- ▶ **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>88</sup>
  - *April 6, 2020*—Guatemala’s foreign ministry said that deportation flights from the United States would be suspended for one week.<sup>89</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>90</sup> Flights resumed in early May, when the United States promised to test all Guatemalans for the virus before they were returned.<sup>91</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>92</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>93</sup>
- ▶ **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>94</sup>
  - Annual Contractor Inspections Suspended—Inspections of ICE detention facilities scheduled to be conducted by an outside contractor between March 27 and April 27 were suspended.
  - Enhanced Screening of Detention Facility Staff—ICE directed enhanced health screenings of staff in areas with “sustained community transmission.”<sup>95</sup> These screenings include verbal self-reporting of symptoms and temperature checks.
  - Social Distancing—Facility administrators and wardens are instructed to implement social distancing as much as practicable, for example by staggering meals and recreation times.

87 ICE, “DHS Announces Flexibility in Requirements Related to Form I-9 Compliance” (news release, March 20, 2020); ICE, “ICE Announces Extension of Flexibility in Rules Related to Form I-9 Compliance” (news release, May 14, 2020); ICE, “ICE Announces Another 30-Day Extension of Flexibility in Rules Related to Form I-9 Compliance” (news release, June 16, 2020); ICE, “ICE Announces Another Extension to I-9 Compliance Flexibility, No More Extensions for Employers to Respond to NOIs Served in March” (news release, July 18, 2020).

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

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

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

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

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

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

94 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.

95 Lucero, *Memorandum on Coronavirus Disease 2019*.

- ▶ **Penalties for Recalcitrant Countries**—*April 10, 2020*—Trump issued a memorandum directing the State Department to issue visa sanctions on countries that are not accepting deportations of their nationals, saying that delays in executing deportations risk the health of Americans.<sup>96</sup> (For more on policies aimed at recalcitrant countries, see Sections 3.B and 6.)
- ▶ **Treatment of New Detainees**—*April 10, 2020*—ICE guidance instructs detention facility staff to screen new arrivals by asking verbally about their symptoms and checking their temperature.<sup>97</sup> New detainees with COVID-19 symptoms must wear face masks, be isolated, and be referred to medical personnel. The guidance also instructs detention facility staff to make a “considerable effort” to quarantine new detainees for 14 days before introducing them into the general population.
- ▶ **Treatment of Individuals Suspected or Confirmed to Have COVID-19 in Detention**—*April 10, 2020*—ICE guidance instructs detention facility staff to isolate people suspected or confirmed to have COVID-19.<sup>98</sup> If it is not possible to isolate all such detainees individually, groups of individuals with suspected cases may be held together, as may be groups of individuals with confirmed cases.
- ▶ **Medical Screening of Deportees**—*April 17, 2020*—Any individual who has a temperature of 99°F or above prior to boarding a deportation flight will be referred for further evaluation.<sup>99</sup> Beginning March 15, the temperature threshold at which immigrants being removed would be referred for further evaluation was changed to above 100.4°F.<sup>100</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>101</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>102</sup> ICE also began offering tests to new admissions at its three family detention centers in June.<sup>103</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>104</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,

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

97 ICE ERO, “COVID-19 Pandemic Response Requirements” (guidance document, ICE, Washington, DC, April 10, 2020), 12, 14.

98 ICE ERO, “COVID-19 Pandemic Response Requirements,” 14.

99 ICE, “ICE Guidance on COVID-19.”

100 ICE, “ICE Guidance on COVID-19.”

101 ICE, “ICE Guidance on COVID-19.”

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

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

104 ICE, “ICE Expands Voluntary COVID-19 Testing.”

immigration court hearings continued long past the first detection of COVID-19 in the United States. On March 15, the National Association of Immigration Judges, the American Immigration 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>105</sup> Two days later, EOIR agreed to postpone all hearings for nondetained immigrants, effective March 18. Hearings for detainees continued without pause.

- ▶ **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>106</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>107</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>108</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>109</sup> After the initial suspension of hearings, 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>110</sup> Because DHS has 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>111</sup> (For further discussion of the MPP program, see Section 3.A.)
- ▶ **Filing by Email—March 31–June 2020**—Both EOIR and the Board of Immigration Appeals (BIA) established guidelines to allow foreign nationals to submit court filings by email.<sup>112</sup> As individual courts began to resume hearings for nondetained migrants in June 2020, the Justice Department announced that each court’s account for emailed filings would be shut down.
- ▶ **Permitting Copies—April 3, 2020**—EOIR made a permanent change to its policies, accepting digital or electronic signatures and copies of original documents.<sup>113</sup>

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

106 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.

107 Memorandum from James McHenry, Director of EOIR, to all of EOIR, *EOIR Practices Related to the COVID-19 Outbreak*, June 11, 2020.

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

109 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).

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

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

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

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

## E. Immigration Benefits

USCIS, which is tasked with immigration benefits adjudication, 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 has 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 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. USCIS is a fee-based agency, meaning nearly all of its funding comes from the application fees noncitizens pay for the services it administers. On May 15, USCIS notified Congress that it lacked sufficient funding to maintain operations through the end of the fiscal year and requested an emergency appropriation of \$1.2 billion, which it would repay by adding a 10-percent surcharge to immigration benefits applications.<sup>114</sup> Without this funding, by August 31, USCIS will need to furlough more than 13,000 personnel, more than half of its staff.<sup>115</sup>

*The agency's budget woes, which have roots in pre-pandemic immigration trends and Trump administration policies, have been exacerbated by the COVID-19-related halt in operations.*

A deeper look shows that USCIS was suffering budget problems long before the pandemic.<sup>116</sup> In November 2019, USCIS was already predicting a \$1.26 billion budget shortfall for FY 2020, stemming at least in part from decreasing immigration petitions, which fell by more than 900,000 between the end of FY 2017 and FY 2019.<sup>117</sup> At the same time, USCIS has more than doubled spending on operations that aim to detect immigration-benefit fraud (from \$177 million

in FY 2016 to \$379 million in FY 2020) and, during the same period, nearly tripled spending on vetting applications (from \$53 million to \$149 million).<sup>118</sup> Thus, the agency's budget woes, which have roots in pre-pandemic immigration trends and Trump administration policies, have been exacerbated by the COVID-19-related halt in operations.

- **Temporary Closure of Offices in China**—February 5, 2020—USCIS temporarily closed its international field offices in Beijing and Guangzhou, China.<sup>119</sup>

114 USCIS, "Deputy Director for Policy Statement on USCIS' Fiscal Outlook" (news release, updated June 25, 2020).

115 USCIS had originally planned for the furloughs to start on August 3, but after pressure from Democratic senators, this was delayed until August 30. See Senator Patrick Leahy, "Leahy Announces That USCIS Is Postponing Furloughs Of 13,000 Public Servants, Including 1,109 In Vermont" (news release, July 24, 2020).

116 Sarah Pierce and Doris Meissner, "USCIS Budget Implosion Owes to Far More than the Pandemic" (commentary, MPI, June 2020).

117 USCIS, "U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements," *Federal Register* 84, no. 220 (November 14, 2019): 62280–71; Pierce and Meissner, "USCIS Budget Implosion."

118 Pierce and Meissner, "USCIS Budget Implosion."

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

- ▶ **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>120</sup> (For a more thorough discussion of the administration’s expansion of public-charge policies, see Section 7.)
- ▶ **Temporary Closure of USCIS Offices in the United States**—*March 17–June 4, 2020*—After initially advising individuals potentially exposed to coronavirus to cancel or reschedule interviews and services, USCIS closed its offices to the public, ending naturalization ceremonies, interviews, and biometric services.<sup>121</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. USCIS extended the closure twice, before beginning to reopen some domestic offices on June 4.<sup>122</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>123</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>124</sup>
- ▶ **Suspension of Premium Processing**—*March 20–June, 2020*—Due to the pandemic, USCIS announced the suspension of expedited, “premium processing” for all qualifying nonimmigrant and immigrant petitions.<sup>125</sup> On May 29, USCIS announced it would resume premium processing for all affected petitions in June.<sup>126</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>127</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.)

120 USCIS, “Public Charge,” updated March 27, 2020.

121 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).

122 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).

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

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

125 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).

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

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

- ▶ **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>128</sup> USCIS announced two additional 60-day extensions, covering responses due between March 1 and September 11, 2020.<sup>129</sup>
- ▶ **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>130</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 planned increase of the H-2B cap by 35,000 additional visas.<sup>131</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>132</sup>
- ▶ **Maximizing the Use of Already Present Agricultural Workers**—*April 20–August 18, 2020*—USCIS published a temporary final rule that aims 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>133</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>134</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–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>135</sup>

128 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).

129 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).

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

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

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

133 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.

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

135 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>136</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 has 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. However, in the face of the coronavirus pandemic, ICE in mid-March announced that enforcement would generally be limited to individuals presenting risks to public safety and those with criminal convictions.<sup>137</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 has 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 is 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.<sup>138</sup> The administration also pointed to declining apprehensions of migrants crossing the border illegally to claim that Trump assuming office, in and of itself, was deterring prospective unauthorized migrants.<sup>139</sup>

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

But enforcement successes, particularly at the border, began to fade in the latter part of 2018. The systematic separation of migrant families at the U.S.-Mexico border in May and June 2018, facilitated by the administration's "zero-tolerance" policy, was a humanitarian, public opinion, and immigration enforcement disaster. When the administration stopped these separations, in response to public outcry and a court order, it fueled migrant smugglers' message that potential migrants had to leave immediately, before more

<sup>136</sup> Miriam Jordan, "Trump Administration Faces Bipartisan Calls to End Citizenship Delays," *New York Times*, June 17, 2020.

<sup>137</sup> ICE, "ICE Guidance on COVID-19."

<sup>138</sup> ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report* (Washington, DC: ICE, 2017).

<sup>139</sup> See, for example, DHS, "Statement by Secretary of Homeland Security John Kelly on Southwest Border Security" (press release, March 8, 2017).

restrictive measures came down.<sup>140</sup> At the same time, the increase in Central Americans traveling in caravans to reach the U.S.-Mexico border—a form of travel that was often safer and cheaper than hiring smugglers—forced smugglers to develop more attractive offers, sometimes chartering buses to shuttle migrants to the border.<sup>141</sup> These factors, combined with poverty, crop failures, violence, and corruption in migrants' home countries, drove apprehensions by U.S. authorities along the border up to levels not seen in years.<sup>142</sup> In May 2019, the peak of the surge, U.S. authorities made 133,000 apprehensions—mostly of migrants traveling as families—as migrants attempted to cross the U.S.-Mexico border illegally, the highest monthly number since March 2006.<sup>143</sup>

In response, the U.S. government implemented a slew of measures to quickly remove potential asylum seekers from U.S. soil and thus deter future arrivals by closing off the possibility of staying in the United States for the duration of asylum proceedings—and, for many, of being eligible for asylum at all.<sup>144</sup> This strategy has worked, in that the number of migrants apprehended crossing the southwest border each month decreased by more than 100,000, from 133,000 in May 2019 to 30,000 in March 2020.<sup>145</sup> In April 2020, apprehensions reached 16,000, as additional restrictive asylum measures and the global halt to mobility due to the coronavirus combined to depress flows even further.<sup>146</sup> (For more on pandemic-related policies at the border, see Section 2.B.)

During the period when border apprehensions were highest, from late 2018 to late 2019, DHS resources that otherwise may have been used to bolster enforcement in the U.S. interior—most prominently, ICE detention space—were diverted to border enforcement. In FY 2019, 73 percent of migrants booked in to ICE detention had been arrested by CBP (indicating they were likely arrested after crossing the border illegally), compared to 57 percent in FY 2017.<sup>147</sup> By early July 2020—slightly more than nine months into FY 2020—that share had dropped to 49 percent,<sup>148</sup> meaning more detention space was available for people arrested as a result of interior enforcement actions.

Regardless of whether the Trump administration is focusing on border or interior enforcement—or both—at a given time, its actions, and the pushback against those actions, are reshaping the face of immigration enforcement in the United States.

140 Randy Capps et al., *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement* (Washington, DC: MPI, 2019).

141 Nick Miroff, "'The Conveyor Belt': U.S. Officials Say Massive Smuggling Effort Is Speeding Immigrants to—and Across—the Southern Border," *Washington Post*, March 15, 2019.

142 For more on the factors that led to the surge in southwest border migration in 2018 and 2019, see Capps et al., *From Control to Crisis*.

143 U.S. Border Patrol, "Total Illegal Alien Apprehensions by Fiscal Year (Oct. 1st through Sept. 30th)," updated January 2020.

144 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.

145 CBP, "Southwest Border Migration FY 2020"; CBP, "Southwest Border Migration FY 2019."

146 CBP, "Southwest Border Migration FY 2020."

147 ICE, *U.S. Immigration and Customs Enforcement Fiscal Year 2019 Enforcement and Removal Operations Report*.

148 ICE, "Detention Management—Detention Statistics."

## A. *Border Security*

While Trump has tended to focus on the construction of a wall along the U.S.-Mexico border as the centerpiece of his border security policy, his administration has been 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 have 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.

As the pandemic set in, DHS further shut down U.S. land borders in March 2020, barring nonessential travel through land ports, effectively ending cross-border tourism, but also preventing asylum seekers who were waiting in Mexico under the United States' "metering" policy from being admitted to ports of entry to register their claims.<sup>149</sup> The CDC also ordered the immediate expulsion of any migrant crossing the border illegally, until the CDC director determines they can be processed in the United States without endangering public health.<sup>150</sup>

The Trump administration's willingness to take an increasingly muscular posture in its dealings with the United States' regional partners has 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 its president from signing a so-called Asylum Cooperation Agreement (ACA) with the United States, Guatemala signed on to the agreement within days.

As a result of these policies, not only the number but also the demographic profile of migrants arriving at the U.S. southwest border has shifted. In May 2019, before most of these policies were implemented, people traveling as families made up almost two-thirds of U.S. apprehensions at the border, whereas in June 2020, adults traveling without children made up 90 percent.<sup>151</sup> Similarly, migrants from El Salvador, Guatemala, and Honduras accounted for 78 percent of apprehensions in May 2019, compared to 12 percent in June 2020.<sup>152</sup>

149 CBP, "Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Mexico" (March 24, 2020); CBP, "[Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada](#)," *Federal Register* 85, no. 57 (March 24, 2020): 16548–49; Stephanie Leutert, Savitri Arvey, Ellie Ezzell, and Marianne Richardson, *Metering & COVID-19* (Austin, TX: The University of Texas at Austin, Strauss Center for International Security and Law, 2020).

150 CDC and HHS, "Notice of Order under Sections 362 and 365 of the Public Health Service Act."

151 MPI analysis of data from CBP, "[U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019](#)," updated November 14, 2019; CBP, "[U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020](#)."

152 MPI analysis of data from CBP, "[U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019](#)"; CBP, "[U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020](#)."

At the same time, the administration has continued to push forward on border wall construction. As of July 2020, it had obtained a total of \$15 billion for this purpose, only 30 percent of which was appropriated by Congress, with the rest coming from repurposed funds from Defense Department accounts.<sup>153</sup> By July 2020, 229 miles of new and replacement barriers had been built along the nearly 2,000-mile border, with the goal of reaching 450 by the end of the year.<sup>154</sup>

This section lays out the border security policies the administration has implemented in three areas: pushing the southwest border out geographically, developing new or scaled up consequences for migrants apprehended at the border, and building up physical barriers and increasing personnel at the border.

## Pushing U.S. Borders Out/Regional Cooperation

The Trump administration has pursued agreements with Central American countries and Mexico to bolster their own immigration enforcement capacities and to play a role in U.S. immigration enforcement. This has slowed the flow of migrants to the U.S. border and allowed the Trump administration to develop consequences for migrants apprehended for crossing the border illegally that serve as alternatives to ICE detention or release into the United States.

- **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>155</sup> Implementation of MPP began at the San Ysidro port of entry on January 28, 2019, and has been expanded to six other ports of entry and border sectors.<sup>156</sup> As of the end of May 2020, about 65,000 people had been placed in MPP since the program began.<sup>157</sup> Court challenges have thus far been unsuccessful in blocking MPP, with the Supreme Court allowing the program to continue while legal proceedings are ongoing.<sup>158</sup>

153 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; William L. Painter and Audrey Singer, *DHS Border Barrier Funding* (Washington, DC: Congressional Research Service, 2020), 11–12; Brakkton Booker, “Trump Administration Diverts \$3.8 Billion in Pentagon Funding to Border Wall,” NPR, February 13, 2020.

154 CBP, “Border Wall System,” updated July 6, 2020.

155 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 can 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).

156 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. As of January 2020, MPP had been 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 are reportedly being transferred to Calexico and placed in MPP there. Big Bend sector is thus the only one where MPP is not in effect. 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.

157 TRAC Immigration, “Details on MPP (Remain in Mexico) Deportation Proceedings,” accessed July 7, 2020.

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

- **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>159</sup> Judges hear these cases via videoconference. Initially, members of the public were barred from the tent courts, though they could observe some hearings from the judge's location.<sup>160</sup> The courts were opened to the public in December 2019.
- **Paperwork Issues**—*ongoing*—CBP officers often do not list physical addresses on migrants' notices to appear (the charging documents that provide hearing information to migrants and contact information to DHS and the Justice Department) when migrants are sent to Mexico under MPP, making it difficult for the U.S. government to communicate changes to a scheduled hearing.<sup>161</sup> Some migrants who have completed their immigration cases have been 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>162</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>163</sup> After negotiating ACAs with the three countries, the administration announced in October 2019 that it would restore the suspended aid.<sup>164</sup> The restored aid is targeted at reducing migration, implementing the ACAs, supporting U.S. security interests, and creating economic opportunities.<sup>165</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>166</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 migrants back under MPP.<sup>167</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>168</sup> If the United States concludes that Mexico's

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

160 Michelle Hackman, "U.S. Opens Immigration 'Tent Courts' to Public," *Wall Street Journal*, December 29, 2019.

161 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.

162 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.

163 Peter J. Meyer, *U.S. Strategy for Engagement in Central America: An Overview* (Washington, DC: Congressional Research Service, 2020); Lesley Wroughton and Patricia Zengerle, "As Promised, Trump Slashes Aid to Central America over Migrants," *Reuters*, June 17, 2019.

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

165 U.S. Department of State, "United States Continues U.S. Foreign Assistance for El Salvador, Guatemala, and Honduras" (press release, April 13, 2020).

166 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.

