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MEMORANDUM October 3, 2016

To: Senate Judiciary Committee
[redacted]

From: [redacted]
[redacted]
Legislative Attorneys, American Law Division

Subject: **Extending Certain Immigration Programs Through a Continuing Resolution**

This memorandum has been prepared, on an expedited basis, in response to your request for a legal analysis of the impact of a continuing appropriations act (commonly referred to as a "continuing resolution" (CR)), on four expiring immigration programs—E-Verify,[1] EB-5 Regional Center Program,[2] Conrad 30 Waiver Program,[3] and the non-minister special immigrant religious worker program.[4] These immigration programs are subject to sunset provisions that were expressly extended to September 30, 2016 by the regular appropriations act for fiscal year 2016 (Consolidated Appropriations Act, 2016, Public Law 114-113). The question you posed to CRS is whether a CR that lacks any substantive legislative provisions that expressly amend or block these statutory sunset provisions, would nevertheless permit these programs to continue due to generally applicable language in the CR that grants authority to projects or activities that were conducted in the prior fiscal year and for which appropriations, funds, or other authority were made available in the regular appropriations act for fiscal year 2016.

General Background on Appropriations Law

Before responding to this question, it may be helpful to provide a brief review of several concepts in appropriations law, including "authorization," "authorization of appropriations," "appropriation," "continuing resolution," and "sunset."

An authorization may generally be described as a statutory provision that defines the authority of the government to act. An authorization act can establish or continue a federal agency, program, policy, project, or activity (such a law is also referred to as an "organic" or "enabling" statute).[5] Further, an

[1] Section 401(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1324a note).

[2] Section 610(b) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. § 1153 note).

[3] Section 220(c) of the Immigration and Nationality Technical Corrections Act of 1994 (8 U.S.C. § 1182 note).

[4] Subclauses 101(a)(27)(C)(ii)(II) and (III) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(27)(C)(ii)(II) and (III)).

[5] See, e.g., Comprehensive Addiction and Recovery Act of 2016, P.L. 114-198, § 103(b), 130 Stat. 700 ("The Director, in coordination with the Administrator, may make grants to eligible entities to implement comprehensive community-wide strategies that address local drug crises and emerging drug abuse issues within the area served by the eligible entity.").

authorization may establish policies, restrictions, and deal with organizational and administrative matters. By itself, an authorization act does not usually provide funding for government activities.[6]

Instead, Congress must provide such funding by enacting appropriations. An authorization act often, but not always, contains a provision that authorizes the subsequent enactment of appropriations to provide funds for agencies and programs. Such a provision, commonly referred to as an "authorization of appropriation" or "funding authorization," is intended to provide Congress with guidance regarding the appropriate amount of funds to carry out the authorized activities of an agency.[7] For certain programs and activities, the authorization of appropriations may be subject to an explicit expiration date.

An appropriations act provides an agency with legal authority (referred to as "budget authority") to incur financial obligations and make payments out of the U.S. Treasury for specified purposes, usually during a specified period of time.[8] Congress uses an annual appropriations process to fund the routine activities of most federal agencies. Until regular appropriations for a fiscal year are enacted, one or more "CRs can be used to provide funding for a specified period of time for certain activities, which are typically specified with reference to the prior fiscal year's appropriations acts. [9] CRs "are intended by Congress to be stop-gap measures enacted to keep existing federal programs functioning after the expiration of previous budget authority and until regular appropriation acts can be enacted."[10] The amount of funds in the CR, and the purposes for which they may be used for specified activities, may be adjusted through provisions commonly referred to as "anomalies."[11] Substantive legislative provisions that create or change existing laws may also appear in a CR, subject to a point of order.[12] Such legislative provisions may also temporarily extend expiring laws (including sunset provisions, described in the following paragraph). Legislative provisions that temporarily extend expiring laws are effective through the date the CR expires, unless otherwise specified.

A sunset is when the authorization for a particular program, entity, or federal power expires. A sunset provision in legislation automatically terminates programs, agencies, or authorities, on a specific date or within a specified time frame, unless they are explicitly renewed by law.[13] For example, Congress established sunset provisions that applied to two amendments to the Foreign Intelligence Surveillance Act (FISA) that were enacted as part of the USA PATRIOT Act; these amendments provided expanded federal intelligence-gathering powers following the 9/11 terrorist attacks. The amendments were originally

[6] U.S. GENERAL ACCOUNTING OFFICE,, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II, at 2-40 (3d ed. 2004) (hereinafter "GAO Red Book").

