## Immigration Law
### JUDICIAL LAW

**DACA: The saga continues.** As noted in the October 2022 edition of *Bench & Bar of Minnesota*, the Department of Homeland Security (DHS) published its final rule on 8/30/2022 implementing its proposed rule (with some amendments) seeking to establish regulations to "preserve and fortify" the Deferred Action for Childhood Arrivals (DACA) program. The rule was scheduled to go into effect on 10/31/2022. On 10/14/2022, U.S. District Court Judge Andrew Hanen (Southern District of Texas), following a remand by the 5th Circuit Court of Appeals to review the final rule, issued an order partially blocking the regulations from going into effect while allowing USCIS to continue accepting and adjudicating DACA renewal applications filed by those DACA recipients with DACA status on or before the court's 7/16/2021 permanent injunction. Given ongoing litigation, USCIS may nonetheless accept initial DACA applications but not process them. ***State of Texas, et al. v. United States, et al.***, No. 1:18-CV-00068 (S.D. Tex. 10/14/2022). *https://www.nilc.org/wp-content/uploads/2022/11/2022.10.14-Order-J.-Hanen.pdf*

### ADMINISTRATIVE ACTION

**Designation of Ethiopia for TPS.** On 10/21/2022, the Department of Homeland Security (DHS) announced its designation of Ethiopia for temporary protected status (TPS) for 18 months. According to Secretary of Homeland Security Alejandro N. Mayorkas, "Ethiopian nationals currently residing in the U.S. who cannot safely return due to conflict-related violence and a humanitarian crisis involving severe food shortages, flooding, drought, and displacement, will be able to remain and work in the United States until conditions in their home country improve." Eligibility for TPS under the designation requires continuous residence in the United States since 10/20/2022. The designation will go into effect once the notice is published in the *Federal Register*. **U.S. Department of Home Security, *News Release*** (10/21/2022). *https://www.dhs.gov/news/2022/10/21/dhs-designates-ethiopia-temporary-protected-status-18-months*

**DHS announces new parole process for certain Venezuelans.** On 10/19/2022, the Department of Homeland Security (DHS) published notice of a new parole process for certain Venezuelans who agree to enter the United States by air at an interior port of entry (POE) rather than a land port of entry while arranging for someone in the United States to provide them with housing and other support as needed. Such individuals must: 1) be outside the United States; 2) be a national of Venezuela or a non-Venezuelan immediate family member of and traveling with a Venezuelan principal beneficiary; 3) have a U.S.-based supporter who filed an Affidavit of Support (Form I-134) on their behalf and has been vetted and confirmed by USCIS; 4) possess a passport valid for international travel; 5) provide for their own commercial travel to an air POE and final U.S. destination; 6) undergo and pass required national security and public safety vetting; 7) comply with all additional requirements, including vaccination requirements and other public health guidelines; and 8) demonstrate that a grant of parole is warranted based on significant public benefit or urgent humanitarian reasons and that a favorable exercise of discretion is otherwise merited.

DHS emphasized that, after 10/19/2022, "Venezuelans who do not avail themselves of this process, and instead enter the United States without authorization between POEs, will be subject to expulsion or removal." Likewise, "those who enter irregularly into the United States, Mexico, or Panama will also be found ineligible for a discretionary grant of parole under this process." The program is fashioned, in part, on the *Uniting for Ukraine* parole process that was implemented following Russia's invasion of Ukraine. DHS began accepting online applications for the process on 10/18/2022. **87 Fed. Reg. 63507-17** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-10-19/pdf/2022-22739.pdf*

**H-2B cap supplemented with additional visas.** On 10/12/2022, the Department of Homeland Security (DHS), in consultation with the Department of Labor (DOL), announced it will soon issue a regulation adding 64,716 H-2B temporary nonagricultural worker visas for fiscal year 2023 (commencing 10/1/2022), to the existing 66,000 H-2B visas normally allotted each fiscal year. At the same time, DHS and DOL are working on strengthening protections for U.S. and foreign workers—"ensuring that employers first seek out and recruit American workers for the jobs to be filled, as the visa program requires, and that foreign workers hired are not exploited by unscrupulous employers"—by way of the recently created H-2B Worker Protection Taskforce.

This H-2B supplement will include 20,000 visas allocated to Haiti, Honduras, Guatemala, and El Salvador, with the remaining 44,716 visas made available to those returning workers who received an H-2B visa, or were otherwise granted H-2B status, during one of the last three fiscal years.

The H-2B visa system is a program allowing employers to temporarily hire noncitizens to perform nonagricultural labor or services in the United States. Key aspects of the program include the following: 1) the employment must be temporary in nature, such as a one-time occurrence, seasonal need, or intermittent need; 2) employers must certify that there are insufficient numbers of U.S. workers who are able, willing, qualified, and available to perform the temporary work for which they seek a prospective foreign worker; and 3) employers must certify that the employment of H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. **Department of Homeland Security, *News Release*** (10/12/2022). *https://www.dhs.gov/news/2022/10/12/dhs-supplement-h-2b-cap-nearly-65000-additional-visas-fiscal-year-2023*