167 U.S. Department of State, "U.S.-Mexico Joint Declaration" (press release, June 7, 2019).

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

efforts are not sufficiently reducing illegal immigration, the countries have agreed to put in place “a binding bilateral agreement to further address burden-sharing” of asylum claims.<sup>169</sup>

- ▶ **Asylum Cooperation 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.)
- ▶ **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, through this joint program between the U.S. and Mexican governments.<sup>170</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>171</sup> By February 14, 2020, more than 1,000 migrants had been repatriated through this program.<sup>172</sup>
  - **Expansion to San Diego Sector**—*May 19, 2020*—Previously implemented in the Tucson Sector, the Interior Repatriation Initiative expanded to San Diego.<sup>173</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.
- ▶ **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 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>174</sup> USAID will use these data to target development aid that aims to prevent irregular migration.

## Treatment of Migrants upon Apprehension

The U.S. government’s ability to apply what in U.S. Border Patrol parlance are termed “consequences” to the migrants it apprehends or determines to be inadmissible at the U.S.-Mexico border has fluctuated. This subsection covers the consequences or lack of consequences that migrants have faced at the southwest border since President Trump took office, as well as other policy decisions governing how apprehended migrants should be treated.

- ▶ **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>175</sup> After the president’s June 20, 2018, executive order ending family separations, this

169 Rachel Withers, “Mexico Releases the Full Text of Trump’s Immigration ‘Deal,’” Vox, June 15, 2019.

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

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

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

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

174 CBP, “CBP Signs Memorandum of Understanding with USAID” (press release, March 13, 2020).

175 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).

policy was no longer applied to parents traveling with children.<sup>176</sup> However, it continues to be applied to some adults who cross on their own.

- ▶ **Family Separations—May 7–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>177</sup> Previously, family separations occurred on a smaller scale, from July through November 2017, as part of a pilot project in El Paso.<sup>178</sup> It is unclear how 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>179</sup> DHS separately estimated that it separated 3,014 children from their families while the practice was in effect.<sup>180</sup> As of May 2020, the government had identified at least 1,134 additional children who were separated and released from HHS custody between July 2017 and June 2018,<sup>181</sup> meaning an estimated total of between 3,900 and 4,100 children were separated from their parents through June 2018.

→ **“For-Cause” Separations—ongoing**—According to a June 2018 court order, the administration can still separate families for a number of reasons: 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>182</sup> According to testimony from the Government Accountability Office (GAO) in early 2019, such “for-cause” separations were happening at twice the rate they occurred in late 2016.<sup>183</sup> Between the June 2018 termination of blanket family separations and March 2020, more than 1,150 for-cause separations occurred.<sup>184</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>185</sup>

176 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.

177 White House, “Executive Order 13841.”

178 DHS Office of Inspector General (OIG), *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* (Washington, DC: DHS, 2019), 5.

179 *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.

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

181 *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).

182 *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.

183 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.

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

185 *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).

- ▶ **End of ICE's Coordinated Release Program**—October 23, 2018—ICE stopped its practice of assisting detained families with their postrelease plans and travel arrangements, citing the pace of migrant arrivals.<sup>186</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>187</sup>
- ▶ **Increased Investigations into Family Units**—April 29, 2019—Amid the arrival of unprecedented numbers of family units<sup>188</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>189</sup> In some cases, this included collecting fingerprints from minors under age 14, if their parents consented.<sup>190</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>191</sup> The current pilot—Operation Double Helix 2.0—is being implemented at ten border locations and, as of October 31, 2019, had identified 207 fraudulent families (13 percent of the total tested).<sup>192</sup> ICE had identified a total of 653 fraudulent families through October 2019, both through these pilots and other means.<sup>193</sup>
- ▶ **Faster Removals of Guatemalans**—July 2019—Guatemala agreed to a more streamlined U.S. removal process for its nationals, in which CBP confirms the Guatemalan citizenship of individuals before they are removed and Guatemala confirms the identities of the individuals after removal, rather than waiting for Guatemalan officials to do so before removal.<sup>194</sup> This process has particularly sped up the removal of Guatemalan families.
- ▶ **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,

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

187 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).

188 “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.

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

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

191 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.

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

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

194 ICE, “Enhanced Coordination Results in Increased, Faster Removals to Guatemala” (news release, August 20, 2019). There is some indication that the United States has streamlined removals for nationals of El Salvador and Honduras as well. The U.S. embassy in Guatemala stated that “the United States has also worked with the governments of Guatemala, Honduras, and El Salvador to streamline the removal process for illegal immigrants from these countries.” But such initiatives have not been explained to the extent the Guatemala initiative has. See U.S. Embassy in Guatemala, “United States Takes Concrete Measures to Stop Illegal Immigration” (press release, September 18, 2019).

one of the pull factors that drew families to migrate.<sup>195</sup> The rule was blocked in court in September 2019 before going into effect.<sup>196</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>197</sup> In December 2019, DHS expanded PACR to the Rio Grande Valley sector, and it has since expanded the program to the Yuma sector.<sup>198</sup> (For more, see Section 5.B.)
- ▶ **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>199</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>200</sup>

## Border Fortifications and Personnel

The Trump administration has worked to construct new and replacement barriers and bolster personnel capacity along the U.S.-Mexico border through various policies.

- ▶ **Construction of Barriers along the Southern Border**—*ongoing*—Between FY 2017 and FY 2020, Congress appropriated a total of \$4.5 billion for the repair or new construction of physical barriers along the southwest border.<sup>201</sup> The administration also redirected about \$10.5 billion in funds otherwise appropriated.<sup>202</sup> With these funds, DHS had built 229 miles of new and replacement walls and fences as of early July 2020.<sup>203</sup> The administration has stated it aims to complete 450 total miles by the end of 2020.<sup>204</sup>

195 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.

196 *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).

197 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.

198 *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).

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

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

201 *Consolidated Appropriations Act, 2017*; *Consolidated Appropriations Act, 2018*; *Consolidated Appropriations Act, 2019*; *Consolidated Appropriations Act, 2020*.

202 Painter and Singer, *DHS Border Barrier Funding*; Booker, “Trump Administration Diverts \$3.8 Billion.”

203 CBP, “Border Wall System.”

204 Chantal Da Silva, “Trump Has Built Nearly 100 Miles of Border Wall by End of 2019, with 350 Miles to Go in 2020,” *Newsweek*, December 31, 2019.

- Waivers of Environmental and Contracting Laws—*ongoing*—Since 2017, DHS has in multiple instances waived environmental laws and regulations in order to avoid conducting environmental impact assessments in places it plans to build border barriers.<sup>205</sup> In February 2020, for the first time, DHS also waived federal contracting laws that require, for example, open competition for contracts.<sup>206</sup>
- 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 a Treasury Department fund for forfeitures, and he declared a national emergency to access \$3.6 billion from military construction projects.<sup>207</sup>
  - o *February 13, 2020*—The president renewed the emergency declaration for another year.<sup>208</sup> The administration also notified Congress that it would transfer another \$3.8 billion in Defense Department funds to build the border wall.<sup>209</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>210</sup> and 66 acres of land in July 2020<sup>211</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>212</sup>
- Legal Challenges
  - o Counterdrug Funds—*May 2019*—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

205 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.

206 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.

207 *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.

208 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.

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

210 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).

211 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).

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

counterdrug funds for the wall construction it had proposed.<sup>213</sup> However, the Supreme Court in July 2019 allowed the administration to proceed with that construction while legal proceedings are ongoing.<sup>214</sup> In a separate case, *California v. Trump*, a federal district judge in California blocked the administration from using counterdrug funds to build specific sections of the border wall in California and New Mexico in June 2019.<sup>215</sup> Combining the two cases in December 2019, the same federal district judge blocked funding for a broader group of projects in those states and Arizona.<sup>216</sup> In June 2020, the Ninth Circuit Court of Appeals upheld the district court's May and June 2019 decisions, not addressing the December ruling, though the effect of its decision was unclear due to the Supreme Court's decision.<sup>217</sup>

- o **Military Construction Funds—January and February 2020**—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.<sup>218</sup> However, an appeals court lifted that injunction while proceedings are ongoing.<sup>219</sup> On February 27, 2020, a federal district judge in Washington State permanently blocked the administration from diverting funds from a specific military construction project in the state to pay for construction of a border wall.<sup>220</sup>

- **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>221</sup> The original order to deploy up to 4,000 National Guard troops lasted through September 30, 2018.<sup>222</sup> The deployment has been reauthorized several times, most recently 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>223</sup> In February 2019, the governors of California and New Mexico ordered most of their Guard

213 *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).

214 *Donald J. Trump, President of the United States v. Sierra Club*, No. 19A60 (U.S. Supreme Court, July 26, 2019).

215 *State of California v. Donald J. Trump*, No. 19-cv-00872-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, and Certifying Judgment for Appeal, June 28, 2019).

216 *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).

217 *Sierra Club; Southern Border Communities Coalition v. Donald J. Trump*, Nos. 19-16102 and 19-16300 (U.S. Court of Appeals for the Ninth Circuit, June 26, 2020); *State of California v. Donald J. Trump*, Nos. 19-16299 and 19-16336 (U.S. Court of Appeals for the Ninth Circuit, June 26, 2020).

218 *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).

219 *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).

220 *State of Washington v. Donald J. Trump*, Case No. 2:19-cv-01502-BJR (U.S. District Court for the Western District of Washington, February 27, 2020).

221 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.

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

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

troops to withdraw, while the governor of Texas sent an additional 1,000 troops in July of that year<sup>224</sup> By April 2020, about 2,500 National Guard troops were stationed at the border.<sup>225</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>226</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>227</sup> And on April 29, 2019, the Defense Department announced a plan to send 320 additional troops to the border.<sup>228</sup> In the first week of September 2019, the Defense Department authorized the deployment of troops through the end of September 2020, and in June 2020, as described above, 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>229</sup> As of April 2020, 2,700 active-duty troops were assigned to the border.<sup>230</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>231</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>232</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>233</sup>
- ▶ **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

224 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.

225 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.

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

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

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

229 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.”

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

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

232 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.

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

which the agency must comply.<sup>234</sup> This designation allows CBP to withhold the names of officers when disclosing documents to the public.

- ▶ **Border Patrol Staffing Increases—ongoing**—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>235</sup> Despite plans to add 2,700 agents annually, CBP gained just 120 Border Patrol agents in 2018 and 112 in 2019.<sup>236</sup>

- **CBP Officers Reassigned—March–September 2019**—For about six months, 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>237</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>238</sup>

#### ▶ Upcoming

- **Use of Data from Commercial License Plate Readers**—CBP reported in July 2020 that it 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>239</sup>

## 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, this aspect of the interior enforcement landscape has become

234 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.

235 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.

236 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).

237 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.

238 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.

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

increasingly polarized at the state and local level. Some jurisdictions have restricted cooperation with federal immigration authorities, particularly ICE, while others have actively encouraged it.

The divergence in how different jurisdictions deal with immigration enforcement has accelerated during the Trump administration, as cooperation has come to signal support for the administration's immigration agenda. One of the most contentious issues is whether state and local law enforcement agencies honor ICE-issued detainers—that is, whether they will hold detainees whom ICE suspects are removable immigrants for an extra 48 hours past their release date so that ICE has time to take custody of them. While the total number of detainers issued increased 20 percent from FY 2014 to FY 2019, the number of requests that jurisdictions declined increased 89 percent.<sup>240</sup> Though some states, such as Texas and Florida, have passed laws mandating cooperation with ICE detainers, others, including California and Illinois, have passed laws prohibiting cooperation.<sup>241</sup> This has led to an uneven enforcement landscape, wherein ICE is able to make more immigration arrests through the criminal justice system in cooperative jurisdictions and fewer in noncooperative jurisdictions.<sup>242</sup> Noncooperation policies have 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>243</sup>

At the same time, the administration has used other means to eliminate the sense of safety that unauthorized immigrants might feel in noncooperative jurisdictions, often called “sanctuary” jurisdictions. ICE has been able to scale up the number of arrests it makes outside jails (i.e., in the community), reaching arrest numbers similar to those during prior peaks in FY 2009–11.<sup>244</sup> The agency has also quadrupled the number of immigration investigations at worksites. And it is using 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. In the face of this attempt to expand interior enforcement, nonprofit and legal aid organizations across the country have stepped in to provide “Know Your Rights” trainings and, sometimes, legal representation.

In addition to putting pressure on U.S. states and localities, the administration has ramped up demands on foreign countries in order to facilitate enforcement actions, as it has in the name of border security. The Trump administration, more so than any past administration, has made use of its authority to limit the visas granted to people from countries that do not consistently accept back their nationals when the United States orders them removed.<sup>245</sup> Through visa sanctions and other forms of diplomatic pressure, the Trump administration has reduced the number of countries that refuse to accept the return of their nationals from

240 DHS OIG, *U.S. Immigration and Customs Enforcement's Criminal Alien Program Faces Challenges* (Washington, DC: DHS, 2020), 9.

241 State of Texas, *An Act Relating to the Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration and to Related Duties and Liability of Certain Persons in the Criminal Justice System; Providing a Civil Penalty; Creating a Criminal Offense*, SB 4 (2017); State of Florida, *An Act Relating to Federal Immigration Enforcement*, Chapter 2019-102, *Florida Statutes* 908 (2019); 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 (2017); State of Illinois, *Illinois TRUST Act*, Public Act 100-0463 (2017).

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

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

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

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

23 to 13, including some where living conditions are known to be dismal for certain populations, such as Mauritania, where thousands of people are subject to slavery.<sup>246</sup>

Even though ICE's enforcement capacity is somewhat limited by the noncooperation policies of certain U.S. jurisdictions, its expanded enforcement mandate has fostered, if nothing else, a feeling of anxiety that permeates immigrant communities. This subsection examines changes to arrest, detention, and removal policies, as well as actions to prompt state and local cooperation with federal immigration enforcement.

## Broadening the Population Subject to Removal

The Trump administration has made a range of policy changes to ensure that many immigrant populations that previously were largely exempt from enforcement actions, including removal, can now be subject to such actions.

- ▶ **New Interior Enforcement Regime**—*January 25, 2017*—In a January 25 executive order on interior enforcement, the president initiated sweeping changes in immigration enforcement in the U.S. interior, including greatly expanding the classes of noncitizens who are priorities for removal and directing agencies to execute U.S. immigration laws against “all removable aliens.”<sup>247</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>248</sup>
- ▶ **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>249</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>250</sup>
- ▶ **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

<sup>246</sup> Wilson, *Immigration: “Recalcitrant” Countries*; Franklin Foer, “How Trump Radicalized ICE,” *The Atlantic*, September 2018.

<sup>247</sup> 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.

<sup>248</sup> 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.

<sup>249</sup> 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.

<sup>250</sup> Letter from Thomas D. Homan, Acting Director of ICE, to Senator Charles E. Grassley, May 5, 2017.

identified for removal.<sup>251</sup> The memo also instructed ICE attorneys to review cases that the agency had administratively closed for prosecutorial discretion to determine whether the basis for closure is 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 will take enforcement action against noncitizens with final orders of removal, even if they have pending U visa applications.<sup>252</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.)
- ▶ **Increased Checks by CBP on Buses and Trains**—*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>253</sup> Since then, checks within 100 miles of the border (the zone within which CBP has authority to undertake such actions) have increased.
- ▶ **Attempt to Expand Expedited Removal**—*July 23, 2019*—DHS issued a regulation drastically expanding the unauthorized immigrant population subject to expedited removal<sup>254</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 home country. 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>255</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 into effect.<sup>256</sup> A federal appeals court ruling in June 2020 reversed the district court's ruling, though the injunction was not immediately lifted.<sup>257</sup>
- ▶ **Reopening DACA Recipients' Removal Cases**—*October 2019*—ICE began to request that immigration courts reopen the removal cases of immigrants currently protected by the DACA

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

252 AILA, "AILA/ICE Liaison Meeting Minutes" (unpublished meeting notes, October 26, 2017).

253 Adiel Kaplan and Vanessa Swales, "Border Patrol Searches Have Increased on Greyhound, Other Buses Far from Border," NBC News, June 5, 2019.

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

255 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.

256 *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).

257 *Make the Road New York v. Wolf*, No. 19-5298 (U.S. Circuit Court of Appeals for the District of Columbia, June 23, 2020).

program.<sup>258</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.)

- ▶ **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>259</sup> This designation allows ICE to withhold the names of personnel when disclosing documents to the public.
- ▶ **Limits on Visas for Nationals of Recalcitrant Countries—ongoing**—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>260</sup> By June 2020, the number of recalcitrant countries had been reduced from 23 at the start of the administration to 13.<sup>261</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>262</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>263</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 have surfaced since then that the administration is renewing these efforts.<sup>264</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>265</sup>

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

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

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

261 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*.

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

263 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).

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

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

This has raised serious concerns about the racial and ethnic discrimination and slavery these immigrants could face in Mauritania if deported.<sup>266</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 in an effort to pressure the countries' governments to accept their nationals ordered deported from the United States.<sup>267</sup> The administration removed the sanctions on Guinea in August 2018, in recognition of its agreement to accept its deported nationals.<sup>268</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>269</sup> In April 2020, the visa sanctions for Laos were expanded to include all immigrant visas for Lao citizens.<sup>270</sup>
- Ethiopia—*January 18, 2019*—DHS filed a *Federal Register* notice on countries whose nationals are eligible to participate in the H-2A and H-2B nonimmigrant worker programs. In the notice, DHS explained that Ethiopia has been removed from the list of eligible countries because it has been “at risk of noncompliance” with ICE repatriation efforts since 2016.<sup>271</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>272</sup> The sanctions were lifted in January 2020.<sup>273</sup>
- Pakistan—*April 5, 2019*—DHS put into effect visa sanctions against Pakistan, a country that has been identified as recalcitrant.<sup>274</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>275</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

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

267 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).

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

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

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

271 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.

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

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

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

275 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.

organization employees, to Burundians applying in Burundi, as a consequence of the country not accepting its nationals ordered removed from the United States.<sup>276</sup>

- ▶ **Increase in ICE Officers—ongoing**—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>277</sup> No additional ERO officers have been authorized under Trump. In FY 2018, Congress authorized the hiring of 65 additional ICE officers, but only for Homeland Security Investigations (HSI).<sup>278</sup> For FY 2019, the administration requested a total of 2,000 additional ERO and HSI officers, and for FY 2020 it requested 1,000, but Congress has not provided any money for those hires.<sup>279</sup>
- ▶ **Fines for Immigrants Ordered Removed—ongoing**—In December 2018, ICE began issuing fines to immigrants who had been ordered removed but had not departed the United States.<sup>280</sup> The action stemmed from an executive order issued January 25, 2017, in which Trump instructed DHS to collect all the fines it was authorized to from immigrants illegally in the country.<sup>281</sup> Immigrants remaining in the country after being ordered removed can be fined up to \$799 for each day they violate their removal order.<sup>282</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>283</sup>

## Changes to Immigrant Detention

The following policy changes have affected which immigrants are subject to detention and how they are treated while detained.