[7] See, e.g., Fixing America's Surface Transportation Act, P.L. 114-94, § 1123 (h), 129 Stat. 1371 ("There is authorized to be appropriated to carry out this section $100,000,000 for each of fiscal years 2016 through 2020. Such sums shall remain available for a period of 3 fiscal years following the fiscal year for which the amounts are appropriated.").

[8] GOVERNMENT ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 13 (5th ed. 2005).

[9] For more information about CRs, see CRS Report R42647, *Continuing Resolutions: Overview of Components and Recent Practices*, by James V. Saturno and Jessica Tollestrup.

[10] GAO Red Book, Vol. 1, at 8-2.

[11] See, e.g., Continuing Appropriations Act, 2012, P.L. 112-33, § 120, 125 Stat. 366 ("Notwithstanding section 101, amounts are provided for ``Defense Nuclear Facilities Safety Board--Salaries and Expenses" at a rate for operations of $29,130,000.").

[12] For information on points of order, see CRS Report 98-307, *Points of Order, Rulings, and Appeals in the House of Representatives*, by Valerie Heitshusen.

[13] The Comptroller General of the United States has explained that "once a termination or sunset provision becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date ..." Comptroller General of the United States, *Matter of: Civil Rights Commission*, B-246541, 71 Comp. Gen. 378 (1992). For more information on sunsets generally, see CRS Report RL34551, *A Federal Sunset Commission: Review of Proposals and Actions*, by Virginia A. McMurtry.

scheduled to expire on December 31, 2005, but Congress has extended the authorities multiple times, and the amendments now have a sunset date of December 15, 2019.[14]

Generally, the language of an appropriation measure must express the clear intent of Congress to continue the operation of a program, without interruption, after the sunset date provided in the earlier statute.[15] As the Government Accountability Office (GAO)[16] has explained, "when Congress desires to extend, amend, suspend, or repeal a statute, it can accomplish its purpose by including the requisite language in an appropriations or other act of Congress."[17] For example, a common method of extending an expiring program is a legislative provision that expressly amends the underlying statute governing the program by striking out the sunset date and replacing it with a new termination date, such as: "Section 9(m) of the Small Business Act (15 U.S.C. 638(m)) *is amended by striking* '2011' *and inserting* '2017.'"[18] Instead of expressly amending the underlying statute, Congress has also extended the authorization of a program by requiring that a statutory provision "be applied" until a particular specified date that is "substituted" for the statutory sunset date. For example, such legislative language may resemble the following provision: "The Export-Import Bank Act of 1945 (12 U.S.C. 635 et seq.) *shall be applied* through June 30, 2015, *by substituting* such date for 'September 30, 2014' in section 7 of such Act."[19] The potential significance of using either of these two approaches will be discussed later in this memorandum.

The following section lists four circumstances that involved the interaction between sunset provisions and continuing resolutions and describes how courts and the GAO have resolved questions about them.

Consortium Venture Corp. v. United States

In *Consortium Venture Corp. v. United States*, the U.S. Court of Federal Claims (Claims Court) considered the effect of a sunset provision in the Manpower Development and Training Act of 1962 (MDTA).[20] The provision at issue established that "all authority conferred under subchapter II of this chapter shall terminate at the close of June 30, 1973."[21] Subsequently, the United States asserted that this provision terminated the authority of the Secretary of Labor and all contracting officers to contract under Subchapter II of the MDTA after June 30, 1973. Faced with a suit regarding the actual impact of this provision, the court considered whether a continuing resolution enacted on July 1, 1973,[22] authorizing continuing appropriations for fiscal year 1974, continued authorization or reauthorized the execution of contracts under subchapter II of the MDTA "even after that authority had been expressly terminated on June 30, 1973 by virtue of 42 U.S.C. 2620(a)."[23] The MDTA program was not specifically mentioned in the continuing resolution, although section 101(a)(1) of the CR provided: "Such amounts as may be necessary for continuing projects or activities (not otherwise specifically provided for in this joint

[14] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, P.L. 114-23. For more information about this topic, see CRS Report R40138, *Amendments to the Foreign Intelligence Surveillance Act (FISA) Expiring on December 15, 2019*, by Edward C. Liu.