**Final rule amending H-2A regulations published.** On 10/12/2022, the Department of Labor (DOL) published its final rule amending the regulations devoted to the certification of agricultural labor or services performed by temporary foreign national workers in the H-2A nonimmigrant visa program as well as enforcement of employers' contractual obligations to those nonimmigrant workers. These changes will, according to the DOL, "strengthen protections for workers, modernize and simplify the H-2A application and temporary labor certification process, and ease regulatory burdens on employers." At the same time, the changes will remain consistent with the department's responsibility to certify

there are insufficient able, willing, and qualified workers to fill employers' job opportunities and the employment of H-2A workers will not adversely affect the wages and working conditions of workers similarly employed in the United States. The rule will go into effect on 11/14/2022. **87 Fed. Reg. 61660-831** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-20506.pdf*

**Extension and redesignation of Burma for TPS.** On 9/27/2022, the Department of Homeland Security (DHS) published notice of its extension of the designation of Burma (Myanmar) for TPS for 18 months, from 11/26/2022 through 5/25/2024, for those who currently hold that status and continue to meet the eligibility requirements. The period for reregistration runs from 9/27/2022 through 11/26/2022. In addition, DHS redesignated the country for TPS given the "ongoing violence and the resulting displacement in Burma [which] have caused major vulnerabilities related to 1) shelter; 2) food security and nutrition; 3) water, sanitation and hygiene (WASH); 4) health; and 5) education." Eligibility requirements for those filing for the first time under the redesignation include, among others, continuous residence in the United States since 9/25/2022 and continuous physical presence in the United States since 11/26/2022, the effective date of the redesignation of Burma for TPS. The period for first-time registration runs from 9/27/2022 through 5/25/2024. **87 Fed. Reg. 58515-24** (2022). *https://www.govinfo.gov/content/pkg/FR-2022-09-27/pdf/2022-20784.pdf*

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## Intellectual Property
### JUDICIAL LAW

**Patent: Voluntary dismissal of safe harbor claim in declaratory action.** Judge Frank recently granted plaintiff Corning Inc.'s motion to dismiss Count Ten of its complaint. Corning filed a declaratory judgment action against Wilson Wolf Manufacturing Corporation and John Wilson seeking adjudication of questions of patent infringement and invalidity related to it and its customers. In Count Ten of its suit, Corning sought a declaration that the safe harbor defense immunized Corning's customers from Wilson Wolf's claims of patent infringement. Corning moved to voluntarily dismiss Count Ten of its amended complaint.

Under Federal Rule of Civil Procedure 41, after the opposing party serves either an answer or a motion for summary judgment, an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. A court is not required to dismiss a claim upon request. Instead, courts take a variety of factors into account, including whether the party has presented a proper explanation for its desire to dismiss, whether a dismissal would result in a waste of judicial time and effort, and whether a dismissal will prejudice the defendants. In Count Ten, Corning sought a declaration that Corning's customers and end-users of its HYPERStack product did not infringe defendants' patents because the alleged infringing conduct was exempted under the FDA "safe harbor" created by 35 U.S.C. § 271(e)(1). Corning stated that it asserted the safe harbor defense because the defense had been raised in two of the three lawsuits against Corning's customers, but that in view of the discovery in the instant case, the application of the "safe harbor" defense turned on facts that were unique to each customer.

Thus, Corning argued that the "safe harbor" defense was best litigated (if necessary) in the context of each of the customer lawsuits. Defendants did not oppose the dismissal but argued that due to the prejudice and waste caused by litigating Count Ten, the dismissal should be with prejudice. Upon review, the court found that voluntary dismissal of Count Ten without prejudice was warranted, but the court reserved the right to have Corning reimburse defendants for costs and fees directly related to the litigation of Count Ten in the action should circumstances warrant. ***Corning Inc. v. Wilson Wolf Mfg. Corp.***, No. 20-700 (DWF/TNL), 2022 U.S. Dist. LEXIS 201042 (D. Minn. 11/4/2022).

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## Real Property
### JUDICIAL LAW

**Removing a bridge was not a taking.** The Minnesota Court of Appeals affirmed a district court's dismissal of appellants' inverse-condemnation claim because it upheld the district court's determination that the property owners retained reasonably convenient and suitable access to their property following the township's decision to remove a bridge. In *Matter of Kuk*, the property owners argued that they lost reasonably convenient and suitable access to their property because (1) they only have access via a southern easement rather than a public road; (2) the southern easement does not accommodate regular vehicles and would require extra winter maintenance; and (3) accessing the homestead site from the southern easement requires traversing a ravine and steep hillside. The property owners further argued that even if the southern easement provides reasonably convenient and suitable access to the southern portion of the property, it does not provide reasonably convenient and suitable access to the homestead site.

The court found that the evidence sustains the district court's findings that the property owners maintain reasonably convenient and suitable access. The southern easement provides ingress and egress to a nearby street. The court noted that even before the property owners recorded the southern easement, previous owners accessed the property from the south and that the southern easement has been the property's primary access. Further, the southern easement continued to provide suitable access to the property for agricultural purposes. With respect to the bridge, the court added that the property owners suspected in 1995 that the bridge had limited capacity and could not be relied on to provide permanent access. The property owners secured the southern easement because they anticipated problems with the bridge, and have always used the southern easement, rather than the bridge, to access the property to farm. The court discerned no clear error in the district court's determination that the property owners maintain reasonably convenient and suitable access, and as such, concluded as a matter of law that the township's removal of the bridge did not constitute a taking. ***Matter of Kuk***, No. A22-0180, 2022 WL 4682932 (Minn. Ct. App. 10/3/2022).