- ▶ **End of the Family Case Management Program—June 20, 2017**—The administration ended this alternative to detention 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>284</sup> Of the total participants, 99 percent attended their court appearances and ICE check-ins.

<sup>276</sup> DHS, “DHS Announces Imposition of Visa Sanctions on Burundi.”

<sup>277</sup> DHS, *Budget-in-Brief: Fiscal Year 2016* (Washington, DC: DHS, 2015), 47.

<sup>278</sup> U.S. Congress, “Explanatory Statement for the Homeland Security Appropriations Bill, 2018,” accessed April 29, 2019.

<sup>279</sup> 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.

<sup>280</sup> Franco Ordoñez, “Trump Administration Hits Some Immigrants in U.S. Illegally with Fines up to \$500,000,” NPR, July 2, 2019.

<sup>281</sup> White House, “Executive Order 13768.”

<sup>282</sup> While the statute sets the fine at \$500, it is regularly adjusted for inflation, most recently to \$799 in April 2019. See DHS, “Civil Monetary Penalty Adjustments for Inflation,” *Federal Register* 84, no. 66 (April 5, 2019): 13499–513.

<sup>283</sup> 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.

<sup>284</sup> DHS Office of the Inspector General, *U.S. Immigration and Customs Enforcement’s Award of the Family Case Management Program Contract* (Washington, DC: DHS, 2017).

- **Funds Approved to Restart Program—2019**—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>285</sup> The program does not yet seem to have been restarted on the ground.
- ▶ **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>286</sup> Between calendar years 2016 and 2018, the number of detained pregnant women increased from 1,400 to 2,100.<sup>287</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>288</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>289</sup>
- ▶ **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>290</sup> The new standards, which update standards published in 2000, make 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 relax many standards in deference to the standards of individual facilities.<sup>291</sup> For example, the new NDS lower food preparation standards, remove a requirement that new facilities or those renewing their contracts with ICE have outdoor recreation spaces, and loosen requirements for timeliness in providing medical care.
- ▶ **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 agency collects DNA from people age 14 and older who are apprehended crossing the border illegally in the Detroit sector and those presenting for admission at the Eagle Pass port of entry in Texas who have criminal convictions or who are being referred for prosecution.<sup>292</sup> ICE said it would collect DNA from all detainees age 14 and older booked into one detention facility, and its pilot program reportedly began at a facility

285 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."

286 ICE, "Identification and Monitoring of Pregnant Detainees" (ICE Directive 11032.3, December 14, 2017).

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

288 *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).

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

290 ICE, "2019 National Detention Standards for Non-Dedicated Facilities," updated December 19, 2019.

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

292 DHS, *Privacy Impact Assessment for the CBP and ICE DNA Collection* (Washington, DC: DHS, 2020).

in Dallas on May 1.<sup>293</sup> Both agencies plan to scale up DNA collection in the future. The final rule was published on March 9, 2020. (For more, see Section 4).

## Cracking Down on “Sanctuary” Policies

The federal government has exerted pressure on jurisdictions that limit cooperation with federal immigration enforcement agencies, ranging from filing lawsuits and administrative subpoenas to withholding federal funding.

- ▶ **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>294</sup> Among the services offered: A new DHS-Victim Information and Notification Exchange (DHS-VINE) automated service that helps victims track the immigration custody status of foreign nationals charged or convicted of certain crimes.
- ▶ **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. Since January 13, 2020, ICE has 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>295</sup> At the time of writing, San Diego County, CA, and Washington County, OR, had volunteered to comply, and a federal judge had ordered Denver to comply.<sup>296</sup>
- ▶ **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 FAST—in response to a state law that bars the state DMV from sharing information with federal immigration authorities.<sup>297</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>298</sup> On July 23, 2020, DHS announced that it would once again allow New York State residents to enroll.<sup>299</sup> Government lawyers 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>300</sup>

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

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

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

296 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).

297 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.

298 Marina Villeneuve, “As Budget Passes, Cuomo Says: ‘The State Has No Money,’” *Associated Press*, April 3, 2020.

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

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

- ▶ **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>301</sup> The cities vary in the degrees to which they limit cooperation with ICE, from Houston, which has no such restrictive policies, to New York City, which bars local law enforcement from honoring ICE detainers and limits 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>302</sup> To do so, it requested the help of at least 500 agents from the HSI subdivision of ICE, which typically focuses on international criminal and trafficking investigations. The initiative is scheduled to last through December 31, 2020.
- ▶ **Funding Restrictions for “Sanctuary” Cities**—*ongoing*—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.C. 1373, a federal statute that prohibits localities from placing restrictions on sharing citizenship and immigration status information with federal authorities.<sup>303</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>304</sup> In the wake of this injunction, the Justice Department has 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

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

302 Dickerson, Kanno-Youngs, and Correal, “‘Flood the Streets’: ICE Targets Sanctuary Cities.”

303 *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).

304 *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).

(the Notice Condition).<sup>305</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>306</sup> Some of these have been upheld by federal appeals courts.<sup>307</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 has allowed the Justice Department to apply them.<sup>308</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>309</sup> Of those jurisdictions granted COPS funding two months later, the Justice Department announced that 80 percent met these conditions.<sup>310</sup> A federal appeals court ruled against the City of Los Angeles in a lawsuit challenging such prioritization.<sup>311</sup>
- Adding New Immigration Conditions to Various Justice Department Grants—ongoing—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>312</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>313</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

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

306 *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).

307 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).

308 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).

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

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

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

312 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.

313 *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).

the gang prevention grant, taking away much of its impact.<sup>314</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>315</sup>

► **Lawsuits against State and Local Laws and Policies—ongoing**—The Justice Department has 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>316</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>317</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>318</sup> On October 22, 2019, the Justice Department asked the Supreme Court to rule on the case.<sup>319</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>320</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>321</sup>
- *February 10, 2020*—The Justice Department filed its own lawsuit challenging New Jersey's Immigrant Trust Directive.<sup>322</sup>

314 *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).

315 *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).

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

317 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).

318 *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).

319 *United States v. California*, No. 19-532 (U.S. Supreme Court, Petition for a Writ of Certiorari, October 22, 2019).

320 *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).

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

322 *United States v. New Jersey* (U.S. District Court for the District of New Jersey, Complaint for Declaratory and Injunctive Relief, February 10, 2020).

- *February 10, 2020*—The Justice Department also sued King County, WA, and the county executive for a policy directing the relevant county agency and the local airport to insert prohibitions on working with flights carrying deportees into future contracts for service providers at the airport.<sup>323</sup>

### ► Upcoming

- New Requirements for Bond Cancellations—On August 27, 2019, ICE published a notice of revision to the terms of its immigration bonds. Under this revision, which has not yet been implemented, bonds would no longer be cancelled 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>324</sup> This change is in response to states and localities increasingly declining to honor ICE detainees.

## Encouraging Local Cooperation with ICE

In addition to exerting pressure on jurisdictions that limit cooperation with ICE, the federal government has also tried to make it easier for jurisdictions that want to expand their cooperation to do so.

- **Warrant Service Officer Program**—*May 6, 2019*—ICE created the Warrant Service Officer Program in an attempt to avoid liability issues that arise when local law enforcement agencies hold detainees past their release date because of ICE detainer requests 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>325</sup> The program began in Florida, and as of July 2020, 65 law enforcement agencies in nine states were participating.<sup>326</sup>
- **287(g) Expansion**—*ongoing*—The Trump administration has 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 July 2020, ICE had 287(g) agreements with 74 law enforcement agencies in 21 states, a 147 percent increase from the 30 agreements in effect in January 2017.<sup>327</sup>
- **Reinstatement of Secure Communities**—*ongoing*—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 President Obama. 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 2019,

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

324 ICE, "Agency Information Collection Activities; Revision of a Currently Approved Collection: Immigration Bond," *Federal Register* 84, no. 166 (August 27, 2019): 44913–15; ICE, "DRAFT ICE Form I-352," updated October 7, 2019.

325 ICE, "ICE Launches Program to Strengthen Immigration Enforcement" (press release, May 6, 2019).

326 ICE, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," updated July 8, 2020.

327 ICE, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act."

more than 150,000 noncitizens with criminal convictions had been removed as a result of Secure Communities.<sup>328</sup>

## Enforcement against Unauthorized Immigrant Workers and Their Employers

The administration has expanded its capacity to do worksite enforcement and encouraged participation in E-Verify.

- ▶ **E-Verify Upgrade**—2017—USCIS upgraded the E-Verify system so it can handle an increased number of concurrent users.<sup>329</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.
- ▶ **Worksite Enforcement**—ongoing—In FY 2018 and FY 2019, the Trump administration put a much stronger emphasis on worksite enforcement, as evidenced by the promise of then-acting ICE Director Thomas Homan that his agency would quintuple worksite investigations in FY 2018.<sup>330</sup> Though investigations did not increase quite that sharply, they did rise fourfold in FY 2018 and held roughly steady in FY 2019:
  - FY 2017: 1,691 opened worksite investigations
  - FY 2018: 6,848 opened worksite investigations<sup>331</sup>
  - FY 2019: 6,812 opened worksite investigations<sup>332</sup>

## 4 U.S. Department of Justice

Under the Trump administration, the U.S. Department of Justice has 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 later under Matthew Whittaker (November 2018–February 2019) and William Barr (February 2019–present), it has also shaped border security and interior enforcement policy. The Justice Department’s leadership has been extremely effective in advancing the Trump administration’s immigration agenda by creatively making use of all available authorities.

*The Justice Department’s leadership has been extremely effective in advancing the Trump administration’s immigration agenda.*

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

329 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.

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

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

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

On the border, the Justice Department played a central role in the administration's infamous family separation policy. In May 2018, Sessions announced that DHS would refer all individuals apprehended while illegally crossing the southwest border to the Justice Department for prosecution, under what it called a "zero-tolerance" policy.<sup>333</sup> Not exempting families from prosecution, the administration separated parents from their children before the parents were sent for prosecution. Children were recategorized as unaccompanied and placed in shelters run by HHS throughout the country.

The Justice Department has also contributed to the administration's efforts to redefine asylum and remake the application process so as to limit the number of foreign nationals who can apply and, of those who apply, the number who ultimately receive protection. 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>334</sup> With DHS, the Justice Department authored two ill-fated 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 country through which they transited on their way to the United States.<sup>335</sup> Both were later enjoined.

The Justice Department has also played an active role in the administration's interior enforcement efforts, especially in pushing back against "sanctuary" jurisdictions. After the president ordered the government not to grant federal money to sanctuary jurisdictions, the Justice Department led the charge, placing conditions on some of its grants. The Justice Department has also sued jurisdictions for their lack of cooperation, including the states of California and New Jersey, and King County in Washington State (see Section 3.B.). Attorney General Barr also announced in February 2020 that the Justice Department would take action to ensure jurisdictions comply with ICE subpoenas for information on immigrants and review the actions of local district attorneys who charge foreign nationals with lesser offenses for the express purpose of shielding them from the immigration consequences of a more serious charge (see Section 3.B.).<sup>336</sup>

The administration has exercised countervailing approaches when it comes to the immigration court system: while tirelessly pushing to speed adjudications to reduce the court's sizable backlog, it has also made it more difficult for judges to efficiently manage their dockets and accelerated the addition of new cases. While completed cases have increased, so has the backlog, rising 71 percent between FY 2017 and FY 2020.<sup>337</sup> As of March 31, 2020, there were 1,122,697 immigration cases in the backlog. And as the administration increases pressure on judges and systematically limits their ability to do anything other than grant benefits or order migrants deported, there has been more and more outcry over a lack of due process.<sup>338</sup>

333 Justice Department, "Attorney General Delivers Remarks."

334 *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).

335 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.

336 Justice Department, "Attorney General William P. Barr Delivers Remarks at the National Sheriffs' Association Winter Legislative and Technology Conference" (news release, February 10, 2020).

337 MPI analysis of data from EOIR, "Pending Cases."

338 American Bar Association, "ABA President to Congress: Fix the Immigration Courts" (news release, January 29, 2020).

The Justice Department has also used its role as the litigator on behalf of the federal government to focus on violations committed by immigrants. This has included laying the groundwork for what eventually became the administration's zero-tolerance policy at the border and creating a new office within the Justice Department's Office of Immigration Litigation to oversee denaturalization cases.

- ▶ **Changes to Immigration Judge Hiring Process**—*April 2017*—In a memorandum approved by then 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>339</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>340</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>341</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>342</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>343</sup> An interim regulation later published on August 26, 2019, codified the office.<sup>344</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 non-meritorious cancellation of removal cases, regardless of whether the annual limitation has been reached.<sup>345</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

339 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.

340 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.

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

342 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).

343 Catholic Legal Immigration Network, Inc., "FOIA Disclosures on the Office of Policy," updated October 24, 2019.

344 EOIR, "Organization of the Executive Office for Immigration Review," *Federal Register* 84, no. 165 (August 26, 2019): 44537–43.

345 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.

for an extended period of time, meet certain good moral character requirements, and, in some cases, that their removal would cause certain U.S.-citizen or permanent resident relatives unusual hardship. The Justice Department is limited from cancelling the removals 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>346</sup> Then in April 2020, EOIR published a final rule that expanded it further to 23 judges.<sup>347</sup> As of June 2020, the Trump administration had appointed ten permanent judges to the BIA.<sup>348</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>349</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>350</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>351</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>352</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>353</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>354</sup>
  - *September 5, 2018*—EOIR released the first phase of its analysis, finding program participants have longer detention stays and were less likely to obtain representation than other detained

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

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

348 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.

349 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.

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

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

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

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

354 *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>355</sup> The Vera Institute of Justice, which administers the program, said the review had “insurmountable methodological flaws.”<sup>356</sup>

- *January 29, 2019*—EOIR finished the second phase of its analysis.<sup>357</sup> The study found participants have 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>358</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 should improve case scheduling and adjudication efficiency.<sup>359</sup> EOIR expects to initiate the nationwide rollout of ECAS in FY 2020. As of May 2020, the system was in use at 12 courts and two adjudication centers.<sup>360</sup>
- ▶ **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>361</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 cancellation of removal, paperwork that failed to designate a hearing’s time and place did not constitute a legal notice to appear in court.<sup>362</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>363</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 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

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

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

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

358 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.

359 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.

360 EOIR, “Welcome to the EOIR Courts & Appeals System (ECAS) Information Page,” updated May 2, 2020.

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

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

363 *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).

open.<sup>364</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>365</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>366</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>367</sup> The following August, six new BIA members were hired through this process.<sup>368</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>369</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 is starting to replace in-court interpreters at initial immigration court hearings with videos informing foreign nationals of their rights.<sup>370</sup> The pre-recorded video advisals are in English and Spanish and targeted separately to detained and nondetained individuals.<sup>371</sup>
- ▶ **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>372</sup> Such cases were previously adjudicated by the attorney general.
- ▶ **Expanding the Authority of the BIA**—*September 3, 2019*—EOIR issued a regulation expanding the authority of the BIA.<sup>373</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

364 See Maria Gabriella Pezzo and Roberto Daza, "[ICE Is Sending out Fake Court Dates to Immigrants. Here's Why](#)," VICE News, November 1, 2018.

365 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.

366 Tanvi Misra, "[DOJ Changed Hiring to Promote Restrictive Immigration Judges](#)," Roll Call, October 29, 2019.

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

368 Misra, "DOJ Changed Hiring to Promote Restrictive Immigration Judges."

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

370 Tal Kopan, "[Trump Administration Ending In-Person Interpreters at Immigrants' First Hearings](#)," *San Francisco Chronicle*, July 3, 2019.

371 EOIR, "[Proactive Disclosures](#)," accessed December 30, 2019.

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

373 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.

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>374</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. As of July 2020, the director had issued two precedential decisions pursuant to this power.<sup>375</sup>
- ▶ **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>376</sup>
- ▶ **Online Case Status Information**—*February 25, 2020*—EOIR announced an online resource for checking case information.<sup>377</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>378</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>379</sup> Because the national mandate for DNA collection currently has broad exceptions for individuals in immigration custody, the rule would increase DHS's collection of DNA samples from 7,000 annually to approximately 755,000.<sup>380</sup> The Justice Department and DHS will work together to increase collection over time.
- ▶ **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 who are in government custody via VTC.<sup>381</sup> The initiative likely aims to speed up proceedings for these children.

374 EOIR, "Board of Immigration Appeals: Affirmance without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents."

375 EOIR, "[Virtual Law Library](#)," accessed July 8, 2020.

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

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

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

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

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

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

- ▶ **Increasing the Immigration Judge Corps**—*ongoing*—Through a series of strategies, including decreasing the time required to hire new immigration judges and hiring back retired immigration judges, the administration has increased the corps of immigration judges from 289 judges in FY 2016 to 509 at the end of the third quarter of FY 2020.<sup>382</sup>
- ▶ **Upcoming**
  - **Fee Increases**—On February 28, 2020, the Justice Department proposed a rule that would raise filing fees on a range of EOIR forms for the first time since 1986.<sup>383</sup> Many of the increases are significant; the cost of appealing an immigration judge decision to the BIA would increase from \$110 to \$975. The proposed rule also clarifies that the \$50 asylum fee proposed by USCIS in November 2019 (see Section 5.B.) would apply to asylum applications filed before the courts as well.
  - **Public Charge**—Coinciding with the publication of a draft proposed regulation by USCIS (see Section 7), in September 2018 DHS announced that the Justice Department is working on a similar regulation that would detail how the finding that an immigrant is a public charge could affect whether they are considered deportable.<sup>384</sup> No such regulation has been released.

## 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 and, as such, employs more than 450 immigration judges located in 63 immigration courts and two adjudication centers across the United States.<sup>385</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 have made a number of changes to how and where immigration judges conduct adjudications. Such instructions have been handed down directly from the attorney general, the director of EOIR, and the chief immigration judge, who establishes operating policies for the immigration courts.

As a result of the Trump administration's efforts, there has been an increase in the number of cases adjudicated. Between FY 2018 and FY 2019, the total number of cases adjudicated rose 42 percent, from 195,088 to 276,523.<sup>386</sup> Over the same time period, the total number of deportation orders (including both removal orders and voluntary departures) rose by 49 percent, from 144,171 to 215,421.<sup>387</sup> There is widespread concern that the administration's emphasis on speed and efficiency has sacrificed due process

382 EOIR, "Immigration Judge (IJ) Hiring," updated June 2020; 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.

383 EOIR, "Executive Office for Immigration Review; Fee Review," *Federal Register* 85, no. 40 (February 28, 2020): 11866–76.

384 Ryan McCrimmon, "'Big Four' Huddle Today on Farm Bill," *Politico*, September 26, 2018; Justice Department, "Inadmissibility on Public Charge Grounds" (proposed rule 1125-AA84, Fall 2018).