[15] GAO Red Book, Vol. 1, at 2-70, 2-71.

[16] Title III of the Budget and Accounting Act of 1921, P.L. 67-13, 42 Stat. 20 (1921), created the General Accounting Office (the name of which was changed in 2004 to the Government Accountability Office, P.L. 108-271, 118 Stat. 811 (2004)) and conferred upon the head of the GAO, the Comptroller General, the authority to issue legal decisions and legal opinions regarding the availability and use of appropriated funds by federal agencies. GAO Red Book, Vol. 1, at 1-21, 1-39.

[17] *Id.* at 4-19.

[18] P.L. 112-81, § 5101(a), 125 Stat. 1824 (2011) titled "Extension of Termination Dates" (emphasis added).

[19] P.L. 113-164, § 147, 128 Stat. 1874 (emphasis added).

[20] 5 Cl. Ct. 47 (1984), *aff'd,* 765 F.2d 163 (Fed Cir. 1985).

[21] P.L. 87-415, 76 Stat. 23 (1962).

[22] P.L. 93-52, 87 Stat. 130 (1973).

[23] *Consortium Venture,* 5 Cl. Ct. at 50.

resolution) which were conducted in the fiscal year 1973 and for which appropriations, funds, or other authority would be available in the following Appropriation Act for the fiscal year 1974…" The plaintiff argued that this section of the CR reauthorized the United States to enter into contracts after the formal statutory termination date.[24]

However, the Claims Court rejected this argument, determining that the "statutory authority to enter into job training and support type contracts under MDTA terminated on June 30, 1973, and was not continued or reestablished by the continuing resolution."[25] According to the court, Congress "could have very easily" given the United States the authority to execute contracts, but did not do so.[26] The court stressed that "in the absence of express language reestablishing or continuing that authority, this court is unable to recognize its existence."[27] The court concluded its disposition of the issue by noting that "although our holding may produce a harsh result, we are powerless to do otherwise. It is the province of Congress to create such authorization, not of this court."[28] Although the authority for the MDTA program was expressly reestablished by Congress roughly six months after the statutory sunset date (under the Comprehensive Employment and Training Act (CETA)),[29] "the Claims Court held that, in the absence of express language in the continuing resolution or elsewhere, contracts entered into during the gap between expiration of the MDTA and enactment of CETA were without legal authority and did not bind the government."[30]

Labor Surplus Area Contractors

A Department of Defense authorization act for fiscal year 1983 contained a provision that authorized the Secretary of Defense to conduct a test program that permitted the payment of up to a 2.2 percent price differential under contracts awarded to qualifying contractors located in a "labor surplus area" (LSA).[31] This test program was to be conducted during fiscal years 1983 and 1984. The Department of Defense Authorization Act, 1985, specifically extended the test program through the end of fiscal year 1985.[32] However, the continuing resolution for fiscal year 1986 that was enacted on September 30, 1985 contained "no specific provision for the test program nor was there any evidence of congressional intent to continue the test program under the resolution."[33] Furthermore, on November 8, 1985, Congress passed the Department of Defense Authorization Act, 1986, which contained no references to the test program whatsoever, thus confirming to the GAO the lack of congressional intent to continue the test program past its sunset date. In regards to a contract awarded by the Defense Logistics Agency (DLA) on October 29, 1985 (under the funding authority provided by the continuing resolution), the DLA refused to apply the 2.2 percent LSA preference price differential in evaluating bids under the DLA solicitation.[34] In considering a bid protest that challenged its decision, the Comptroller General explained that:

> Although we recognize that a continuing resolution is a temporary appropriations act to keep existing programs functioning after the expiration of previous budget authority, the issue in this

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] P.L. 93-203, 87 Stat. 839 (1973).

[30] GAO Red Book, Vol. II, at 8-33.

[31] P.L. 97-252, § 1109, 96 Stat. 746 (1982),

[32] P.L. 98-525, § 1254, 98 Stat. 2611 (1984).

