Proskauer

Diversity Visa Lottery: Lawsuit over New Passport Rule

September 27, 2019

On September 25, 2019, we reminded clients that the Diversity Visa Lottery would be open from October 2, 2019 to November 5, 2019 for Fiscal Year 2021. A lawsuit has been initiated in federal court challenging the new passport rule included in the FY2021 Diversity Visa rules. While the litigation is pending, the passport requirement remains in place and applications should be completed with the passport information when applying at https://dvlottery.state.gov/.

Specifically, in June 2019, the administration adopted a new policy that requires DV Lottery entrants to enter their passport information in order to submit an entry to the green card lottery. Three plaintiffs, represented by the Georgetown University Law Center's Institute for Constitutional Advocacy, claim that the new rule is an attempt by the administration to limit migration from poorer countries since it effectively prevents applications from countries where it is expensive or time-consuming to obtain a passport. The suit claims that the administration violated the public notice and comment rule.

Agencies have the authority to issue regulations for laws enacted by Congress. Typically, agencies have general authority to regulate certain activities within our society. Agencies must not take action that goes beyond their statutory authority or violates the Constitution. And they must follow an open public process when they issue regulations, according to the Administrative Procedure Act (APA). This includes publishing a statement of rulemaking authority in the *Federal Register* for all proposed and final rules. 5 U.S.C. § 553(b).

In 5 U.S.C. § 553(a)(1), there is an exception to the public notice and comment period for "a military or foreign affairs function of the United States." The State Department invoked 5 U.S.C. § 553(a)(1), claiming an exemption from the notice and comment requirements to implement the passport requirement to the DV Lottery program.

Because of the short window to enter the DV Lottery, and the uncertainty as to the result of the pending litigation, Proskauer advises that anyone who wishes to enter the DV Lottery should enter their passport information.