Immigration Policies To Watch In 2023

By **Rae Ann Varona**

Law360 (January 2, 2023, 12:02 PM EST) -- Border security, immigration backlogs and permanent residency for those who grew up in the U.S. without authorization will continue to be contentious issues this year for President Joe Biden and lawmakers to tackle.

Matt Dunn, a partner and co-chair of Kramer Levin Naftalis & Frankel LLP's immigration practice, said there's currently little consensus within each party on a clear immigration agenda, and that efforts by lawmakers for years have often been "ripped apart" by extremism on both sides.

"Given the circumstances, rather than change through legislation, the only actions that have affected the immigration system are through executive order or rule changes by an agency," Dunn said. "A desire for comprehensive immigration reform seems nowhere on the horizon given the stalemate in congress."

Kathleen Campbell Walker, chair of Dickinson Wright PLLC's immigration practice group in El Paso, Texas, similarly described the state of immigration policy as "political football" that has unfortunately been "strained and dysfunctional."

"Because it's such a polarizing political issue, the ability to make appreciable substantive change is always stymied," she said.

Here, Law360 takes a look at policy moves that immigration attorneys are hoping to see in 2023.

Immigration Court and Visa Processing Backlogs

Immigration law experts agree that court case backlogs aren't going anywhere in 2023. According to Syracuse University's data-gathering organization, Transactional Records Access Clearinghouse, two million cases are currently pending in immigration courts throughout the U.S. for the 2023 fiscal year.

"What needs to be prioritized is addressing backlogs," Walker said, adding that it would take an "act of God" to move forward.

But with the polarization in both the U.S. House of Representatives and the Senate, she said it's hard to see any legislative fixes in the near future and suggested the government get creative.

"I am hoping that we can be smart enough to come up with constructive policy changes and changes in precedents that are on the Board of Immigration Appeals, and we can work on that to create some

avenues of relief during this lame duck session, because I don't think we're going to do it by any other means," she said.

Something as simple as allowing foreign spouses to be processed by U.S. Citizenship and Immigration Services after filing a petition so they can lawfully enter the U.S. and be with their family while waiting for processing can help, she said.

Other simple fixes could include increasing online processing and generating receipts, according to Walker, who said 601A waivers of unlawful presence or Form 589 for asylum applicants often come with five or more months of waiting for receipts.

"Having people wait for a receipt — not even adjudication — because we're so backlogged and inefficient is inexcusable in this age of technology and artificial intelligence being utilized in a security context," Walker said. "Immigration applications are definitely a security-based concern, and I think that we should definitely attack that issue with vigor in the next two years to try to make people's lives easier."

Employment-Based Visa Caps

This year will likely see more attention focused on labor shortages with moves aimed at strengthening the U.S. economy and global competitiveness — something the Biden administration said it would seek when coming into office.

Pointing to remarks by Federal Reserve Chairman Jerome Powell at The Hutchins Center on Fiscal and Monetary Policy in November, in which he highlighted a "plunge" in immigration as one of the factors behind the United States' inflation, Mark Koestler — who co-chairs Kramer Levin's business immigration group — said lawmakers should take actions like attracting and retaining STEM talent and raising "woefully inadequate" employment-based quotas.

Congress had introduced the bipartisan EAGLE Act of 2022 to phase out per-country limits on employment-based visas and get rid of caps on family-based green cards but had difficulty getting a vote in the U.S. House of Representatives. Koestler said he expects a similar bill to be introduced in the new Congress.

Looking at H-1B lottery submission numbers, Koestler said 2022 saw 484,000 submissions to USCIS for the 85,000 numbers available for the 2023 fiscal year — a 57% increase from the previous year.

"Even with the recent slowing of the economy and rising inflation, these lofty numbers indicate that there is an appetite for these educated, professional workers," Koestler said.

Julia Gelatt, a senior policy analyst at the Migration Policy Institute, said it's hard to know how much can be done without Congress but noted that the Biden administration in 2022 did raise the H-2B visa cap to the maximum allowable amount.

"I think that is showing the administration is trying to maximize the pathways available under current law to allow more workers to come into the United States," Gelatt said.

Continued Expansion of Humanitarian Actions

The Biden administration expanded humanitarian efforts in 2022 to address crises happening overseas and along the U.S. border. Legal experts say its efforts will likely continue into the new year as countries like Ukraine and Ethiopia continue to experience war, and people from countries in South and Central America continue to seek asylum relief in the U.S.

Last year, the administration granted Temporary Protection Status for the first time to a number of countries including Afghanistan, Ukraine, Sudan, Cameroon and Ethiopia.