[33] GAO Red Book, Vol. II, at 8-33.

[34] 65 Comp. Gen. 318 (1986).

> case involves the expiration of the program authorization itself as well as the expiration of funding. In similar circumstances, we have held that the specific inclusion of a program in a continuing resolution will provide both authorization and funding to continue the program despite the expiration of the appropriation authorization legislation. Similarly, if it is clear from the legislative history that Congress intends certain programs to continue under the resolution despite the lack or expiration of authorizing legislation, the resolution will act both as authorization and appropriation.[35]

Here, the Comptroller General found that there was no "indication that Congress intended to extend the test program beyond its September 30, 1985 expiration date"[36] and thus determined that the DLA's refusal to apply the price differential "was not legally objectionable."[37]

Civil Rights Commission

The United States Commission on Civil Rights Act of 1983 (1983 Act)[38] established the Civil Rights Commission (Commission) and provided it with the authority to operate as an independent, bipartisan, fact-finding federal agency that studies alleged deprivations of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, or national origin.[39] Section 8 of the 1983 Act, as amended,[40] stated that "the provisions of this Act shall terminate on September 30, 1991," thus setting a date on which the Commission would cease to exist unless Congress took action to pass legislation that amended the sunset provision. During the fiscal year 1991, bills were introduced to reauthorize the Commission as well as to provide it with a fiscal year 1992 appropriation. However, none of the bills were enacted into law before the September 30 sunset date. But on September 30, Congress passed a continuing resolution[41] that appropriated funds to the Commission until October 29, 1991, and then passed the regular fiscal year 1992 appropriation bill[42] on October 28, 1991. The United States Commission on Civil Rights Reauthorization Act of 1991[43] was enacted into law on November 26 and expressly extended the life of the Commission by 3 years, with a new statutory termination date of September 30, 1994.

The question posed to the Comptroller General by the staff director of the Commission was whether the appropriations acts for fiscal year 1992 authorized the Commission to operate past its statutory sunset date. The Comptroller General concluded that the appropriations acts effectively suspended the Commission's termination from October 1 to November 26, 1991 (the date of the Commission's reauthorization):

> The Congress may revive or extend an act by any form of words which makes clear its intention to do so. ... Furthermore, when the Congress desires to extend, amend, suspend, or repeal a statute, it can accomplish its purpose by including the requisite language in an appropriations or other act of Congress. The whole matter depends on the intention of Congress as expressed in statute. ...

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[35] *Id.* at 6-7.

[36] *Id.*

[37] GAO Red Book, Vol. II, at 8-34.

[38] P.L. 98-183, 97 Stat. 1301 (1983).

[39] *See* U.S. Commission on Civil Rights, About Us, *at* http://www.usccr.gov/about/index.php.

[40] The Civil Rights Commission Reauthorization Act of 1989, P.L. 101-180, § 2(2), 103 Stat. 1325, extended the 1983 Act's original termination date of November 30, 1989 to September 30, 1991.

[41] P.L. 102-109, 105 Stat. 551 (1991).

[42] P.L. 102-140, 105 Stat. 782 (1991).

[43] P.L. 102-167, 105 Stat. 1101 (1991).

> In this case we believe Congress clearly intended the Commission to operate beyond September 30, 1991. The language of the continuing resolution providing funds to the Commission for fiscal year 1992 is irreconcilable with the language of section 8 of the 1983 Act terminating the enabling legislation, and thus the Commission, on October 1, 1991. The language of the continuing resolution is unqualified and nothing in the continuing resolution or its legislative history supports the view that the appropriation to the Commission was being made contingent on extending the termination date in the 1983 Act. Further, the action taken by the House and the Senate on H.R. 3350 and the annual appropriations act prior to as well as after October 1, 1991, confirms the intent of the Congress that the Commission should continue without interruption after September 30, 1991.
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> ...
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> When viewed in their entirety, legislative actions on the Commission's reauthorization and appropriation bills, together with their legislative history, clearly manifest an intent by Congress for the Commission to continue to operate after September 30, 1991. We therefore conclude that the specific appropriation provided the Commission served to suspend the operation of section 8 of the 1983 Act and the termination of the Commission, and to authorize it to operate from October 1 through November 26, 1991, when the reauthorization bill extending the 1983 Act and the Commission was enacted.[44]

