

## Top Immigration Policies Of 2022: Year In Review

By **Rae Ann Varona**

*Law360 (December 22, 2022, 5:03 PM EST)* -- Two years into promises of reversing much of the Trump administration's immigration regime, the Biden administration in 2022 made some moves expanding humanitarian actions but continued having to fight growing immigration backlogs and lingering effects of the COVID-19 pandemic.

Legal challenges by states hoping to keep remnants of the former administration's policies have also dampened the administration's goals.

Here, Law360 looks back at some of the biggest legislative and regulatory moves of 2022 in the immigration space.

### Tackling Continued Backlogs

Immigration court backlogs remained a big challenge for the Biden administration this year. According to the Migration Policy Institute, the immigration court backlog as of February topped 1.6 million, up from 1.1 million before the COVID-19 pandemic and more than double that of the 2018 fiscal year. So far, for the fiscal year 2023, roughly 2 million cases are pending in immigration courts across the country, according to Syracuse University's data-gathering organization called Transactional Records Access Clearinghouse, which has been tracking case backlogs since 2008.

In February, the U.S. Department of Justice's Executive Office for Immigration Review began requiring new immigration court filings to be made electronically, which immigration attorneys believed could relieve backlogs.

In March, it said that it was aiming to put \$1.4 billion toward efforts to slash the backlog, while also hiring new judges and support staff and giving the system a digital upgrade. The same month, U.S. Citizenship and Immigration Services established new time goals for processing cases, ranging from two weeks to six months.

U.S. Immigration and Customs Enforcement policy also sought to clear low-priority cases off the dockets but was left in limbo after a Texas federal judge threw the guidelines out. The Biden administration also streamlined the process for Afghan interpreters and translators applying for special immigrant visas by allowing them to apply to only one federal agency rather than several.

Julia Gelatt, a senior policy analyst at the Migration Policy Institute said backlogs are "still really bad,"

but that the numbers show some improvements.

"It seems clear that the government issued over one million green cards in the fiscal year of 2022," Gelatt said. And while that's not quite back to normal, she said it's getting close for permanent immigration.

She also said the issuance of temporary visas in recent months has been back to pre-pandemic levels.

USCIS acknowledged in a progress report released earlier this month that there was a 62% reduction in the net naturalization backlog, but that there was still "more work to do."

### **Slight Improvements In Certain Immigration Benefits**

Matt Dunn, co-chair of Kramer Levin's business immigration group, said the Biden administration has made some positive developments focused on limiting delays incurred in processing immigration benefits.

For one, spouses of E and L visa holders are no longer required to apply for work authorization, meaning they can immediately start working upon their admission to the U.S., saving approximately six to 10 months of waiting for a work card to arrive, Dunn said.

Green card holders similarly are being granted work and travel authorization for two years — up from one year — when they timely file an application to renew their green card status.

"Getting an extension of that time was quite an arduous process, requiring a personal appearance to the USCIS," Dunn said.

USCIS has also taken a "less stringent" approach to process certain types of visa petitions, like L-1 intracompany transferee petitions, he said, which involve the transfer of executives, managers, or people with specialized knowledge from a company abroad to a related company in the U.S.

Whereas previously, the agency would have limited the definition of a person with specialized knowledge to one or two select individuals who developed a product or process, it has now "begun to recognize that a qualified applicant may also be someone that has become an expert in a process or product," Dunn said.

"This approach comports with the relevant immigration regulations, allows companies to transfer highly skilled workers to the U.S. to do vital work, and is certainly a welcomed development by the immigration community," he said.

Kathleen Campbell Walker, chair of Dickinson Wright's immigration practice group in El Paso said the U.S. State Department implemented some good policies like stateside processing and expanding the use of the visa renewal process where one doesn't have to come in for another physical interview if they're renewing a visa within a two-year timeframe.

"Of course, nobody has ever dealt with something as severe as the pandemic and you have to give some credit for dealing with an unprecedented challenge," Walker said.

### **Extension of Humanitarian Hand**

The Biden administration extended humanitarian efforts in response to crises happening abroad and along the U.S. border.