385 EOIR, "Office of the Chief Immigration Judge," updated January 21, 2020.

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

387 TRAC Immigration, "Outcomes of Deportation Proceedings in Immigration Court."

and denied foreign nationals a meaningful opportunity to apply for the benefits to which they are legally entitled.<sup>388</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 to detention facilities across the country (including along the southwest border).<sup>389</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>390</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>391</sup>
- ▶ **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>392</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>393</sup>

388 Sarah Pierce, “As the Trump Administration Seeks to Remove Families, Due-Process Questions over Rocket Dockets Abound” (commentary, MPI, Washington, DC, July 2019); 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.

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

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

391 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.

392 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.

393 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.

- ▶ **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>394</sup> For example, one measure of good performance is whether 85 percent of nondetained removal cases are completed within one year of initiation.
  - *December 21, 2018*—The director of EOIR implemented performance standards for the Office of the Chief Administrative Hearing Officer (OCAHO), a tribunal within EOIR that has jurisdiction over cases related to employers, such as unfair immigration-related employment practices.<sup>395</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>396</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>397</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 has grown 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 are obligated to finish 85 percent of non-status-docket cases within one year. The August 2019 memo limits the types of cases judges can 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>398</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 document.<sup>399</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

394 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.

395 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.

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

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

398 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.

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

continuances.<sup>400</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>401</sup>

► **Revised Case Processing Priorities—ongoing**—The administration has made a number of changes to ensure that certain types of cases 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 ORR custody who do not have sponsors, and (3) foreign nationals released from custody on bond after six months or more of detention.<sup>402</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>403</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>404</sup> The 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>405</sup>
- *November 19, 2018*—EOIR announced a policy of expediting asylum applications, with the expectation that they would be adjudicated within 180 days.<sup>406</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>407</sup>

► **Upcoming**

- **Allowing Immigration Judges Contempt Power**—The Justice Department has indicated that it will publish a proposed rule that, if implemented, would allow immigration judges to

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

401 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*.

402 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.

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

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

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

406 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.

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

sanction by financial penalty actions in contempt of the judge's proper exercise of authority.<sup>408</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 has 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 have already far outpaced those in prior administrations in terms of use of this power, with 15 self-referrals to date, compared to four under the entirety of the Obama administration and ten under Bush. Using this power, recent attorneys general have made major changes to the definition of asylum, the docket management strategies of immigration judges, and more.

In 2019, much of Attorney General Barr's focus was on the interaction between criminal convictions and immigration consequences. For example, in *Matter of Castillo-Perez*, Barr held that foreign nationals with two or more convictions for driving under the influence should presumptively be denied an immigration benefit called cancellation of removal, which allows some long-term U.S. residents in removal proceedings to stay in the country. The influence of this unilateral decision did not stop there. Because one of the factors weighed by the court when deciding a cancellation of removal case is also considered by USCIS when deciding naturalization cases—good moral character—USCIS later applied the standard established by this case to the consideration of foreign nationals' applications for U.S. citizenship.

- ▶ **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>409</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 completion of immigration processes before other agencies).<sup>410</sup>
  - 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>411</sup> At that time, there were more than 355,000 administratively closed cases.

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

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

410 *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.

411 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.

- *August 29, 2019*—A three-judge panel before the 4th Circuit Court of Appeals found that regulations do confer the authority to administratively close cases to immigration judges and the BIA.<sup>412</sup> As a result, immigration judges and the BIA have administrative closure authority in cases arising in Maryland, North Carolina, South Carolina, Virginia, and West Virginia, but not the rest of the country.
- ▶ **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>413</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>414</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>415</sup>
- ▶ **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>416</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 this form of relief and the potential effects of the relief on the proceedings alone do not justify a continuance grant.<sup>417</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>418</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>419</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>420</sup> A federal district court

412 *Jesus Humberto Zuniga Romero v. William Barr*, No. 18-1850 (U.S. Court of Appeals for the Fourth Circuit, August 29, 2019).

413 *Matter of A-B-*.

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

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

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

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

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

419 *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).

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

judge later enjoined the decision in July 2019, meaning immigration courts must continue to provide bond hearings to certain asylum seekers.<sup>421</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>422</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>423</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>424</sup>
- ▶ **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>425</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>426</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

421 *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). On July 22, 2019, the Ninth Circuit declined to stay the order requiring bond hearings and on March 27, 2020, the same court denied the government’s appeal. 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); *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, March 27, 2020).

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

423 EOIR, “Board of Immigration Appeals: Affirmance without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents.”

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

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

426 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).

the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>427</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.

### ► Upcoming

- Increased Difficulty of Exemption from the Persecutor Bar—On October 18, 2018, Sessions referred the case *Matter of Daniel Girmai Negusie* to himself to decide whether coercion and duress are relevant to the application of the persecutor bar. Individuals who commit persecution are barred from receiving asylum in the United States.<sup>428</sup> However, if applicants are able to show that they did so under imminent threat, they may be exempt from this ban and their claims to asylum will be considered. The attorney general may limit this exemption.
- Expansion of the Attorney General’s Referral and Review Power—The Justice Department has indicated it intends to significantly expand the attorney general’s referral and review power.<sup>429</sup> Currently, the attorney general can only review cases that have been decided by the BIA. The Justice Department intends 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>430</sup>
- Increased Immigration Consequences for Foreign Nationals with Convictions—On November 21, 2019, Barr referred the case *Matter of Onesta Reyes* to himself to decide when certain state court convictions rise to the level of aggravated felonies for immigration purposes, thus barring convicted foreign nationals from certain immigration benefits and increasing the likelihood that they will be deported.<sup>431</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.<sup>432</sup> The BIA decisions in *Matter of A-M-R-C-* were issued in 2006.<sup>433</sup>

## 5 Humanitarian Flows

The president and administration officials have frequently characterized humanitarian migrants—people requesting asylum, refugees, Temporary Protected Status (TPS) holders, and noncitizen victims of crime for whom special visas are reserved—as a burden on the country’s economy, public safety, and social welfare

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

428 *Matter of Daniel Girmai Negusie*, 27 I&N Dec. 481 (Attorney General, October 18, 2018).

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

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

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

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

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

system.<sup>434</sup> The administration has therefore worked to narrow the pathways for people to come to or stay in the United States for humanitarian reasons.

The administration has largely dismantled the U.S. asylum system—most significantly at the U.S.-Mexico border, but with implications for asylum seekers throughout the country as well. A series of policies targeted

*The administration has largely dismantled the U.S. asylum system—most significantly at the U.S.-Mexico border.*

at different populations has made almost all migrants crossing the border illegally or arriving without proper documents, including those seeking protection, ineligible for asylum and/or subject to quick removal.<sup>435</sup> Legal decisions by the attorney general since 2018 have narrowed the grounds on which a migrant can qualify for asylum. A new regulation would make those with pending applications wait longer to receive work authorization. And proposed regulations would impose a fee

to file an asylum application and would require adjudicators to consider illegal entry a “significantly adverse” factor in deciding whether to grant someone asylum.

The administration has also reduced refugee resettlement. It has set the lowest annual refugee admission ceilings of any administration (50,000 in FY 2017, 45,000 in FY 2018, 30,000 in FY 2019, and 18,000 in FY 2020), and admitted the fewest refugees in a single year of any year since the modern U.S. refugee resettlement program began in 1980—22,000 in FY 2018.<sup>436</sup> While the administration justified its low FY 2020 ceiling by pointing to the rising number of asylum claims it had to adjudicate, its narrowing of the population of migrants who qualify for an asylum hearing arguably moots that justification.

Beyond asylum and refugee resettlement, the administration has narrowed other humanitarian pathways. It has, for example, changed the standards abused or neglected children and young adults must meet to receive Special Immigrant Juvenile status, and it terminated TPS for 98 percent of beneficiaries.<sup>437</sup>

## A. Refugees

Since 1980, the United States has consistently led the world in resettling the most refugees. That changed in calendar year 2018, when Canada, for the first time, surpassed the United States and became the top resettlement country, admitting 28,000 refugees that year in comparison to the United States’ 23,000.<sup>438</sup> Not only has the United States set lower admissions ceilings under the Trump administration, increased

<sup>434</sup> See, for example, speech by Donald Trump, President of the United States, *Remarks by President Trump on Modernizing Our Immigration System for a Stronger America*, Washington, DC, May 16, 2019. (“Unfortunately, legitimate asylum seekers are being displaced by those lodging frivolous claims—these are frivolous claims—to gain admission into our country. Asylum abuse also strains our public school systems, our hospitals, and local shelters, using funds that we should, and that have to, go to elderly veterans, at-risk youth, Americans in poverty, and those in genuine need of protection. We’re using the funds that should be going to them.”)

<sup>435</sup> Chishti and Bolter, “Interlocking Set of Trump Administration Policies.”

<sup>436</sup> MPI Data Hub, “U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present,” accessed March 5, 2020.

<sup>437</sup> MPI analysis of data from Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2018), 5.

<sup>438</sup> Jynnah Radford and Phillip Connor, “Canada Now Leads the World in Refugee Resettlement, Surpassing the U.S.,” Pew Research Center, June 19, 2019.

vetting measures have lengthened the resettlement process, resulting in fewer refugee admissions. The Trump administration has also shifted the profile of refugees it is prioritizing for resettlement. Compared to FY 2016, when the largest share of refugees were Muslim and the top region of origin was the Middle East, refugees admitted in FY 2019 were more likely to be Christian and from Africa.<sup>439</sup>

In 2019, the administration tried to give states an opportunity to opt out of refugee resettlement. But even before the policy was blocked in court, 42 states—with both Republican and Democratic governors—opted in to the program.<sup>440</sup> However, the onset of the coronavirus pandemic in early 2020 slowed resettlement to a trickle: since March 19, 2020, when the International Organization for Migration and the United Nations High Commissioner for Refugees (UNHCR) announced the suspension of refugee travel, through June 15, 2020, just 281 refugees arrived in the United States.<sup>441</sup> Though refugee resettlement continues across the country, the decreased arrival numbers and the associated reduction in funding have handicapped resettlement agencies and damaged the infrastructure that in the past allowed the United States to be the world leader in resettlement, with potential effects on the system for years to come.

- ▶ **Refugee Ban—June 26–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>442</sup>
  - **Increased Vetting for Refugees—October 23, 2017**—The administration announced new vetting requirements for refugees before they can be resettled to the United States. It also deprioritized 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 risks.<sup>443</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>444</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

439 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).

440 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.

441 U.S. State Department Refugee Processing Center, “Map - Arrivals by State and Nationality,” accessed June 22, 2020.

442 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.

443 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.

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

program for minors in El Salvador, Guatemala, and Honduras.<sup>445</sup> On November 9, 2017, the State Department stopped accepting new applications for the refugee side of the program.<sup>446</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>447</sup>
- ▶ **Increased Data Sharing with the UN Refugee Agency**—*January 9, 2019*—DHS signed a memorandum of understanding with UNHCR to expand the biometric and biographic data UNHCR shares with DHS.<sup>448</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>449</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>450</sup>
  - *January 15, 2020*—A federal district judge temporarily enjoined the executive order, meaning that refugees can be resettled even in states and localities that have not opted in.<sup>451</sup>
- ▶ **Admitting Refugees by Category**—*November 29, 2019*—In setting the refugee admissions ceiling at 18,000 for FY 2020, the lowest ceiling to date, the president also changed the way in which admissions are allocated. In contrast to past years, when admissions were allocated by refugees' region of origin, the president determined that the 18,000 admissions should be split among the following categories:
  - 5,000 would be of refugees fleeing religious persecution, certain former Soviet and Indochinese nationals, and Iranian religious minorities;
  - 4,000 would be of Iraqis who assisted the U.S. armed forces;
  - 1,500 would be of Guatemalans, Hondurans, and Salvadorans; and

445 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).

446 USCIS, "Central American Minors (CAM): Information for Parole Applicants," updated June 18, 2019.

447 *S.A. v. Donald J. Trump*, No. 18-cv-03539-LB (U.S. District Court Northern District of California, March 1, 2019).

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

449 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.

450 Chishti and Pierce, "Despite Trump Invitation to Stop Taking Refugees."

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

- 7,500 would be of other refugees, including those referred by a U.S. embassy, family unification refugees, those already cleared by the refugee admissions program by September 2019, and those currently in Australia, Nauru, or Papua New Guinea who are included in a refugee transfer arrangement between the United States and Australia.<sup>452</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>453</sup> The order states that due to this finding, refugee slots within the FY 2020 ceiling may be reallocated to residents of Hong Kong.
- ▶ **Historic Reductions in Refugee Admissions—ongoing**—In addition to suspending refugee admissions from June 26 to October 24, 2017, the administration in FY 2019 and FY 2020 set two of the lowest annual refugee ceilings, and annual admissions of refugees have hit record low numbers.
  - FY 2017: 50,000 ceiling (lowered from 110,00 after Trump entered office), 53,716 actual admissions<sup>454</sup>
  - FY 2018: 45,000 ceiling, 22,491 actual admissions<sup>455</sup>
  - FY 2019: 30,000 ceiling,<sup>456</sup> 30,000 actual admissions<sup>457</sup>
  - FY 2020: 18,000 ceiling,<sup>458</sup> 7,754 admissions in first nine months of fiscal year<sup>459</sup>

USCIS has 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>460</sup> By February 2019, USCIS reported that “nearly all” refugee officers were returned to processing refugee applications.<sup>461</sup>

- ▶ **Closures of Refugee Resettlement Offices—ongoing**—As of April 2019, at least 51 of 325 refugee resettlement affiliates (the organizations that support refugees after arrival) had closed since the start of the Trump administration, and 41 others had temporarily stopped offering services.<sup>462</sup> It is unclear whether they closed due to a December 2017 State Department decision to eliminate affiliates that

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

453 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.

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

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

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

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

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

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

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

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

462 Refugee Council USA, *Where Are the Refugees? Drastic Cuts to Refugee Resettlement Harming Refugees, Communities, and American Leadership* (Washington, DC: Refugee Council USA, 2019), 19–20.

resettled fewer than 100 refugees annually<sup>463</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).

## **B. Asylum Seekers**

One of the main immigration challenges the Trump administration has attempted to address has been the lengthy case backlog in the U.S. asylum system. The backlog started to become unmanageable in FY 2010, then the number of asylum claims filed in immigration courts rocketed from 82,000 in FY 2016 to 159,000 in FY 2018.<sup>464</sup> The years-long adjudication backlog that resulted from increased cases filed in an under-resourced system offered some migrants with a low likelihood of ultimately receiving asylum a way to stay in the country temporarily—and legally—while their cases inched forward.

But instead of reforming the asylum system in a way that delivers timely and fair decisions to those with and without valid claims, the Trump administration has used blunt policy tools that cut off access for entire populations seeking safety in the United States. At the southwest border, these tools include metering (the practice of allowing a limited number of asylum seekers to present themselves daily at ports of entry), the Migrant Protection Protocols (MPP, otherwise known as “Remain in Mexico”), a ban on asylum eligibility for migrants who have failed to seek asylum and receive an official rejection in a transit country, agreements with Central American governments to return asylum seekers to countries in the region to request protection there (Asylum Cooperation Agreements), and programs to speed up the adjudication of asylum and other humanitarian protection cases (Prompt Asylum Case Review and Humanitarian Asylum Review Process). These programs and policies together have deterred some migrants from seeking protections in the United States and made successful case outcomes significantly more elusive.<sup>465</sup> In December 2019, of those who attempted to seek asylum at the U.S.-Mexico border, only 45 percent passed the initial screening interview, compared to 82 percent in May of the same year.<sup>466</sup>

In the face of the COVID-19 pandemic, the administration further cut off access to asylum at the U.S.-Mexico border with a CDC order allowing almost all migrants crossing illegally or without valid documents to be immediately expelled to Mexico or their countries of origin, without regard to whether they fear persecution at home.<sup>467</sup> The only fear-based protection claims allowed are those based on fear of torture, a higher standard than fear of persecution. While many countries have blocked asylum claims at their borders during the pandemic,<sup>468</sup> the CDC order is in effect until the CDC director determines that processing unauthorized migrants is not a risk to public health<sup>469</sup>—a period not tied to any public-health metrics. (For more on pandemic-related policies affecting the asylum system, see Section 2.B.)

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

464 Nadwa Mossad, “Refugees and Asylees: 2018” (annual flow report, DHS, Washington, DC, October 2019).

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

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

467 CDC and HHS, “Notice of Order under Sections 362 and 365 of the Public Health Service Act.”

468 António Guterres, “The COVID-19 Crisis Is an Opportunity to Reimagine Human Mobility,” United Nations, June 3, 2020.

469 CDC and HHS, “Amendment and Extension of Order under Sections 362 and 365 of the Public Health Service Act.”

## Narrowing Asylum Eligibility

The Trump administration has narrowed the populations that are eligible for asylum, making some migrants ineligible due to the way they traveled to the United States and barring asylum grants based on several common grounds for seeking protection.

- ▶ **Limits on Asylum for Victims of Private Violence**—*June 11, 2018*—In *Matter of A-B-*, Attorney General Sessions limited the ability of victims of domestic or gang violence to qualify for asylum.<sup>470</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>471</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>472</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 the country and who enters anyway ineligible for asylum.<sup>473</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>474</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>475</sup> In a separate case, a federal district judge in Washington, DC, ruled on August 2, 2019, that the rule violates federal law.<sup>476</sup> The administration has appealed.
  - Proclamations Barring Entry of Foreign Nationals Who Cross the Border Illegally—*November 15, 2018; February 12 and May 13, 2019*—The president has issued three proclamations barring entry for anyone who crosses the southern border illegally,<sup>477</sup> the third of which is set to expire 90 days after the administration obtains relief from all injunctions blocking the rule’s implementation. Because the injunction is still in place, the proclamation has thus far had no effect.
- ▶ **Transit-Country Asylum Ban**—*July 16, 2019*—The administration issued a 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

470 *Matter of A-B-*.

471 *Grace v. Matthew G. Whitaker*.

472 *Grace v. William P. Barr*.

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

474 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.

475 *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).

476 *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).

477 White House, “Presidential Proclamation 9822 of November 9, 2018”; 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.

they had not already applied for asylum and been rejected in that country, and if they arrived on July 16, 2019, or later.<sup>478</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 protections 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 proceeds.<sup>479</sup> A different federal district court blocked the policy in June 2020, and immigration officers subsequently stopped applying the ban.<sup>480</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>481</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-*, 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>482</sup>
- ▶ **Asylum Cooperation 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>483</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.

478 EOIR and USCIS, "Asylum Eligibility and Procedural Modifications."

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

480 *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.

481 *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 issued November 19, 2019). The 9th 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 issued March 5, 2020).

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

483 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 cooperation 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.