Solar Bank

The Solar Energy and Energy Conservation Act of 1980[45] created the Solar Bank that had the power to subsidize loans and grants for the installation of energy conservation and solar energy improvements in family homes and commercial buildings. This Act contained a sunset provision that terminated the existence of the Bank on September 30, 1987. Congress extended the life of the Bank several times, and on December 21, 1987, passed a law that required the Bank to cease to exist on March 15, 1988.[46] On that same day, but after passage of the extension of the Bank's termination date, Congress passed a continuing resolution[47] for fiscal year 1988 that funded the federal government for the rest of the fiscal year, including a $1.5 million appropriation to the Bank that was to remain available until September 30, 1989. This complicated legislative activity was described by the Comptroller General as follows:

> In sum, the Congress passed two statutes within hours of one another which appear to be in opposition. Because the Housing and Community Development Act contained no further extension of the life of the Bank, the Bank was to expire after March 15, 1988. Under the continuing resolution, the Bank received an appropriation which was to remain available until September 30, 1989.[48]

At the request of a member of the House Appropriations Committee, the Comptroller General issued a legal opinion regarding appropriated funds to the Solar Bank. The Comptroller General determined that the continuing resolution did *not* authorize the continuation of the Solar Bank's life to the end of September 1989, but rather that the appropriation of money to the Bank was for its use during its limited existence that would end on March 15, 1988. The Comptroller General reached this conclusion based in part on legislative history that indicated congressional intent to terminate the Bank on the specified sunset

[44] Comptroller General of the United States, *Matter of: Civil Rights Commission*, B-246541, 71 Comp. Gen. 378 (1992) (citations omitted).

[45] P.L. 96-294, 94 Stat. 611 (1980).

[46] P.L. 100-200, 101 Stat. 1327 (1987).

[47] P.L. 100-202, 101 Stat. 1329 (1987).

[48] Comptroller General of the United States, *Use of Appropriated Funds for the Solar Energy Conservation Bank*, B-207186 (1989).

date, finding that "the legislative histories of the housing bill and the continuing resolution, when viewed together, do not indicate that the Congress intended the appropriation to extend the life of the Bank beyond March 15, 1988."[49]

Summary of Immigration Provisions at Issue

Your request involves construction of a date-based limitation in four discrete immigration provisions. This section will summarize briefly the provisions, and how the date-based limitation functions in each of them, before turning to the potential effect that the FY2017 CR may have on the dates found in those provisions.

These four provisions are:

1. **E-Verify**: Section 401 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorizes the Department of Homeland Security (DHS) to "conduct 3 pilot programs of employment eligibility confirmation" including the E-Verify program, which allows employers to electronically check the employment eligibility of potential employees. [50] Section 401(b) of that Act, as amended, currently provides that "[u]nless the Congress otherwise provides, the Secretary of Homeland Security shall terminate a pilot program on September 30, 2015."[51]
2. **Non-minister Special Immigrant Religious Worker Program**: Section 101(a)(27)(C) of the Immigration and Nationality Act (INA) is sometimes referred to as the non-minister special immigrant religious worker program. The INA defines a "special immigrant" to include certain immigrants, and such immigrants' spouses and children, who are affiliated with a religious denomination.[52] For such individuals who are not entering the United States to carry on the vocation of a minister, the individual must seek entry before September 30, 2015.[53]
3. **Conrad 30 Waiver Program**: Section 220 of the Immigration and Nationality Technical Corrections Act of 1994 established the Conrad 30 Waiver Program for J-1 visa holders, which describes individuals that have come to the United States to receive graduate medical education or training.[54] Under this program, a limited number of J-1 visitors may receive a waiver of the 2-year residency requirement that would normally apply before such individuals could seek an immigrant visa, permanent residence, or a non-immigrant work visa.[55] Section 220(c), as amended, provides that an individual must have received a J-1 visa before September 30, 2015, in order to be eligible for such waiver.[56]
4. **EB-5 Regional Center Program**: The EB-5 Regional Center Program was established in Section 610 of P.L. 102-395, and reserves certain immigrant investor visas for those who invest in certain

[49] *Id.*

[50] 8 U.S.C. § 1324a note (P.L. 104-208, Div. C., § 401). For more information about E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno (noting that the E-Verify program is the only one of the three pilot programs that is still in operation).