The "Operation Enduring Welcome" program, which followed the discontinued "Operation Allies Welcome" humanitarian parole program, prioritized bringing Afghans to the U.S. who have families in the country, those eligible for special immigrant visas for helping the U.S. and those referred to the U.S. refugee program.

The U.S. Department of Homeland Security also announced a parole program to allow 24,000 Venezuelans to lawfully come to the U.S., while USCIS announced that certain Ukrainian and Afghan nationals paroled into the U.S. would be able to immediately get employment authorization, similar to refugees.

When it comes to refugee admissions, Biden raised his former predecessor's historically low annual limit on the number of refugees to 125,000 for FY 2022. That cap remains the same for FY 2023 as well, but the actual number of refugee admissions has yet to reach that limit.

According to the State Department's Refugee Processing Center, refugee admissions for FY 2022 reached roughly 25,000 — up from the last two years, but significantly lower than most of the other prior years.

As of Nov. 30, 2022, refugee admissions for FY 2023 were just above 4,000, according to the RPC.

"Refugee arrivals were very low last fiscal year, so we're still seeing limited use of refugee resettlement," Gelatt said. "The administration says it's working on speeding processing and increasing those numbers, but we haven't yet seen the results of that."

Domestic Visa Renewal Program

Carl Risch, a partner in Mayer Brown LLP's global mobility and migration practice and a former assistant secretary of state for consular affairs, said the U.S. State Department signaled it might revive a domestic visa renewal program that would allow certain visa holders to renew visas in the U.S.

Risch said this would ease uncertainty surrounding appointments and processing times for travelers, especially from India.

According to the State Department's website, the current wait time as of Dec. 18 for nonimmigrant B-1 business visas and B-2 visitor visas at the U.S. Embassy in New Delhi, India, is 999 calendar days — nearly three years. For students and exchange visitors under the F, M, or J visas, the wait time is 127 days if an interview is required and 96 days if they have an interview waiver.

"Such a policy change would be especially impactful on the visa sections in India, which could see a substantial drop in workload, allowing those consular sections to better prioritize tourist and student visas, as well as new work visa applicants," Risch said.

Comprehensive Immigration Revamp Remains a Pipe Dream

It's unlikely that a comprehensive immigration bill to overhaul the immigration system will come in 2023, as lawmakers continue to battle party priorities of border security and providing a path to citizenship for so-called Dreamers who came to the U.S. as kids and made it their home.

"Legislatively, I don't expect to see anything, unfortunately," Walker said.

Independent Sen. Kyrsten Sinema of Arizona, formerly of the Democratic Party, and Sen. Thom Tillis, R-N.C., had reportedly reached a bipartisan immigration deal in December that would give Dreamers a path to citizenship while also leaving room for border security. But their framework has yet to materialize as a bill that can be introduced in Congress.

DHS Secretary Alejandro Mayorkas said in December that the department was working on plans to address an expected increase of arriving migrants through a six-pillar plan involving "surging resources," imposing consequences for unlawful entry and "bolstering" the capacity of nonprofits to receive noncitizens.

Acknowledging DHS' efforts, Walker said she, however, hopes a more "proactive" solution will be found next year, and that she's concerned about what's next to come at border communities.

"I'm sitting here on the border in El Paso, Texas, and can see the people lining up to try to claim asylum in the United States," Walker said. "If we had a legal process to address some of these issues, we would not have this horrific problem at our ports of entry on the southern border."

Gelatt similarly said she isn't optimistic about Congress' ability to pass legislation on immigration in 2023, an outlook she said she would have given for 2022 as well.

Change is more likely to come from executive action, she said, saying restrictions on asylum at the border and the creation of parole programs for people from Cuba, Nicaragua and Haiti could come in 2023.

Unclear Future for DACA

The Biden administration's final rule to save the Deferred Action for Childhood Arrivals program went into effect in October.

But the ultimate fate of the program, which offers work and study permits and temporary relief from deportation, currently sits in the courts with challenges from several states, including Texas, which have argued that they incurred financial injuries from taking on costs for providing education, healthcare and law-enforcement protection to DACA recipients.

"If there is some decision in 2023 that leads to current DACA holders losing their work authorization, I expect both a flurry of Congressional activity and also the Biden administration taking executive action to exercise prosecutorial discretion for Dreamers and see what other actions they can think of to provide opportunities for DACA holders to be able to stay and potentially work in the United States," Gelatt said.

If DACA dies, Walker said the U.S. will be faced with dealing with nearly two million people who will potentially be subject to deportation despite knowing the U.S. as their only home.

"Hiding from that issue is a travesty," she said. "I'm very concerned that we may have something in the next few years that will severely impact those [who] have benefited from DACA in the past."

--Editing by Dave Trumbore.