- **Guatemala Agreement Implemented**—November 20, 2019—The agreement with Guatemala is the only one to be implemented as of July 2020, though Guatemala suspended the agreement on March 17, 2020, due to COVID-19 transmission concerns.<sup>484</sup> By March 16, more than 900 Salvadoran and Honduran asylum seekers had been sent to that country, with few choosing to pursue asylum there.<sup>485</sup> Initially, only single adults from El Salvador and Honduras were subject to the agreement, but it was expanded to include families and could be expanded in the future to include Mexicans.<sup>486</sup>

## Speeding Up Asylum Processes

The administration has put into effect several measures to cut the time it takes to adjudicate asylum claims.

- ▶ **Limits on Asylum Hearings**—March 5, 2018—In *Matter of E-F-H-L*, Sessions overruled a case that held asylum and withholding-of-removal applicants are entitled to full evidentiary hearings.<sup>487</sup>
- ▶ **Humanitarian Asylum Review Process**—October 2019—HARP is a pilot program operating in El Paso, TX, as of February 2020, that aims to quickly remove Mexicans who do not pass their initial asylum screenings.<sup>488</sup> While other deterrent measures, such as MPP and the transit-country asylum ban, cannot be applied to Mexicans, HARP targets this population.
- ▶ **Prompt Asylum Case Review (PACR)**—October 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>489</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.
- ▶ **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>490</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>491</sup> In contrast, 21 percent were assigned to the border in FY 2020.

484 Camila DeChalus, "Guatemala Suspends US Flights Carrying Asylum-Seekers," CQ Roll Call, March 17, 2020.

485 Rachel Schmidtke, Yael Schacher, and Ariana Sawyer, *Deportation with a Layover: Failure of Protection under the U.S.-Guatemala Asylum Cooperative Agreement* (Washington, DC: Refugees International and Human Rights Watch, 2020).

486 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.

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

488 Aleaziz, "The Trump Administration Launched a Secretive Program." By late February 2020, about 1,250 migrants had been processed through the Humanitarian Asylum Review Process (HARP). See Alfredo Corchado, "Most Mexicans Seeking Asylum Have Seemingly Vanished in This Border City," *Dallas Morning News*, March 14, 2020.

489 *Las Americas Immigrant Advocacy Center v. Chad Wolf*.

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

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

- ▶ **Steps to Reduce the Affirmative Asylum Backlog**—*ongoing*—At the beginning of the Trump administration, the backlog of affirmative asylum cases (those of individuals who present themselves to USCIS to request asylum, rather than doing so defensively in court during a removal proceeding) was 233,389.<sup>492</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 has enacted strategies to reduce the backlog and inflow of affirmative asylum applications. At the end of FY 2019, the backlog was 340,000, though the rate of monthly increase had slowed dramatically since FY 2016.<sup>493</sup>
  - **Interview Waiver Pilot Program**—*Late 2017–August 2018*—USCIS conducted a pilot program offering certain asylum applicants (those who likely filed their applications to trigger removal proceedings) the opportunity to waive their asylum interviews and be directly placed into removal proceedings.<sup>494</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 in the second, 27 percent were accepted.<sup>495</sup> USCIS is not running further pilots but is allowing 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 non-meritorious claims, USCIS started scheduling asylum interviews for recent applicants ahead of older filings.<sup>496</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>497</sup>
  - **Allowing Applicants to Request Placement in Removal Proceedings**—*June 28, 2018*—USCIS now allows 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>498</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.

## Changes to Credible-Fear Interviews

Changes to the initial asylum screening, the credible-fear interview, have both limited the population eligible for asylum and expedited the process.

492 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).

493 USCIS, “Asylum Office Workload September 2019,” accessed June 24, 2020.

494 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).

495 USCIS, “Agenda” (Asylum Division Quarterly Stakeholder Meeting, USCIS, May 20, 2019).

496 USCIS, “USCIS to Take Action to Address Asylum Backlog” (news release, January 31, 2018).

497 USCIS Ombudsman, *Annual Report 2020*, 48.

498 USCIS, “Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens” (policy memorandum, USCIS, Washington, DC, June 28, 2018).

- ▶ **Raised Standards for Credible-Fear Interviews**—*February 2017 and April 2019*—USCIS has 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>499</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>500</sup>
- ▶ **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, supplementing the USCIS asylum officers who usually conduct these interviews.<sup>501</sup> As of February 2020, 75 Border Patrol agents and 16 CBP officers were conducting interviews.<sup>502</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>503</sup> CBP agents and officers have approved a smaller proportion of claims than asylum officers: from May 2019 through May 2020, CBP employees approved 37 percent of credible-fear interviews, while asylum officers approved 64 percent.<sup>504</sup>
- ▶ **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>505</sup> USCIS also directed asylum officers not to grant extensions of this period, except in extraordinary circumstances.

499 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.

500 USCIS, “Lesson Plan Overview” (lesson plan, USCIS, Washington, DC, April 30, 2019); Catholic Legal Immigration Network, Inc. (CLINIC) and AILA, “Credible Fear Lesson Plans Comparison Chart: 2006 -> 2014 -> 2017 -> 2019” (chart, CLINIC and AILA, Washington, DC, May 30, 2019).

501 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.

502 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.

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

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

505 *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).

- *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>506</sup>

## Deterrents to Applying for Asylum

Measures that cut off access to the United States for asylum seekers have often been implemented with the aim of discouraging future migrants from making the journey and claiming asylum.

- ▶ **Metering**—*May 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>507</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 has not released an official statement about the effects of this practice, or even where it is being implemented, researchers estimated that more than 21,000 migrants had been subject to metering in 11 Mexican border cities as of November 2019; however, at its height in August 2019, some researchers estimated that 26,000 were waiting.<sup>508</sup> By November, wait times ranged from one day to six months, depending on the migrant’s location and nationality (Mexican or non-Mexican).<sup>509</sup> 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, calling into question the capacity limitations that CBP claimed necessitated metering.<sup>510</sup> However, CBP maintains that its capacity issues involve staffing as well as physical space constraints.
  - *September 26, 2019*—The DHS Inspector General found that migrants subject to metering at the Tecate Port of Entry in the San Diego sector, unlike at other ports, were not allowed to enter once space opened up in the port; instead, they were told to travel to other ports.<sup>511</sup>
- ▶ **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 protection, to wait in Mexico for the duration of their immigration court proceedings. (For more on MPP, see Section 3.A.)
- ▶ **Reducing Likelihood of Receiving Work Authorization**—*June 2020*—Two final rules published in June 2020 and set to go into effect in August 2020 will make it more difficult for asylum seekers to receive authorization to work while their applications are pending.

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

507 Dara Lind, “The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam is Breaking,” Vox, November 28, 2018; Stephanie Leutert et al., *Asylum Processing and Waitlists at the U.S.-Mexico Border* (Austin, TX: University of Texas at Austin, Robert Strauss Center for International Security and Law, 2018), 3.

508 See, for example, Leutert et al., *Asylum Processing and Waitlists*; Robert Strauss Center for International Security and Law and the Center for U.S.-Mexican Studies, *Metering Update: November 2019* (Austin, TX: University of Texas at Austin, 2019), 1.

509 Robert Strauss Center and the Center for U.S.-Mexican Studies, *Metering Update*, 5–14.

510 Elliot Spagat, “Holding-Cell Stats Raise Questions about Trump Asylum Policy,” Associated Press, February 13, 2020.

511 DHS OIG, *Investigation of Alleged Violations of Immigration Laws at the Tecate, California, Port of Entry by U.S. Customs and Border Protection Personnel* (Washington, DC: DHS, 2019).

- *June 22, 2020*—The first rule, effective August 21, 2020, eliminates a requirement that the government either approve or deny asylum seekers' work authorization applications within 30 days of filing.<sup>512</sup>
- *June 26, 2020*—The second rule, effective August 25, 2020, 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>513</sup> Currently, they can apply when an asylum application has been pending for 150 days. The rule will also make ineligible for work authorization most asylum seekers who entered the country illegally, and require asylum seekers to submit biometric information—and pay the \$85 biometrics fee—when applying for work authorization.
- ▶ **Detention of Arriving Families, Children, and Asylum Seekers**—*ongoing*—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 has 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 is still prevented from doing so under current laws. It has 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>514</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>515</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>516</sup> In July 2019, a U.S. district judge in Washington State enjoined this decision.<sup>517</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

512 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.

513 DHS, "Asylum Application, Interview, and Employment Authorization for Applicants," *Federal Register* 85, no. 124 (June 26, 2020): 38532–628.

514 *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).

515 *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).

516 *Matter of M-S-*, 27 I&N Dec. 509 (Attorney General, April 16, 2019).

517 *Yolany Padilla v. U.S. Immigration and Customs Enforcement*.

of the pull factors that had drawn migrants to travel as families.<sup>518</sup> The rule also loosened the standards for detention of unaccompanied child migrants. The rule was blocked in court before going into effect.<sup>519</sup>

- *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>520</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>521</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>522</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>523</sup>

## Upcoming

- ▶ **Changes to Asylum Adjudications**—On April 29, 2019, the president issued a memorandum proposing a series of changes to asylum adjudications.<sup>524</sup> As of July 2020, almost all the proposed changes were in effect or in progress, with the exception of eliminating asylum seekers' ability to apply for work authorization.
- ▶ **Affirmative Asylum Fee**—A proposed rule published November 14, 2019, that largely focused on routine fee increases for immigration benefits would also impose a \$50 fee on affirmative asylum applicants.<sup>525</sup> The United States has never before charged a fee for asylum applications, and it would join only three other countries in the world that do so.<sup>526</sup>
- ▶ **Expanded Criminal Bars to Asylum**—A proposed rule published December 19, 2019, would make ineligible for asylum foreign nationals with various criminal convictions, including driving under

518 ICE, CBP, and ORR, "Apprehension, Processing, Care, and Custody of Alien Minors."

519 *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).

520 DHS, "Acting Secretary McAleenan Announces End to Widespread Catch and Release" (press release, September 23, 2019).

521 *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).

522 Camilo Montoya-Galvez, "ICE Asked Migrant Parents Whether They Wished to Be Separated from Their Children, Agency Tells Court," CBS News, May 17, 2020.

523 *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).

524 Memorandum from the president, *Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System*, April 29, 2019.

525 USCIS, "U.S. Citizenship and Immigration Services Fee Schedule."

526 Those countries are Australia, Fiji, and Iran.

the influence, illegally re-entering the country, and any felony.<sup>527</sup> If the rule goes into effect, it would dramatically expand 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>528</sup> The comment period ended January 21, 2020; a final rule has yet to be published.

- ▶ **Changes to Asylum Process and Eligibility for Humanitarian Protection**—On June 15, 2020, EOIR and USCIS published a proposed rule that would make a number of changes to humanitarian protection in the United States.<sup>529</sup> It would raise the standards applicants would have to meet during their credible-fear screenings in order to be considered for withholding of removal or protections under the Convention against Torture. If they triggered a mandatory bar to asylum, applicants would be disqualified from seeking asylum at the credible-fear stage, rather than later in the process. The proposed rule would create fast-track asylum-only proceedings, in which asylum applicants would have their protection claims heard but could not apply for any other forms of immigration relief. 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 which would make more people ineligible for asylum in the United States. The comment period ended July 15, 2020; a final rule has yet to be published.
- ▶ **Expanded “Danger to Security” Bar to Asylum and Withholding of Removal**—USCIS and EOIR proposed a rule on July 9, 2020, that would bar from eligibility for asylum and withholding of removal migrants 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>530</sup> Such migrants would still have the opportunity to apply for protections under the Convention Against Torture, but the proposed rule would also allow DHS to remove people applying for such protections to third countries to pursue relief there. The comment period ends August 10, 2020.

## 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 has expressed the view that this practice encourages minors to attempt to cross the border without authorization,<sup>531</sup> and in the absence of congressional will

527 EOIR and USCIS, “Procedures for Asylum and Bars to Asylum Eligibility,” *Federal Register* 84, no. 244 (December 19, 2019): 69640–61.

528 USCIS, “Asylum Bars,” updated April 1, 2011.

529 EOIR and USCIS, “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review,” *Federal Register* 85, no. 115 (June 15, 2020): 36264–306.

530 USCIS and EOIR, “Security Bars and Processing,” *Federal Register* 85, no. 132 (July 9, 2020): 41201–19.

531 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.”

to change the statutory requirements, federal agencies have tried to work within existing statutes to ensure that fewer can be released. These efforts have 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, as well as using information shared by those who come forward to sponsor an unaccompanied child as a potential trigger for immigration enforcement. (While Congress has passed little legislation relating to immigration, it did include a provision in the FY 2019 and FY 2020 appropriations bills that prohibits the latter practice.) The administration has also made it more difficult to obtain one of the most common forms of immigration relief sought by unaccompanied children—Special Immigrant Juvenile status.

## Treatment in Government Custody

The administration has tried to hold more children in government custody, while also attempting to loosen detention standards for these children.

- ▶ **Increased Number of Unaccompanied Children in Staff Secure Facilities**—*August 16, 2017*—ORR, the entity within HHS that cares for unaccompanied children, now places all children with any gang-related history in staff secure detention, whether or not they have ever been arrested or charged with a crime.<sup>532</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 remains in place.<sup>533</sup>
  - *June 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>534</sup> This policy was preliminarily enjoined in June 2018, and the injunction remains in place.<sup>535</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 minors, including ICE running potential sponsors’ information through its database to check their immigration status.<sup>536</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>537</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>538</sup>

532 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.

533 *Ilsa Saravia v. Jefferson B. Sessions*, No. 3:17-cv-03615-VC (U.S. District Court Northern District of California, November 20, 2017).

534 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.

535 *L.V.M. v. Scott Lloyd*, No. 18-cv-01453 (U.S. District Court for the Southern District of New York, June 27, 2018).

536 ORR, ICE, and CBP, “Memorandum of Agreement Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters,” April 13, 2018.

537 DHS, “Privacy Act of 1974; System of Records,” *Federal Register* 83, no. 89 (May 8, 2018): 20844–50.

538 Tal Kopan, “ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children,” *San Francisco Chronicle*, December 10, 2018.

- *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>539</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>540</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>541</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>542</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 requires fingerprints for grandparents or adult siblings acting as potential sponsors of unaccompanied children.<sup>543</sup>
- **Changes to Detention Standards**—*August 23, 2019*—The administration issued a final regulation, effective October 22, 2019, that expands family detention (see Section 5.B.). The regulation also affected conditions for unaccompanied minors in government custody.<sup>544</sup> For example, with a general focus on expediency and operational welfare, the regulation expands 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>545</sup>

539 Robert Moore, “Thousands of Migrant Children Could Be Released with Trump’s Major Policy Reversal,” *Texas Monthly*, December 18, 2018.

540 *Consolidated Appropriations Act, 2019*.

541 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.

542 Kristina Cooke, “Trump Administration Moves to Release Migrant Children Faster From U.S. Custody,” Reuters, June 10, 2019.

543 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.

544 ICE, CBP, and ORR, “Apprehension, Processing, Care, and Custody of Alien Minors.”

545 *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).

- ▶ **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>546</sup>

## Access to Immigration Relief

The Trump administration has tried to limit the population of unaccompanied children who are eligible for immigration relief.

- ▶ **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 should 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>547</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>548</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>549</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>550</sup> Previous policy guidance had instructed asylum officers to adopt prior determinations made by CBP or ICE.<sup>551</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>552</sup>

<sup>546</sup> Hamed Aleaziz, "ICE Is Now Fingerprinting Immigrants as Young as 14 Years Old," BuzzFeed News, February 6, 2020.

<sup>547</sup> 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.

<sup>548</sup> 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.

<sup>549</sup> Memorandum from MaryBeth Keller, *Operating Policies and Procedures Memorandum 17-03: Guidelines for Immigration Court Cases Involving Juveniles*.

<sup>550</sup> 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.

<sup>551</sup> 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.

<sup>552</sup> *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).

- *Upcoming*—A proposed regulation published jointly by DHS and HHS would obligate officers in both agencies to assess whether or not a minor continues to merit the designation each time they interact with the minor’s case.<sup>553</sup> The comment period on the proposed rule ended on November 6, 2018; a final rule has yet to be published.
- ▶ **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 when applicants are age 18 or older, despite being eligible until they are 21, due to discrepancies between state and federal laws.<sup>554</sup> The status is available to children who were abused, neglected, or abandoned by one or both parents. In April 2018, a USCIS spokesman said that roughly 260 cases had been denied based on February USCIS guidance, which was not made public.<sup>555</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>556</sup> In December 2019, the lawsuit concluded with a settlement, wherein USCIS agreed to no longer apply this policy in California.<sup>557</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>558</sup>
  - *October 15, 2019*—USCIS stopped applying this policy nationwide.<sup>559</sup> By this time, the SIJ status denial rate had already started to decrease.<sup>560</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>561</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

553 ICE, CBP, and ORR, “Apprehension, Processing, Care, and Custody of Alien Minors.”

554 Austin Rose, “For Vulnerable Immigrant Children, a Longstanding Path to Protection Narrows,” *Migration Information Source*, July 25, 2018.

555 Ted Hesson, “Travel Ban at SCOTUS,” *Politico*, April 25, 2018.

556 *J.L. v. Cissna*, No. 5:18-cv-04914 (U.S. District Court for the Northern District of California, October 24, 2018).

557 *J.L. v. Cissna*, 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).

558 *R.F.M. v. Nielsen*, No. 1:18-cv-05068 (U.S. District Court for the Southern District of New York, April 8, 2019).

559 USCIS, “USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection” (press release, October 15, 2019).

560 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,” January 14, 2020.

561 USCIS, “USCIS Clarifies Special Immigrant Juvenile Classification.”

representatives play in the legal proceedings of unaccompanied child migrants.<sup>562</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>563</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>564</sup> According to the Vera Institute of Justice, as of May 24, 2020, 15 courts had expedited dockets for unaccompanied children.<sup>565</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 who are in ORR custody via VTC (see Section 4).<sup>566</sup>
- ▶ **Decreased Access to Counsel**—*unknown date*—ORR stopped transporting children in custody to meetings with their lawyers.<sup>567</sup>
- ▶ **Upcoming**
  - Codification of Heightened Evidentiary Requirement for SIJ Status—USCIS on October 16, 2019, 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>568</sup> The comment period ended November 15, 2019; a final rule has not yet been published.

## 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 has criticized past administrations, both Democratic and Republican, for extending certain TPS designations for such a long time that the benefit no longer

562 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.

563 Alvarez, "Trump Administration Puts Pressure on Completing Deportation Cases of Migrant Children."

564 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.