[51] 8 U.S.C. § 1324a note.

[52] *Id.* § 1101(a)(27)(C). These individuals must be a member of a religious denomination having a bona fide nonprofit, religious organization in the United States for at least 2 years immediately preceding the time of application for admission and must be seeking entry into the United States solely for the purpose of carrying on a religious vocation or occupation. *Id.*

[53] *Id.* §§ 1101(a)(27)(C)(ii)(II) and (III).

[54] *Id.* § 1182 note (P.L. 103-416, § 220).

[55] *Id.* § 1182(e); *see generally* USCIS, *Conrad 30 Waiver Program*, https://www.uscis.gov/working-united-states/students-and-exchange-visitors/conrad-30-waiver-program (last updated on May 5, 2014).

[56] 8 U.S.C. § 1182 note (P.L. 103-416, § 220(c) as amended).

targeted employment areas.[57] Section 610(b), as amended, provides that 3,000 visas shall be annually set aside for the EB-5 Regional Center Program until September 30, 2015.[58]

Though the statutory text of the four immigration provisions at issue currently provides effective dates through September 30, 2015,[59] that date has been extended, without being amended, through several legislative enactments. On September 30, 2015, Congress enacted the first of three CRs for FY2016.[60] That CR provided language directing that the four provisions "shall be applied" as if "September 30, 2015" were replaced by December 11, 2015, the end date of the CR.[61] Two subsequent enactments resulted in extensions of the CR through December 22, 2015.[62]

On December 18, 2015, Congress enacted the Consolidated Appropriations Act for FY2016, providing funding for the federal government through September 30, 2016, the end of the fiscal year.[63] Division F of the Consolidated Appropriations Act for FY2016 was the DHS Appropriations Act for FY2016, and it included explicit language directing that the four immigration provisions "be applied" as if extended through September 30, 2016.[64] The DHS Appropriations Act for FY2016 also appropriated $119,671,100 expressly for the E-Verify program.[65] It does not appear that funds were appropriated in that Act for the other three provisions. Instead, the operation of those programs is provided through moneys deposited in the Immigration Examination Fee Account (IEFA) that is permanently appropriated in Section 286 of the INA for those purposes.[66]

Potential Effect of FY2017 CR Upon Immigration Provisions at Issue

On September 28, 2016, the House and Senate passed H.R. 5325, which includes a CR for FY2017 through December 9, 2016.[67] The President signed H.R. 5325 on September 29, 2016.[68] You have asked us to discuss whether the FY2017 CR would allow the four immigration provisions to have continued applicability after September 30, 2016.[69] As an initial matter, the FY2017 CR does not have any

[57] *Id.* § 1153 note; *see generally* USCIS, *EB-5 Immigrant Investor Program*, http://www.uscis.gov/eb-5 (last visited Oct. 2, 2016).

[58] 8 U.S.C. § 1153 note.

[59] P.L. 112-176, §§ 1-4 expressly extended the authorization of these programs by amending each of these provisions by striking "September 30, 2012" and inserting "September 30, 2015."

[60] P.L. 114-53.

[61] *Id.* §§ 130-133.

[62] P.L. 114-96 (extending CR through Dec. 16, 2015); P.L. 114-100 (extending CR through Dec. 22, 2015). Neither of these enactments changed the directive that the immigration provisions should be "applied" as if the sunset date were extended through the end of the CR.

[63] P.L. 114-113.

[64] *Id.* Div. F, §§ 572-575.

[65] *Id.* Div. F, Title IV, 129 Stat. 2509.

[66] 8 U.S.C. § 1356(m) (requiring fees collected to be deposited in the IEFA) and *Id.* § 1356(n) (authorizing amounts in the IEFA to be used for "providing immigration adjudication and naturalization services."). *See also* CRS Report R44038, *U.S. Citizenship and Immigration Services (USCIS) Functions and Funding*, by William A. Kandel. The DHS Appropriations Act for FY2016 did authorize up to $10,000,000 of the funds in the IEFA to be used for immigrant integration grants. P.L. 114-113, Div. F, § 538. However, it is not clear whether those moneys are used to fund any of the immigration programs addressed by this memorandum.