This year, for example, the U.S. Department of Homeland Security granted first-time Temporary Protected Status to Afghanistan, Ukraine, Sudan, Cameroon and Ethiopia.

In May, DHS began implementing a rule authorizing USCIS asylum officers to consider the asylum applications of certain individuals subject to expedited removal rather than overloaded immigration judges.

The Biden administration also widely used its parole authority, most recently with Venezuelans whose parole plan involves them applying for the program remotely before flying to the U.S. instead of trekking to the southwest border.

Walker said that trying to reduce the number of Venezuelans appearing at the ports of entry and coming up with an avenue for them to apply for asylum remotely "was a positive."

As for the government's United for Ukraine program announced in April, Carl Risch, a partner in Mayer Brown's global mobility and migration practice and a former assistant secretary of state for consular affairs, said the "first-of-its-kind" program was "game-changing" for future initiatives.

"The Biden administration has shown it can and will roll out large-scale, private sponsorship programs rapidly impacting the movement of large numbers of people to the United States," Risch said.

The expansion of humanitarian efforts, though positive steps, was not flawless, as Senate Democrats, for example, highlighted the unequal treatment of fleeing Ukrainians, thousands of whom were approved for parole in just weeks, and Afghans, of whom only hundreds obtained parole over a span of months.

And while DHS' parole program for Venezuelans allowed up to 24,000 Venezuelans to lawfully come to the U.S., Venezuelans seeking parole benefits were also subject to Title 42 expulsions.

Risch said the Biden administration or future administrations will still need to decide what to do about parolees with no clear path to permanent residency.

### **'Fair and Humane' Public Charge Rule**

In September, DHS **redrafted** the Trump administration's definition of who counts as a "public charge" for immigration purposes, largely reverting to the 1999 definition and removing dependency on non-cash benefits as a condition of receiving immigration benefits.

DHS said that the new "fair and humane" public charge rule — which goes into effect Dec. 23 — restored the "historical understanding" of a public charge to someone who is "likely to become primarily dependent on the government for subsistence."

Former President Donald Trump in 2019 broadened the definition, making it harder for people to obtain visas and green cards if they were expected to rely on cash for public assistance programs like Medicaid, housing vouchers, or food assistance.

The Biden administration, however, stopped defending the Trump definition in March 2021 after an Illinois federal judge vacated it on the ground that the Seventh Circuit had before deemed the rule "both substantively and procedurally defective." The judge said the Administrative Procedure Act also states that courts should set aside agency actions that are arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

A number of states had unsuccessfully attempted to get lower and appellate courts to hear their defense of the Trump administration's definition, and in September, urged the U.S. Supreme Court to take on their case.

"The Trump administration's rule was no longer enforced because of some court maneuvers, but this year we saw the new public charge rule to codify essentially the pre-Trump public charge policies," Gelatt said.

### **Virtual I-9 Verification**

With much of the workforce still remote and many companies unable to operate on-site to conform with I-9 employment verification compliance, DHS extended compliance flexibilities that allowed remote employers to use video, fax, email or other technologies to remotely inspect I-9 forms and verify that their employees were eligible to work in the U.S.

"In large part due to the pandemic, the Biden administration has offered certain new flexibilities relating to this process and extended work permits for some foreign workers," Morgan Bailey, counsel in Mayer Brown's employment and benefits practice and a former deputy chief of staff at USCIS, said.

Employers are responsible for verifying the identity and employment authorization of newly hired employees through the I-9 employment eligibility verification process, Bailey explained. ICE first announced the verification flexibility in March 2020 in light of the COVID-19 pandemic and extended the flexibility a number of times up through 2022.

Walker said the move was smart and an example of a "pragmatic approach" to a problem, a view seemingly shared by employers who hoped virtual I-9 document verification would be permanent and not just subject to extensions.

In August, the Biden administration said in a notice that it was looking into making some of the COVID-19 pandemic-related flexibilities permanent. But ahead of an extension that ended in October, ICE announced another extension until the end of July 2023.

--Editing by Alyssa Miller.