565 Vera Institute of Justice, "Express Injustice."

566 Kriel, "New Trump Administration Policies."

567 Kriel, "New Trump Administration Policies."

568 USCIS, "Special Immigrant Juvenile Petitions," *Federal Register* 84, no. 200 (October 16, 2019): 55250–51.

seems temporary. As such, the administration has tried to end protections for nationals of seven countries, totaling more than 300,000 people.<sup>569</sup>

- ▶ **End of TPS Designations for Nationals of Six Countries**—September 2017–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>570</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>571</sup> That preliminary injunction remains in place.
  - *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>572</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 remains in place.<sup>573</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>574</sup> This gives 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.
- ▶ **Extension of TPS Designations for Nationals of Four Countries**—March 2018–April 2019—The administration has extended TPS designations for nationals of Syria twice (most recently extended through March 31, 2021),<sup>575</sup> Yemen twice (through September 3, 2021),<sup>576</sup> Somalia twice (through September 17, 2021),<sup>577</sup> and South Sudan (through November 2, 2020).<sup>578</sup>

<sup>569</sup> Wilson, *Temporary Protected Status* (2018), 5.

<sup>570</sup> Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2020), 5.

<sup>571</sup> *Crista Ramos v. Kirstjen Nielsen*, No. 3:18-cv-01554-EMC (U.S. District Court for the Northern District of California, October 3, 2018).

<sup>572</sup> *Keshav Bhattarai v. Kirstjen Nielsen*, No. 3:19-cv-00731-EMC (U.S. District Court for the Northern District of California, March 12, 2019).

<sup>573</sup> *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).

<sup>574</sup> 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.

<sup>575</sup> USCIS, "Extension of the Designation of Syria for Temporary Protected Status," *Federal Register* 84, no. 184 (September 23, 2019): 49751–57.

<sup>576</sup> USCIS, "Extension of the Designation of Yemen for Temporary Protected Status," *Federal Register* 85, no. 41 (March 2, 2020): 12313–19.

<sup>577</sup> USCIS, "Extension of the Designation of Somalia for Temporary Protected Status," *Federal Register* 85, no. 48 (March 11, 2020): 14229–235.

<sup>578</sup> USCIS, "Extension of the Designation of South Sudan for Temporary Protected Status," *Federal Register* 84, no. 66 (April 5, 2019): 13688–94.

- ▶ **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>579</sup> Liberians have 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>580</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>581</sup>
  - *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>582</sup>
- ▶ **Limits on Opportunities for TPS Recipients 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 (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>583</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 have begun denying green-card applications to TPS holders who travel after receiving removal orders from immigration courts and some offices have begun denying green-card applications regardless of whether the TPS holder has a removal order.<sup>584</sup>

## E. *Victims of Trafficking and Other Crimes*

Victims of certain crimes and victims of trafficking who assist with the law enforcement investigations into those crimes can be eligible for U and T nonimmigrant statuses, respectively. The Trump administration has taken several steps that may make it more difficult to obtain certifications from law enforcement agencies confirming that the victim assisted with the investigation. It has also opened the possibility of removing unauthorized immigrants who have pending U visa applications.

579 USCIS, “DED Granted Country – Liberia,” updated April 7, 2020.

580 Memorandum from the President, *Memorandum on Extension of Deferred Enforced Departure for Liberians*, March 28, 2019.

581 USCIS, “Liberian Refugee Immigration Fairness,” updated April 7, 2020.

582 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.

583 USCIS, “Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal” (policy alert, USCIS, Washington, DC, 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).

584 Bennett Savitz, USCIS Committee Update, 2020 AILA Spring CLE Conference, March 6, 2020.

- ▶ **Restricting Department of Labor Certifications for U and T Visas**—*July 1, 2019*—New policy guidance for the 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>585</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, 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>586</sup>
- ▶ **Enforcement Actions against U Visa Applicants**—*ongoing*—Over the course of the administration, ICE has 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>587</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>588</sup> The revised policy leaves that decision entirely to ICE’s discretion.
- ▶ **Upcoming**
  - Work Authorization for U Visa Applicants—USCIS plans to propose a rule that would define “bona fide” U visa applications.<sup>589</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 has been central to the Trump administration’s efforts to increase vetting or all-out ban the arrival of certain groups of foreign nationals.

<sup>585</sup> 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.

<sup>586</sup> 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.

<sup>587</sup> AILA, “AILA/ICE Liaison Meeting Minutes” (unpublished meeting notes, October 26, 2017).

<sup>588</sup> ICE, “Revision of Stay of Removal Request Reviews for U Visa Petitioners” (fact sheet, ICE, August 2, 2019).

<sup>589</sup> USCIS, “Discretionary Employment Authorization for U Nonimmigrants” (proposed rule 1615-AC53, Spring 2020).

*The State Department has been central to the Trump administration's efforts to increase vetting or all-out ban the arrival of certain groups of foreign nationals.*

The State Department leads the implementation of the president's travel bans, including those due to the COVID-19 pandemic (see Section 2) as well as the original 2017 travel ban and its 2020 expansion. The 2017 ban continues to block the entry of certain nationals from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, and the 2020 expansion blocks that of certain nationals from Burma, Eritrea,

Kyrgyzstan, Nigeria, Sudan, and Tanzania. Despite exceptions and waivers built into the bans, they have drastically decreased travel from these countries. For example, immigrant visas issued to would-be U.S. permanent residents from Iran, Libya, Somalia, Syria, and Yemen fell 55 percent between FY 2017 and FY 2019.<sup>590</sup>

The State Department also features prominently in the administration's vetting initiatives, including two aimed at low-income foreign nationals. A presidential proclamation 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 has the potential to block two-thirds of those applying for legal permanent residence from abroad.<sup>591</sup> Currently, the policy is enjoined by a federal district court. In early 2020, the State Department also implemented a public-charge regulation, following USCIS's lead. This builds on January 2018 changes by the State Department to its consular manual to instruct officers to consider a variety of factors about applicants when deciding whether they are likely to use public benefits in the United States. This earlier change greatly increased the number of applicants who received "inadmissible" determinations on public-charge grounds, from 1,076 in FY 2016 to 20,941 in FY 2019, and the 2020 regulation is likely to further intensify this vetting.<sup>592</sup>

- **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 upheld the third iteration of the ban on June 26, 2018.<sup>593</sup> Under this ban, nationals of seven countries (Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen) are prevented from entering the United

590 MPI analysis of data from U.S. Department of State, "Table XIV: Immigrant Visas Issued at Foreign Service Posts (by Foreign State Chargeability) (All Categories) Fiscal Years 2009-2018," accessed July 24, 2020; U.S. Department of State, "IV Issuances by FSC or Place of Birth and Visa Class" (monthly data compiled from October 2018 – September 2019).

591 Julia Gelatt and Mark Greenberg, "Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration" (commentary, MPI, Washington, DC, October 2019).

592 Because of a 2019 change in the State Departments 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.

593 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.

States, to varying degrees.<sup>594</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>595</sup>

→ *February 21, 2020*—The president signed a proclamation adding travel restrictions for six new countries on January 31, 2020.<sup>596</sup> The ban went into effect on February 21, 2020, restricting new permanent immigration from Burma, Eritrea, Kyrgyzstan, and Nigeria and restricting nationals from Sudan and Tanzania from participating in the Diversity Visa Lottery. Nationals of all of the newly designated countries are 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 original travel ban.

► **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>597</sup> The change was implemented in the department's *Foreign Affairs Manual* in July 2017.<sup>598</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>599</sup>

→ *May 14, 2019*—The U.S. embassy in Nigeria announced an immediate indefinite suspension of all interview waivers for those renewing visas.<sup>600</sup> The announcement came less than a month after the president issued a memorandum aimed at curbing overstay from countries with overstay rates higher than 10 percent, according to DHS's *Entry/Exit Overstay Report* for FY 2018 (see more under "Upcoming," later in this section).<sup>601</sup> In that report, DHS described an overstay rate of 14.81 percent for Nigerian nonimmigrants and 18.56 percent for Nigerian nonimmigrant students.

594 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.

595 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.

596 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.

597 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."

598 State Department, "9 Foreign Affairs Manual 403.5: (U) NIV Interview by Consular Officer," updated July 27, 2017.

599 State Department, "9 Foreign Affairs Manual 403.5."

600 U.S. Embassy & Consulate in Nigeria, "Indefinite Suspension of 'Dropbox' Process for Renewals" (news release, May 14, 2019).

601 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).

- ▶ **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>602</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>603</sup>
- ▶ **Changes to the 30-/60-Day Rule**—*September 16, 2017*—For a certain period after a nonimmigrant enters the country, the State Department can declare their application to have included a material misrepresentation if the individual engages in activities inconsistent with the terms of their nonimmigrant status.<sup>604</sup> While previously the period in which this could be done was 30 or 60 days after admission, it has been extended 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>605</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>606</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 DHS’s public-charge litigation.<sup>607</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, through August 31, 2020.<sup>608</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>609</sup> Previously, officers were encouraged to issue visas for the full available validity period, typically ten years.<sup>610</sup> After the

602 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.

603 State Department, “60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants,” *Federal Register* 82, no. 148 (August 3, 2017): 36180–82.

604 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).

605 State Department, “9 Foreign Affairs Manual 302.8–2: (U) Public Charge,” updated January 3, 2018.

606 State Department, “Visas: Ineligibility Based on Public Charge Grounds,” *Federal Register* 84, no. 198 (October 11, 2019): 54996–5015.

607 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).

608 Office of Information and Regulatory Affairs, “View ICR - OIRA Conclusion; OMB Control No: 1405-0234,” accessed February 21, 2020.

609 Memorandum from Secretary of State, *Update to 9 FAM 403.9-4 Validity of Nonimmigrant Visas*, January 26, 2018.

610 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.”)

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 believe there are concerns about the foreign national potentially overstaying the visa.<sup>611</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 is intended to streamline vetting of would-be immigrants and nonimmigrants and to improve the flow of information between various federal agencies.<sup>612</sup> In August 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>613</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, they are now required to do so.<sup>614</sup>
- ▶ **Additional Screenings for Chinese Nationals in Sensitive Fields**—*June 11, 2018*—The State Department now conducts additional screenings of Chinese nationals applying for visas to study or work in certain "sensitive" fields.<sup>615</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>616</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 Secretary of State announced "visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel."<sup>617</sup> Less than a month later, in April 2019, the State Department revoked the visa of

611 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.")

612 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.

613 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).

614 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.

615 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.

616 State Department, "Senior Administration Officials on Visas for Same-Sex Domestic Partners of G-4 and Diplomatic Visa Holders" (news release, October 2, 2018).

617 State Department, "Remarks to the Press" (news release, March 15, 2019).

the ICC's chief prosecutor, Fatou Bensouda.<sup>618</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>619</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>620</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>621</sup>
- ▶ **Visa Restrictions against Individuals Undermining Democracy in Guyana—July 15, 2019**—After a contested national election in the Co-Operative Republic of 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>622</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>623</sup>
- ▶ **Required Proof of Health-Care Coverage—November 3, 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>624</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>625</sup> The same judge later preliminarily enjoined the proclamation, and the injunction remains in place.<sup>626</sup>

618 Marlise Simons and Megan Specia, “U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes,” *The New York Times*, April 5, 2020.

619 State Department, “This Week at State: June 12, 2020” (news release, June 12, 2020).

620 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.

621 State Department, “Visas: Diversity Immigrants,” *Federal Register* 84, no. 108 (June 5, 2019): 25989–91.

622 State Department, “U.S. Department of State Imposes Visa Restrictions on Guyanese Individuals Undermining Democracy” (news release, July 15, 2020).

623 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.

624 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.

625 *John Doe #1 v. Donald Trump*, Case No. 3:19-cv-01743 (U.S. District Court for the District of Oregon, November 2, 2019).

626 *John Doe #1 v. Donald Trump*, Case No. 3:19-cv-01743 (U.S. District Court for the District of Oregon, November 26, 2019). In May 2020, the U.S. Court of Appeals for the 9th Circuit denied a stay of the lower court’s injunction, thus keeping the proclamation enjoined as litigation continues. See *John Doe #1 v. Donald Trump*, Case No. 3:19-cv-01743-SI (U.S. Court of Appeals for the 9th Circuit, May 4, 2020).

- ▶ **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>627</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 against Individuals Undermining Peace in South Sudan**—*December 12, 2019*—Secretary of State Michael Pompeo announced visa restrictions against anyone who undermines or impedes the peace process in South Sudan.<sup>628</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.
- ▶ **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>629</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).
- ▶ **Limits on Visas for Nationals of Recalcitrant Countries**—*ongoing*—Pursuant to the president’s January 25, 2017, executive order on interior enforcement, the State Department and DHS have 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 aim to pressure these countries to accept the return of their nationals when they are subject to removal from the United States. (For more, see Section 3.B.)
- ▶ **Retaliatory Visa Restrictions against Chinese Nationals**—*ongoing*—As tensions flared between China and the United States over the coronavirus 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.)
  - 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>630</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 the Chinese military.<sup>631</sup> The same proclamation encouraged the secretary of state to consider revoking visas of such nationals already in the United States.

627 DHS, “Acting Secretary McAleenan Announces Designation of Poland into the Visa Waiver Program” (news release, November 6, 2019).

628 State Department, “Visa Restrictions on South Sudan Peace Process Spoilers” (news release, December 12, 2019).

629 State Department, “Visas: Temporary Visitors for Business or Pleasure,” *Federal Register* 85, no. 16 (January 24, 2020): 4219–25.

630 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.

631 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.

- 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 who are believed to be responsible for, or complicit in, undermining Hong Kong's autonomy.<sup>632</sup>
  - 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>633</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>634</sup>
- Chinese Technology Companies—July 15, 2020—The secretary of state announced indefinite visa restrictions on “on certain employees of Chinese technology companies that provide material support to regimes engaging in human rights abuses globally.”<sup>635</sup> It includes employees of Huawei Technologies Co., Ltd., a Chinese multinational technology company that has become entangled in several U.S. foreign policy issues.

### ► Upcoming

- Codifying and Narrowing Criteria for Certain Special Immigrant Visas—The State Department published a final regulation in June 2020 that codifies criteria already in the department's practice manual for granting of special immigrant status for certain foreign nationals who have been employed by the U.S. government abroad for at least 15 years.<sup>636</sup> The regulation, which will go into effect on December 16, 2020, excludes criteria that would have previously allowed foreign nationals to qualify, 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.
- Making it More Difficult for J Visa Holders to Stay in the United States—The administration has indicated it intends to publish a regulation that would make it harder for J visa holders (research scholars and other temporary exchange visitors) to stay in the United States.<sup>637</sup> Certain J visa recipients, including those that 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 can currently apply to the State Department to request that this two-year

632 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).

633 White House, “Executive Order 13936.”

634 State Department, “Implementing Visa Restrictions under the Reciprocal Access to Tibet Act” (news release, July 7, 2020).

635 State Department, “U.S. Imposes Visa Restrictions on Certain Employees of Chinese Technology Companies that Abuse Human Rights” (news release, July 15, 2020).

636 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.

637 State Department, “Visas: Two-Year Home-Country Physical Presence Requirement” (proposed rule 1400-AE48, Fall 2017).

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 State Department, DHS, and the Justice Department to initiate steps to reduce the number of nonimmigrants who overstay their permitted time in the United States.<sup>638</sup> The memo drew particular attention to countries that have visitor visa (B-1, B-2) 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>639</sup> CBP plans to request five years of social media information from Visa Waiver Program applicants, among others.
- Bond Requirements for Some Visitors—The State Department indicated that it will launch a pilot program in which consular officers will require certain applicants for temporary visas for business or pleasure (B-1/B-2 visas) to post a bond as a condition of visa issuance, to ensure the foreign nationals will not overstay their period of lawful admission.<sup>640</sup>
- Federal Preemption Governing Au Pairs—The State Department indicated that it will publish a proposed rule clarifying that federal regulations governing the au pair program preempt state and local laws, including those governing labor rights.<sup>641</sup>

## 7 U.S. Citizenship and Immigration Services and U.S. Department of Labor

USCIS is the agency within DHS tasked with immigration benefits adjudication, but under the Trump administration, USCIS has played an increasingly large role in enforcement. This shift is 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>642</sup>

USCIS has drastically increased the rate at which it refers applicants to removal proceedings. In 2018, the agency enacted a policy instructing officers to issue notices to appear (NTAs)—the charging documents that initiate removal proceedings—to more foreign nationals. Even prior to the policy's implementation, NTA issuance by USCIS rose by 53 percent, from 91,711 NTAs in 2017 to 140,246 NTAs in 2018.<sup>643</sup>

638 Memorandum from the president, *Presidential Memorandum on Combating High Nonimmigrant Overstay Rates*.

639 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.

640 State Department, "Visas: Temporary Visitors for Business or Pleasure" (final rule 1400-AE99, Spring 2020).

641 State Department, "Exchange Visitor Program – Au Pair Federal Regulation Preemption of State and Local Law" (proposed rule 1400-AF12, Spring 2020).

642 USCIS, "USCIS Director L. Francis Cissna on New Agency Mission Statement" (news release, February 22, 2018).

643 Mike Guo and Ryan Baugh, *Immigration Enforcement Actions: 2018* (Washington, DC: DHS Office of Immigration Statistics, October 2019).

USCIS and the Labor Department, which participates in the adjudication of certain employment-based petitions, have been responsible for policies orienting the immigration system more towards employment-based immigration. Under Trump, employment-based applicants have endured more scrutiny, including increased interviews and application denials, but they have also been spared some of the measures applied to other groups. For example, more than a year and a half after USCIS implemented its expanded NTA policy for family-based and (later) humanitarian immigrants, it has yet to apply it to employment-based immigrants. And the Labor Department has released several regulations that have modernized and streamlined application processes for certain types of temporary workers.

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*USCIS and the Labor Department ... have been responsible for policies orienting the immigration system more towards employment-based immigration.*

USCIS also plays a central role in implementing a new public-charge rule, which gives adjudicators broad discretion to disproportionately deny green cards to family-based applicants. Under the new standards, immigration officials will look at factors including applicants' age, health, family status, education, skills, assets, and ability to speak English among other criteria when deciding whether they are likely to become a public charge. Using Census data, MPI found that 69 percent of recent green-card recipients had at least one negative factor named in the new rule, 43 percent had at least two, and 17 percent had at least three, suggesting the rule could affect a large share of future applicants.<sup>644</sup> This analysis also showed that the policy will disproportionately exclude women, children, the elderly, and applicants from Mexico and Central America.

USCIS policies already appear to be having a chilling effect on immigration applications. Between 2016 and 2019, applications for green cards before USCIS dropped by 17 percent to the lowest level in half a decade.<sup>645</sup> Over the same time period, applications to initiate the permanent residency process for family members dropped 25 percent for immediate relatives of U.S. citizens and 42 percent for all other family members.<sup>646</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>647</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.

644 Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration* (Washington, DC: MPI, 2018).

645 MPI analysis of data from USCIS, "Number of I-485 Applications," multiple quarters.

646 MPI analysis of data from USCIS, "All USCIS Application and Petition Form Types," multiple quarters, accessed March 10, 2020.