[67] H.R. 5325, Div. C, § 106(3).

[68] Press Release, WHITE HOUSE, Statement by the Press Secretary on H.R. 5325, H.R. 2615, H.R. 5252, H.R. 5936, H.R. 5937 and H.R. 5985 (Sept. 29, 2016), https://www.whitehouse.gov/the-press-office/2016/09/29/statement-press-secretary-hr-5325-hr-2615-hr-5252-hr-5936-hr-5937-and-hr.

[69] CRS has not identified any other enactments that would appear to explicitly extend the effective dates of the four provisions in question beyond September 30, 2016.

provisions that would expressly address or extend the four immigration provisions, either by directly amending the relevant statutes or by directing that such statutes "be applied" using a different date.

Whether Immigration Provisions are Extended by FY2017 CR

The *Consortium Venture Corp.* case discussed above held that a CR did not automatically extend provisions found in an authorizing statute "in the absence of express language reestablishing or continuing that authority."[70] Absent such language, that case might suggest that the four immigration provisions should not be applied using a date beyond September 30, 2016. However, that decision may be distinguishable on the basis that the Claims Court in *Consortium Venture Corp.* was resolving the question of whether an otherwise silent CR would suspend or supersede sunsets imposed in *authorizing* legislation.[71] In contrast, all four immigration provisions were explicitly addressed and extended in the FY2016 DHS Appropriations Act, under which funding is expressly continued by the FY2017 CR.[72] Specifically, Section 101 of the FY2017 CR appropriates:

> Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2016 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2016, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: [including] The Department of Homeland Security Appropriations Act, 2016 (division F of Public Law 114-113).[73]

While the FY2017 CR explicitly extends *appropriations*, and the authority and conditions imposed on those appropriations, contained within the FY2016 DHS Appropriations Act, the Act is otherwise silent with regard to the extension of authorizations in the FY2016 DHS Appropriations Act that are not tied to funds provided therein. One interpretation of this language is that programs that received funding under the FY2016 DHS Appropriations Act would appear to be authorized to continue in FY2017. This interpretation is supported by the language of the FY2017 CR which appropriates "such amounts as may be necessary" and subject to the same "authority and conditions" provided in the FY2016 DHS Appropriations Act. Under this reading, the fact that the FY2016 DHS Appropriations Act provided "$119,671,100 for the E-Verify Program" would mean that "amounts as may be necessary" for the E-Verify program are appropriated by the FY2017 CR, with the same authority and conditions as were provided in the FY2016 DHS Appropriations Act. Pursuant to this argument, the authorities and conditions would necessarily include the provisions in the FY2016 DHS Appropriations Act that expressly address the duration of the E-Verify program through FY2016.

Although the FY2016 DHS Appropriations Act does explicitly extend the relevant dates for the other three immigration provisions in question, CRS has not been able to identify similarly explicit funds appropriated for those provisions in the FY2016 DHS Appropriations similar to the explicit funds appropriated for the E-Verify program. Insofar as no funds were provided in the FY2016 DHS Appropriations Act specifically for the other three provisions, and given that FY2017 CR did not otherwise extend the sunset date authorizing those three programs, it does not appear that this reading of Section 101 would require the conclusion that the "authority and conditions" regarding those three provisions, such as the date extension, would be continued by the FY2017 CR.

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[70] *Consortium Venture Corp.*, 5 Cl. Ct. 47, 50 (Cl. Ct. 1984) (declining to hold that a CR extended a statutory sunset "[i]n the absence of express language reestablishing or continuing that authority"). *See also* 65 Comp. Gen. 318 (1986) (same).

[71] *Consortium Venture Corp.*, 5 Cl. Ct. at 50.

[72] H.R. 5325, Div. C, § 101(a)(6).

[73] *Id.*

While such a reading may be consistent with the text and grammatical structure of Section 101, it is important to note that none of the precedent discussed above directly addresses the scope of Section 101 in the same factual scenario. If Section 101 were read more broadly, such that authorities and conditions provided in the prior year's appropriations acts were continued, regardless of whether funding for a particular provision was expressly provided, then one might conclude that the provisions extending the dates for all four immigration provisions in question would be continued beyond September 30, 2016.