647 DHS, *Privacy Impact Assessment for the Continuous Immigration Vetting* (Washington, DC: DHS, 2019).

- ▶ **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>648</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<sup>649</sup> to, among other things, remove the phrase “nation of immigrants” and add a focus on protecting Americans.
- ▶ **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 holds on to the document for 60 days before destroying it; previously, the agency held on to such documents for one year.<sup>650</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>651</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>652</sup> The move is 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>653</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>654</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 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,

648 Betsy Swan, “Trump Administration Is Set to Add Another Burden on Immigrants,” *The Daily Beast*, December 27, 2017.

649 USCIS, “USCIS Director L. Francis Cissna on New Agency Mission Statement.”

650 USCIS, “Undeliverable Permanent Resident and Employment Authorization Cards and Travel Documents to Be Destroyed after 60 Days” (news release, April 3, 2018).

651 USCIS, “Instructions for Application for Employment Authorization” (guidance document, USCIS, Washington, DC, May 31, 2018). Among the classes of foreign nationals this change affects are applicants for asylum, TPS, DACA, and adjustment of status.

652 Amy Taxin, “APNewsBreak: US Launches Bid to Find Citizenship Cheaters,” *Associated Press*, June 11, 2018. The agency has yet to confirm whether the launch was carried out.

653 DHS Office of the Inspector General, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records* (Washington, DC: USCIS, 2016).

654 USCIS, “Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator’s Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)” (policy memorandum, USCIS, Washington, DC, July 13, 2018).

would become unauthorized.<sup>655</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 has yet to be implemented for employment-based visa applicants.<sup>656</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 terminated prior to taking the oath of allegiance for naturalization.<sup>657</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>658</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>659</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>660</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

655 USCIS, “Updated Guidance for the Referral of Cases and Issuance of NTAs.” Even leading up to the policy’s implementation, NTAs issued by USCIS rose by 53 percent. See Guo and Baugh, *Immigration Enforcement Actions: 2018*.

656 USCIS, “USCIS to Continue Implementing New Policy Memorandum on Notices to Appear” (news release, November 8, 2018).

657 USCIS, “Marriage and Living in Marital Union Requirements for Naturalization” (policy alert, USCIS, Washington, DC, October 12, 2018).

658 USCIS, “Controlled Substance-Related Activity and Good Moral Character Determinations” (policy alert, USCIS, Washington, DC, April 19, 2019).

659 USCIS, “USCIS Public Services” (policy alert, USCIS, Washington, DC, 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.

660 Memorandum from Cheryl Stanton, *Certification of Supplement B Forms of U Nonimmigrant and T Nonimmigrant Visa Applications*; Penn, “Trump Wage Chief Adds Visa Hurdles.”

expanded the list of U visa qualifying crimes that WHD could certify and allowed the division to begin certifying T visa applications.<sup>661</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>662</sup> Where previously denials were automatically certified to the Office of Administrative Appeals, now they will only be certified for cases involving complex legal issues or unique facts.<sup>663</sup>
- ▶ **Closure of International Offices**—*September 2019–August 2020*—USCIS is closing 16 international offices.<sup>664</sup> While originally, USCIS announced it was in preliminary discussions to close all international offices, the agency now plans to 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>665</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 are being consolidated to four military bases and the State Department is taking responsibility for processing certain applications.<sup>666</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 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>667</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>668</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

661 U.S. Department of Labor, “The Department of Labor Expands Its Support of Victims of Human Trafficking and Other Crimes” (fact sheet, U.S. Department of Labor, Washington, DC, n.d.).

662 USCIS, “Updated Guidance for Adjudication of Cuban Adjustment Act Cases” (policy alert, USCIS, Washington, DC, August 13, 2019).

663 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.

664 USCIS, “USCIS Will Adjust International Footprint to Seven Locations” (news release, August 9, 2019).

665 USCIS, “USCIS Will Adjust International Footprint”; Vanessa Romo, “Trump Administration Seeks to Close International Immigration Offices,” NPR, March 12, 2019.

666 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).

667 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.

668 USCIS, “Policy Manual Updates,” accessed January 28, 2019.

services.<sup>669</sup> In October 2019, USCIS eliminated receipt of a means-tested benefit as criteria to prove eligibility for such a waiver.<sup>670</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 remains in place.<sup>671</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>672</sup> Since 2004, USCIS policy provided that such children were in fact “residing in the United States” and thus automatically received citizenship.<sup>673</sup> However, under the new policy these children would have to proactively apply for citizenship. In March 2020, the president signed a bill passed by Congress that reverses this policy change and ensures automatic citizenship for these children.<sup>674</sup>
- ▶ **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>675</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>676</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.”
- ▶ **Rejection of Forms with Blank Responses**—December 31, 2019—For at least two forms, Form I-918 (for U visas for crime victims) and Form I-589 (for asylum or withholding of removal), USCIS added an extra layer of review to its initial intake process.<sup>677</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.

669 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.

670 USCIS, “USCIS Updates Fee Waiver Requirements” (news release, October 25, 2019).

671 *The City of Seattle v. Department of Homeland Security*, No. 3:19-cv-07151 (U.S. District Court for the Northern District of California, San Francisco Division, December 11, 2019).

672 USCIS, “Defining ‘Residence’ in Statutory Provisions Related to Citizenship” (policy alert, USCIS, Washington, DC, August 28, 2019).

673 Letter from Members of Congress to Kenneth T. Cuccinelli, Acting Director, USCIS, September 4, 2019.

674 *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.

675 USCIS, “Implementing the Decisions on Driving under the Influence Convictions on Good Moral Character Determinations and Post-Sentencing Changes” (policy alert, USCIS, Washington, DC, December 10, 2019).

676 USCIS, “Conditional Bar to Good Moral Character for Unlawful Acts” (policy alert, USCIS, Washington, DC, December 13, 2019).

677 Office of Citizenship and Immigration Services Ombudsman, “Ombudsman Alert: Recent Updates to USCIS Form Instructions,” updated January 23, 2020.

- ▶ **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>678</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>679</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 changes of status or extension applications.
- ▶ **Clarified Naturalization Requirements**—*February 26, 2020*—USCIS issued updated policy guidance on one of the requirements for naturalization: continuous U.S. residence.<sup>680</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>681</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>682</sup> BALCA is an administrative body within the Department of Labor which reviews appeals of certain immigration cases within the department's jurisdiction, including the initial certifications for most employment-based green cards.
- ▶ **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

678 USCIS, "Inadmissibility on Public Charge Grounds," *Federal Register* 84, no. 157 (August 14, 2019): 41292–508.

679 *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).

680 USCIS, "Effect of Breaks in Continuity of Residence on Eligibility for Naturalization" (policy alert, USCIS, Washington, DC, February 26, 2020).

681 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.

682 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.

a U.S. citizen.<sup>683</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 U.S. drivers' licenses.

- ▶ **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, and did not follow through with its plan to hire federal employees to take on this work due to budget issues, according to the agency.<sup>684</sup> As of July 22, 2020, there was a backlog of 115,000 documents.<sup>685</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>686</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.
- ▶ **Slowed Adjudications of Immigration Benefits Applications—ongoing—** A mix of changed policies (such as interviewing all employment-based applicants; see Section 7.B.) and new vetting procedures has caused adjudications of immigration benefits applications to slow down significantly.<sup>687</sup>
- ▶ **Streamlining Requests for Case Assistance—ongoing—** USCIS has 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 gives USCIS the discretion to decide whether such an appointment is warranted.<sup>688</sup> USCIS intended to transfer all offices to the new system by the end of September 2019.<sup>689</sup>

683 USCIS, "False Claim to U.S. Citizenship Ground of Inadmissibility and Matter of Zhang" (policy alert, USCIS, Washington, DC, April 24, 2020).

684 Email from DHS to stakeholders, *Ombudsman's Alert: Card Production Delays at USCIS*, July 22, 2020.

685 Geneva Sands, "Green Card Backlog Due to Budget Issues at Immigration Agency," CNN, July 22, 2020.

686 USCIS, "Applying Discretion in USCIS Adjudications" (policy alert, July 15, 2020); USCIS, "Chapter 8 - Discretionary Analysis," updated July 15, 2020.

687 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.

688 USCIS, "USCIS to Expand Information Services Modernization Program to Key Locations" (news release, October 30, 2018).

689 It is unclear whether that transfer is complete. See DHS Citizenship and Immigration Services Ombudsman, *Annual Report 2019* (Washington, DC: DHS, 2019).

- Discontinuation of Service Center E-Mail Boxes for Case-Specific Questions—January 21, 2019—USCIS Service Centers no longer manage email inboxes to address case-specific questions.<sup>690</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>691</sup>
- ▶ **Moving Forms Online**—*ongoing*—USCIS has accelerated the process of transitioning from paper applications to digital forms. During FY 2018 and FY 2019, the administration introduced seven online forms, bringing the total number of online forms to ten.<sup>692</sup> According to USCIS Acting Director Ken Cuccinelli, the agency plans to introduce at least five more digital versions of forms during FY 2020.<sup>693</sup>
- ▶ **Upcoming**
  - Increased Fees—On November 14, 2019, USCIS published a proposed regulation that would increase fees on 39 immigration benefit applications.<sup>694</sup> Some of the fees would increase considerably, including an 83 percent hike to the cost of applying for U.S. citizenship and a new fee for asylum applications, which previously were not subject to fees (see Section 5.B.)<sup>695</sup> The proposed rule would also limit applications eligible for fee waivers and set stricter eligibility standards.
  - Updated Naturalization Test—On July 9, 2019, USCIS announced its plan to update the test applicants must pass to be granted U.S. citizenship.<sup>696</sup> By law, applicants for naturalization must prove their understanding of English and basic knowledge of U.S. history and government. The most recent version of the test was launched in 2009. USCIS has formed a naturalization test working group that will announce an implementation date for the new test in late 2020 or early 2021.

690 USCIS, “[Update on Case Assistance by Service Centers](#)” (news release, December 21, 2018).

691 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*.

692 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.

693 USCIS, “[Cuccinelli Announces USCIS’ FY 2019 Accomplishments and Efforts to Implement President Trump’s Goals](#)” (news release, October 16, 2019).

694 USCIS, “U.S. Citizenship and Immigration Services Fee Schedule.”

695 Jessica Bolter and Doris Meissner, “[USCIS Fee Increase Proposed Rule Could Represent the Latest Step in Reshaping Immigration to the United States](#)” (commentary, MPI, Washington, DC, December 2019).

696 USCIS, “[USCIS Announces Plan to Improve the Naturalization Test](#)” (news release, July 19, 2019); memorandum from L. Francis Cissna, Director of USCIS, to USCIS Associate Directors and Program Office Chiefs, *Revision of the Naturalization Civics Test*, May 3, 2019.

- 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>697</sup> The form revision, among other things, limits the issues considered on appeal.<sup>698</sup>
- Collection of Social Media Information—On February 10, 2020, DHS published a notice on its intention to collect applicants' social media information.<sup>699</sup> USCIS plans to add the request for five years of social media information to eight forms, including applications for naturalization, legal permanent residence, asylum, and refugee status.
- Reforms to Provisional Unlawful Presence Waivers—USCIS plans 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>700</sup>

## A. *Deferred Action for Childhood Arrivals*

On the campaign trail, Trump promised that as president he would “immediately” end the Obama-era program that provides protection and work authorization to unauthorized immigrants who arrive in the country as children, Deferred Action for Childhood Arrivals (DACA).<sup>701</sup> Once in office, the president delayed this decision until pressure from his base and a lawsuit filed by ten states seeking an end to the program forced his hand. The administration announced the rescission of the program on September 5, 2017.

However, the attempt to end DACA was quickly enjoined and ultimately shut down by the Supreme Court. In June 2020, the court ruled that while the administration may have the power to end DACA, DHS's failure to consider, among other things, DACA recipients' reliance on and expectations of continued benefits in its decision was a violation of federal law. As a result, the 644,000 DACA recipients can continue to renew their benefits.<sup>702</sup> A subsequent federal court order required USCIS to consider DACA applications from new applicants.<sup>703</sup> The agency did not do so; instead, the acting secretary of homeland security implemented a new policy in July 2020, instructing USCIS to deny all new applications and to issue renewals for only one year, rather than two.<sup>704</sup>

697 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.

698 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 the Catholic Legal Immigration Network, 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.

699 DHS, “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information.”

700 USCIS, “Revision of Provisional Unlawful Presence Waiver of Inadmissibility” (proposed rule 1615-AC50, Spring 2020).

701 Sarah Pierce, Jessica Bolter, and Andrew Selee, *Trump's First Year on Immigration Policy: Rhetoric vs. Reality* (Washington, DC: MPI, 2018).

702 MPI Data Hub, “Deferred Action for Childhood Arrivals (DACA) Data Tools,” accessed July 15, 2020.

703 *Casa de Maryland v. Department of Homeland Security*, No. PWG-17-2942 (U.S. District Court for the District of Maryland, July 17, 2020).

704 Memorandum from Wolf to Morgan, Albence, and Edlow.

- ▶ **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>705</sup>
- ▶ **Attempt to Rescind DACA**—*September 5, 2017*—The administration announced a staggered end to the DACA program.<sup>706</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.
  - *January 9, 2018*—Three federal district courts blocked the DACA program’s termination.<sup>707</sup> A federal appeals court upheld one of these injunctions.<sup>708</sup> Another federal appeals court overturned a lower court ruling that the rescission was valid, finding the decision illegal.<sup>709</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>710</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>711</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>712</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.

705 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.

706 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.

707 *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).

708 *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).

709 *Casa de Maryland v. Department of Homeland Security*, No. 18-1521 (U.S. Court of Appeals for the Fourth Circuit, May 17, 2019).

710 *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (Supreme Court of the United States, June 18, 2020).

711 *Casa de Maryland v. DHS*, No. PWG-17-2942 (U.S. District Court for the District of Maryland, July 17, 2020).

712 Josh Gerstein, “Judge Faults Trump Administration’s Response to DACA Ruling,” Politico, July 24, 2020.

- July 28, 2020—DHS issued a new policy that once again limits DACA benefits while Acting Secretary Chad Wolf considers whether to fully rescind the program.<sup>713</sup> Under the new policy, all initial applicants are to be denied, as are all applications for advance parole (allowing for international travel) absent extraordinary circumstances. While renewal applications may be approved, grants will allow for only one year of work authorization and protection from deportation, rather than two.
- ▶ **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>714</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 non-U.S. citizens without lawful residency are not eligible for FHA-insured loans.<sup>715</sup>
- ▶ **Reopening DACA Recipients' Removal Cases**—*October 2019*—ICE began to request that immigration courts reopen the removal cases of immigrants currently protected by the DACA program.<sup>716</sup> (For more, see Section 3.B.)

## B. Immigrant Visas

Immigrants, as opposed to nonimmigrants (see the next subsection), are foreign nationals who come to the United States to reside permanently. The number of grants of permanent residence (i.e., green cards) each year is set in statute for most family- and employment-based categories, meaning it would require an act of Congress to change them. However, by increasing the vetting immigration applications undergo, stretching out processing times, and implementing measures that discourage foreign nationals from applying for green cards, the administration may be able to reduce the number of foreign nationals permitted to immigrate.

Under the Trump administration, case processing times have significantly increased for all application types, but especially for immigrants. For example, the processing time for employment-based green-card applications more than doubled between FY 2016 and FY 2020: from 6.8 months to 14 months.<sup>717</sup> Similarly, the processing time for green-card applications for recipients of asylum more than doubled, from 7.3 months in FY 2016 to 15.6 months in FY 2020.

- ▶ **Mandatory Interviews for Employment-Based Visa Applicants**—*October 1, 2017*—USCIS now mandates that all applicants for employment-based permanent residency attend an in-person interview.<sup>718</sup> Previously, face-to-face interviews were only required if there was a specific concern

713 Memorandum from Wolf to Morgan, Albence, and Edlow.

714 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.

715 Letter from U.S. Department of Housing and Urban Development to Representative Pete Aguilar, June 11, 2019.

716 Ortega, "ICE Reopening Long-Closed Deportation Cases against Dreamers."

717 USCIS, "Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year," updated July 2020.

718 USCIS, "USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants" (news release, August 28, 2017).

related to the foreign national's application. 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.

- ▶ **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>719</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>720</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>721</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>722</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>723</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 sponsors of and enforce reimbursement obligations, and to issue guidance on other consequences for sponsors, including limiting their ability to sponsor additional immigrants.<sup>724</sup>

719 USCIS, "Adjustment of Status Interview Guidelines and Waiver Criteria" (policy alert, May 15, 2018).

720 USCIS, "Policy Manual: Chapter 5 – Interview Guidelines," updated January 31, 2020.

721 USCIS, "Revised Interview Waiver Guidance for Form I-751, Petition to Remove Conditions on Residence" (policy memorandum, November 30, 2018).

722 USCIS, "Marriage Involving Minor(s)" (policy alert, USCIS, Washington, DC, February 15, 2019).

723 USCIS, "Marriage Involving Minor(s)" (policy alert, USCIS, Washington, DC, April 12, 2019).

724 Memorandum from the president, *Presidential Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens*, May 23, 2019.

- *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>725</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>726</sup>
- *Upcoming*
  - o In October 2019, USCIS published 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>727</sup>
  - o In December 2019, USCIS published a notice of a proposed 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>728</sup> The new form would allow 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>729</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>730</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.
- ▶ **Slower Processing for EB-5 Applications**—*January 29, 2020*—Due to annual per country limits, there are significant backlogs of EB-5 investor visas for applicants from India, Vietnam, and especially

725 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.

726 Letter from Lizbeth Silbermann, 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.

727 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.

728 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.

729 USCIS, “Sponsor Deeming and Agency Reimbursement - Proposed Screens” (form preview, USCIS, Washington, DC, May 6, 2020).

730 USCIS, “EB-5 Immigrant Investor Program Modernization,” *Federal Register* 84, no. 142 (July 24, 2019): 35750–810.

China.<sup>731</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>732</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>733</sup> The EB-5 program provides permanent residence to a foreign national who invests in a commercial project in the United States that creates at least ten U.S. jobs.
- ▶ **Increased Scrutiny for EB-5 Regional Centers**—*ongoing*—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. As of June 16, 2020, the Trump administration had terminated 476 regional centers.<sup>734</sup> To compare, during the entirety of the Obama administration, 73 regional centers were terminated.
- ▶ **Upcoming**
  - **Slowing the Green-Card Application Process**—USCIS has indicated that it will eliminate the option to concurrently file an immigrant visa petition and an application to adjust to permanent residence status.<sup>735</sup> Right now, green-card applicants who have an immigrant visa immediately available (such as immediate relatives of U.S. citizens) can 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 will 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 will also delay the receipt of these benefits.

## C. Nonimmigrant Visas

In overseeing the nation’s nonimmigrant visa programs, which allow foreign nationals to enter the United States temporarily for specific purposes (e.g., education or work), the administration has focused on protecting the interests of U.S. workers. This effort has centered around the president’s April 2017 executive order, “Buy American and Hire American,” which encouraged agencies to “rigorously enforce” and administer

<sup>731</sup> State Department, “*Visa Bulletin for January 2020*,” *Visa Bulletin X*, no. 37 (December 9, 2019).

<sup>732</sup> USCIS, “*USCIS Adjusts Process for Managing EB-5 Visa Petition Inventory*” (news release, January 29, 2020).

<sup>733</sup> USCIS, “*Clarifying Guidance for Deployment of Capital in Employment-based Fifth Preference (EB-5) Category*” (policy alert, July 24, 2020).

<sup>734</sup> USCIS, “*Regional Center Terminations*,” updated June 16, 2020.

<sup>735</sup> DHS, “*Updating Adjustment of Status Procedures for More Efficient Processing of Immigrant Visa Usage*” (proposed rule 1615–AC22, Fall 2018).

U.S. immigration laws in an effort to create higher wages and employment rates for U.S. workers.<sup>736</sup> As such, USCIS and the Labor Department have increased the scrutiny with which new nonimmigrant applications are processed and intensified efforts to ensure that nonimmigrants already inside the United States are adhering to the terms of their visas.

Much of the increased scrutiny has focused on the H-1B visa, the most popular visa for employers bringing in high skilled labor. H-1B applications overall face 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>737</sup> In its policy changes, the administration has taken particular aim at outsourcing and consulting companies that place their H-1B employees at client sites. In February 2018, USCIS began requiring such employers to provide contracts or itineraries showing that work is available for the entire period of time requested in the H-1B application, a difficult demand in a field that is project based. Consequently, not only did denials increase for top outsourcing and consulting companies, these companies also decreased the number of H-1B applications they file to begin with.<sup>738</sup> On June 17, 2020, USCIS rescinded this policy in order to comply with a legal settlement and lawsuit.<sup>739</sup> However, less than a week later, the president issued a proclamation blocking the entry of several types of temporary workers who were at the time outside of the United States, including those seeking to enter on H-1B visas (see Section 2.A. for this and other visa-related changes amid the pandemic). The proclamation again significantly restricted use of the program, but this time for all types of employers.

- ▶ **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>740</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>741</sup> On March 9, 2018, USCIS leadership sent out internal guidance titled “Additional Guidance Regarding Wage Level Analysis” outlining the approach adjudicators should follow when determining whether the listed wage level is “clearly inconsistent” with the proposed position.<sup>742</sup>
- ▶ **Suspension of Premium Processing**—*April 3–September 18, 2017; April 2, 2018–February 15, 2019; April 1–June 10, 2019; March 20–June 22, 2020*—USCIS receives an influx of applications during the H-1B

736 White House, “Executive Order 13788 of April 18, 2017: Buy American and Hire American,” *Federal Register* 82, no. 76 (April 21, 2017): 18837–39.

737 MPI analysis of data from USCIS, “H-1B Employer Data Hub,” accessed March 10, 2020.

738 National Foundation for American Policy, *H-1B Approved Petitions and Denial Rates for FY 2019* (Arlington, VA: National Foundation for American Policy, February 2020).

739 USCIS, “Rescission of Policy Memoranda” (policy alert, USCIS, Washington, DC, June 17, 2020); Stuart Anderson, “USCIS Rescinds Policy Memos That Increased H-1B Visa Denials,” *Forbes*, June 22, 2020.

740 USCIS, “Rescission of the December 22, 2000 ‘Guidance Memo on H1B Computer Related Positions’” (policy memorandum, March 31, 2017).

741 USCIS, “Rescission of the December 22, 2000 ‘Guidance Memo on H1B Computer Related Positions’”

742 Email from Stephanie Doumani, Branch Chief, Service Center Operations, USCIS, *‘Clearly Inconsistent’ Clarifying Guidance*, March 9, 2018.

cap application period each April. Under the Trump administration, USCIS has suspended premium processing multiple times, focusing on this peak period.<sup>743</sup> During 2020, due to the coronavirus pandemic, this suspension was temporarily extended to other types of applications that qualify for premium processing, such as employment-based immigrant petitions.<sup>744</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. Now, renewals are subject to as much scrutiny as new applications.<sup>745</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>746</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>747</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>748</sup> And in February 2019, the administration announced that the Labor Department will 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

743 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).

744 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.”

745 USCIS, “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status” (policy memorandum, USCIS, Washington, DC, October 23, 2017).

746 USCIS, “TN Nonimmigrant Economists Are Defined by Qualifying Business Activity” (policy memorandum, USCIS, Washington, DC, November 20, 2017).

747 Department of Labor, “U.S. Department of Labor Announces Updates to the H-2B Temporary Labor Certification Program” (guidance document, Department of Labor, Washington, DC, February 26, 2019).

748 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.

at third-party worksites.<sup>749</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>750</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>751</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>752</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.
  - *May 2019*—A federal district court judge issued a preliminary nationwide injunction blocking the policy.<sup>753</sup>
  - *February 2020*—The same judge issued a permanent nationwide injunction, finding the development of the policy violated federal law.<sup>754</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>755</sup>
- ▶ **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

749 USCIS, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" (policy memorandum, USCIS, Washington, DC, February 22, 2018).

750 USCIS, "Rescission of Policy Memoranda"; Anderson, "USCIS Rescinds Policy Memos That Increased H-1B Visa Denials."

751 USCIS, "*Matter of S- Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018)*" (policy memorandum, USCIS, Washington, DC, March 23, 2018).

752 USCIS, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (policy memorandum, USCIS, Washington, DC, August 9, 2018).

753 *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).

754 *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).

755 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 Dornig, President, Department for Professional Employees, AFL-CIO](#), October 16, 2019.

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>756</sup> Because the United States has no other qualifying treaties with Iran, Iranian nationals are no longer eligible for E-1 or 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>757</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>758</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>759</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 21, 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>760</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 has changed how the annual lottery that selects initial H-1B visas works.<sup>761</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. 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>762</sup>

756 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.

757 USCIS, “Satisfying the L-1 1-Year Foreign Employment Requirement; Revisions to Chapter 32.3 of the Adjudicator’s Field Manual (AFM)” (policy memorandum, USCIS, Washington, DC, November 15, 2018).

758 Department of Labor, “Side-by-Side: Major Changes to Labor Condition Application (LCA) ETA Form 9035/9035E” (fact sheet, Department of Labor, Washington, DC, November 2018).

759 AILA, “Practice Alert: Filing Subsequent L-1 Petitions for Canadian Applicants at Ports of Entry” (unpublished practice alert, April 25, 2019).

760 USCIS, “USCIS to Public Revised Form I-539 and New Form I-539A” (news release, February 11, 2019).

761 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.

762 Rani Molla, “New Immigration Rules Could Prevent Our Next Elon Musk,” *Vox*, April 15, 2019.

- ▶ **Improving Recruitment for Guatemalan and Honduran Workers**—*July 30, 2019 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>763</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 Cooperation Agreements (see Section 5.B.).<sup>764</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>765</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>766</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>767</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>768</sup> This prevents thousands of employers from having to file full applications that will never be selected and thus never read.
- ▶ **Increased H-2B Cap**—*ongoing*—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,

763 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).

764 DHS, "DHS Agreements with Guatemala, Honduras, and El Salvador" (fact sheet, DHS, Washington, DC, October 3, 2019).

765 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).

766 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.

767 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.

768 USCIS, "FY 2021 H-1B Cap Petitions May Be Filed as of April 1" (news release, April 1, 2020).

if so, by how much. For FY 2017 and FY 2018, DHS increased the cap by 15,000 visas.<sup>769</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>770</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>771</sup> This was the result of broader negotiations with these three countries over the Asylum Cooperation Agreements (see Section 5.B.). However, due to the COVID-19 pandemic, this increase was never finalized (see Section 2).
- ▶ **Detection and Elimination of Fraud and Abuse of Foreign Workers—ongoing**—Trump’s April 18, 2017, executive order, “Buy American and Hire American,” seeks to protect the economic interests of U.S. workers by, among other things, preventing fraud and abuse within the immigration system.<sup>772</sup> As a result, USCIS and the Labor Department have 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>773</sup> The MOU improves collaboration by establishing a framework that 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>774</sup>

<sup>769</sup> 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.

<sup>770</sup> 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.

<sup>771</sup> Michelle Hackman, “Trump Administration to Make 35,000 Additional Seasonal Worker H-2B Visas Available,” *Wall Street Journal*, March 5, 2020.

<sup>772</sup> White House, “Executive Order 13788.”

<sup>773</sup> Justice Department, Civil Rights Division and USCIS, “Information Sharing and Case Referrals” (memorandum of understanding, May 11, 2018).

<sup>774</sup> 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).

- Targeted Site Visits—ongoing—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>775</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>776</sup>
  - H-1B Visas—April 3, 2017—USCIS began targeting site visits of specific employers in the H-1B program.<sup>777</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.
  - 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>778</sup>
  - 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>779</sup>

## ► Upcoming

- Rescission of Employment Authorization for H-4 Visas—DHS has indicated it will propose a rule to end an Obama-era program that grants work authorization to certain spouses of H-1B visa holders.<sup>780</sup> Currently, 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.
- Major Reforms of the H-1B Visa—DHS has indicated it will propose a regulation that would make a number of changes to the H-1B visa, including redefining “specialty occupation,” redefining “employer-employee relationship,” and adding requirements to ensure that visa holders receive adequate wages.<sup>781</sup>

775 Laura D. Francis, “Trump Immigration Fraud Focus Yields Limited Results (1),” Bloomberg Law, November 6, 2018.

776 DHS, *FY 2020 Budget in Brief* (Washington, DC: DHS, 2019), 59; DHS, *FY 2021 Budget in Brief*, 65.

777 USCIS, “Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse” (news release, April 3, 2017).

778 DHS, *FY 2020 Budget in Brief*, 59.

779 DHS, *FY 2021 Budget in Brief*, 65.

780 DHS, “Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization” (proposed rule 1615-AC15, Fall 2017).

781 DHS, “Strengthening the H-1B Nonimmigrant Visa Classification Program” (proposed rule 1615-AC13, Fall 2018).

- Comprehensive Reforms to Practical Training Programs—DHS has indicated that it will propose a comprehensive regulatory reform to practical training options, including OPT (a temporary employment authorization program offered to foreign students).<sup>782</sup>

## D. Parole

The president has taken aim at programs that allow certain categories of foreign nationals to use a benefit called parole to enter and temporarily stay in the country. Under U.S. immigration law, the government may parole immigrants for urgent humanitarian or significant public benefit reasons. Over time, the government has used this discretionary power to create numerous categorical parole programs, allowing qualifying immigrants to apply with more assurance that parole would be granted.

In his January 25, 2017, executive order on border security, Trump mandated that parole only be used on a case-by-case basis, rather than for predesignated categories of immigrants.<sup>783</sup> Since then, the administration has been conducting a review of all categorical parole programs and announced the termination, or upcoming termination, of multiple programs.<sup>784</sup>

- ▶ **End of Central American Minors (CAM) Refugee and Parole Program**—*August 16 and November 16, 2017*—The administration ended first the parole and later the refugee 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 to depart and return to the United States) if the applicant traveled while the application was pending.<sup>785</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>786</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

<sup>782</sup> See DHS, "Practical Training Reform" (proposed rule 1653-AA76, Spring 2018).

<sup>783</sup> White House, "Executive Order 13767 of January 25, 2017: Border Security and Immigration Enforcement Improvements," *Federal Register* vol. 82, no. 18 (January 30, 2017): 8793–97; memorandum from John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies*.

<sup>784</sup> Among the programs in audit, USCIS has confirmed that 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.

<sup>785</sup> DHS, "Tenacity and Partnership Leads to Change in Advance Parole Processing," updated March 19, 2019.

<sup>786</sup> 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).

status for certain individuals in the CNMI.<sup>787</sup> While USCIS has been working to implement the new law, it has automatically extended the CNMI parole programs.<sup>788</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>789</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>790</sup>
- ▶ **Upcoming**
  - 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>791</sup> The notice and comment period for the proposed regulation ended on June 28, 2018; a final version has yet to be published.
  - End of the Haitian Family Reunification Parole Program and the Filipino World War II Veterans Parole Program—On August 8, 2019, USCIS announced its intention to end these two categorical parole programs.<sup>792</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. The programs will continue until USCIS makes the required changes to the applicable form.

## 8 Other Actions

The Trump administration's efforts on immigration have 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) have all announced changes relevant to foreign nationals inside the United States.

- ▶ **Attempt to Collection of Information about Citizenship Status in Connection with the 2020 Decennial Census**—*March 26, 2018 and July 11, 2019*—In March 2018, the Commerce Department

787 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).

788 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).

789 USCIS, "Employment Authorization for Parolees" (policy alert, USCIS, Washington, DC, August 19, 2019).

790 USCIS, "Policy Manual: Chapter 2 – Parolees," accessed January 6, 2019.

791 USCIS, "Removal of International Entrepreneur Parole Program," *Federal Register* 83, no. 103 (May 29, 2018): 24415–27.

792 USCIS, "USCIS to End Certain Categorical Parole Programs" (news release, August 2, 2019).

announced that a question on citizenship status would be added to the 2020 decennial census.<sup>793</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>794</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>795</sup> After conflicting statements from the administration regarding next steps, 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>796</sup> This is the first time DHS has been asked to share personally identifiable information with the Census Bureau. In addition to addresses, 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, have also agreed to share state-level data from driver's licenses and other identification cards with DHS for this purpose.<sup>797</sup> The data sharing will assist in identifying residents who do not have Social Security or tax identification numbers.<sup>798</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>799</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>800</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>801</sup> Unlike previous no-match letters, which were targeted only to employers with at least

793 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.

794 *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.

795 *Department of Commerce v. New York*, Case No. 18-966 (Supreme Court of the United States, June 27, 2019).

796 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.

797 Hansi Lo Wang, “Four States Are Sharing Driver’s License Info to Help Find Out Who’s a Citizen,” NPR, July 14, 2020.

798 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).

799 Memorandum from the President to the Secretary of Commerce, *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, July 21, 2020.

800 Social Security Administration, “Employer Correction Request Notices,” accessed February 25, 2020.

801 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.

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.<sup>802</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>803</sup> Removals on most grounds disqualify foreign nationals from continuing to receive such benefits.<sup>804</sup>
- ▶ **Disruptions for Foreign Nationals in the U.S. Military**—*ongoing*—Citing national security concerns, the Department of Defense and USCIS have 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>805</sup> Subsequently, 502 MAVNI recruits were discharged between July 2017 and July 2018.<sup>806</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 discharge of additional 149.<sup>807</sup>
  - *July 7, 2017*—USCIS issued new guidance advising that MAVNI naturalization applicants not proceed to interviews until all enhanced Department of Defense security checks are complete.<sup>808</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>809</sup> The memos also ordered military branches to withhold the “certification of honorable service” form (N-426)

802 Miriam Jordan, “Letters from Washington: Your Employees Could Be Undocumented,” *New York Times*, May 16, 2019.

803 Social Security Administration, “Privacy Act of 1974; Matching Program,” *Federal Register* 84, no. 241 (December 16, 2019): 68537–38.

804 Social Security Administration, “Program Operations Manual System—RS 02635.001 Effects of Removal (Deportation) on Retirement or Disability Beneficiaries,” updated December 1, 2017.

805 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.

806 Ellen Mitchell, “Army Discharged More than 500 Immigrant Recruits in One Year,” *The Hill*, October 12, 2018.

807 *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,” *AP News*, August 20, 2018.

808 *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).

809 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.

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>810</sup>

### ► Upcoming

- 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>811</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.
- Removing “Lack of English Proficiency” as a Factor in Disability Benefits Considerations—On February 1, 2019, SSA published a proposed rule that would remove lack of English proficiency as a factor that can help make someone eligible for Social Security disability insurance.<sup>812</sup>

## 9 Conclusion

In nearly four years, the administration of President Donald J. Trump has dismantled and reconstructed many elements of a U.S. immigration system that was last reformed in 1996. Humanitarian protections have been severely diminished. The U.S.-Mexico border is more closed off than perhaps any time in U.S. history. Immigration enforcement appears more random. And legal immigration has experienced a historic contraction. All of this was accomplished nearly exclusively by the executive branch, with both sweeping presidential proclamations and executive orders, departmental policy guidance, and hundreds of small, technical adjustments. Congress, which has been overwhelmingly deadlocked on immigration legislation for years, largely sidelined itself during this period of incredibly dynamic policy change. And the federal judiciary, from individual district courts through the U.S. Supreme Court, at times blocked administration actions and at other times offered a green light.

Even after this intense period of change, the coming year—with the presidential election and the economic and public-health crises brought by the COVID-19 pandemic—promises more significant developments. There is no clear timeline for when immigration restrictions put in place in the name of slowing the spread of the virus will be eased. And because many actions are closely tied to the president’s immigration agenda, rather than

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*The coming year—with the presidential election and the economic and public-health crises brought by the COVID-19 pandemic—promises more significant developments.*

810 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).

811 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.

812 Social Security Administration, “Removing Inability to Communicate in English as an Education Category,” *Federal Register* 84, no. 22 (February 1, 2019): 1006–14.

simply public-health concerns, it seems unlikely that the administration will be eager to walk them back, even if the public-health risk has diminished.

The November 2020 election may further reshape the already unsettled immigration landscape. A Trump re-election would likely be viewed by many as a reaffirmation of his immigration agenda, which was more central to his 2016 election campaign and first term than immigration has been for any other contemporary U.S. national politician. Since the administration needs legislative action to accomplish many of its remaining immigration policy goals, such as making the E-Verify system mandatory nationwide and reshaping legal immigration in a way that cannot be administratively changed by a successor administration, officials may continue to pursue cooperation with Congress, however likely or unlikely it may be. Spurred by recent successes before the judiciary, the administration may also continue to push the bounds of its authority to make unilateral changes.

Should Democrats instead prevail in 2020, the new administration would likely seek to undo many of the Trump actions on immigration—as presumptive presidential nominee Joe Biden has pledged. While it may be possible to rescind many of these changes, others cannot simply be unwound. An immediate reversal of the Trump administration’s asylum policies at the southern border could invite another surge of asylum seekers, something the country’s resources and public trust are ill prepared to handle. And merely rescinding each of the hundreds of changes catalogued in this report would require a massive financial, personnel, and bureaucratic investment. Thus, whatever the outcome of the election, it seems likely that many of the changes to policy and to political discourse around immigration that have emerged since 2017 are likely to continue to shape the U.S. immigration system for years to come.

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