Application of Potential Extension of Immigration Provisions

Assuming that all four such provisions are extended, either because they are tied to funding or because Section 101 may be read more broadly, there may still be questions regarding what it means for authorities and conditions to be the "same" as provided under the FY2016 DHS Appropriations Act. For all four of the provisions, the language of the FY2016 DHS Appropriations Act states that they "shall be applied by substituting 'September 30, 2016'" for the actual statutory date (currently September 30, 2015).[74] One approach may be to apply these provisions literally, such that the direction to replace the September 30, 2015, date would continue, but the new date would still be September 30, 2016. A second approach might be to view September 30, 2016, as simply a reference to the end of FY2016, suggesting that the provisions should be applied in FY2017 for as long as the FY2017 CR is effective. Although the cases and decisions discussed above may establish the proposition that the inquiry should be focused on Congressional intent, the relevant precedent may not definitively resolve the questions posed by this factual scenario.

In some cases, the manner in which a CR extends funding for a particular program may clearly indicate a congressional intent to extend the authorization for a program, and counsel against a literal application of the September 30, 2016, sunset date. For example, the date in the E-Verify provision provides a sunset on the authority of the program to operate.[75] However, Section 101 of the CR would purport to provide funding for the operation of that program beyond that date.[76] As in the case of the Civil Rights Commission discussed above, this apparent conflict may be resolved by construing the CR as specifically extending authority for the program through the duration of that temporary funding law, under the canon of statutory construction requiring a more recently enacted statute to supersede a previously enacted statute where the two are in irreconcilable conflict.[77] In the case of the EB-5 Regional Center Program, that program reserves a number of visas on an annual basis.[78] If the continued operation of that program during FY2017 cannot be accomplished using the September 30, 2016 date, because no new visas would be reserved, that may support the position that the FY2017 CR extended the date through its duration for that program.

It may be more difficult to ascertain legislative intent where there is not the same level of conflict inherent in the continued application of the September 30, 2016 date. In the context of the non-minister special immigrant religious worker program, the "September 30, 2016" date does not appear to terminate the program, but only requires that an immigrant have sought to enter the United States before that date in order to be considered a special immigrant.[79] Under the FY2017 CR, the literal date of September 30,

[74] 8 U.S.C. § 1324a note; 8 U.S.C. §§ 1101(a)(27)(C)(ii)(II) and (III); 8 U.S.C. § 1182 note; 8 U.S.C. § 1153 note.

[75] 8 U.S.C. § 1324a note ("Unless the Congress otherwise provides, the Secretary of Homeland Security shall terminate a pilot program on September 30, 2015.").

[76] H.R. 5325, Div. C, § 101 (appropriating funds "for continuing projects or activities" in FY2017).

[77] 71 Comp. Gen. 378 (1992). *See also* Comptroller General of the United States, *Bureau of Alcohol, Tobacco, Firearms, and Explosives--Prohibition in the 2008 Consolidated Appropriations Act, July 15, 2008*, B-316510 at 3 (2008) (citing Posadas v. Nat'l. City Bank of N.Y., 296 U.S. 497, 503 (1936) and Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978)).

[78] 8 U.S.C. § 1153 note.

[79] *Id.* § 1101(a)(27)(C)(ii)(II) and (III).

2016 could still be theoretically applied in FY2017, by granting special immigrant status for those otherwise eligible individuals who arrived before September 30, 2016, while excluding those who arrived on or after that date. Similarly, the Conrad 30 program, which does not terminate substantive authority for the program but requires that an individual have received a J-1 visa before September 30, 2016, in order to be eligible for a waiver, might still be applied in FY2017 using the same date, insofar as the literal date can be read harmoniously with the continuation of "authority and conditions" under the CR.[80] For these provisions, the question of whether Congress intended to have these provisions continue beyond September 30, 2016 may be less clear.

[80] Comptroller General of the United States, *Use of Appropriated Funds for the Solar Energy Conservation Bank*, B-207186 at 3-4 (1989) (citing Watt v. Alaska, 451 U.S. 259, 265-268 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.")).