



News & Types: Immigration Update

Business Immigration Monthly - October 2022

10/25/2022

By: Julie T. Emerick, Derek W. Strain

Practices: Immigration

Co-Author: Hirokazu Kishinami, Law Clerk

FORM I-9 EMPLOYEE ELIGIBILITY VERIFICATION UPDATE

The Department of Homeland Security (DHS) announced that it is extending the COVID flexibilities for Form I-9 completion until July 31, 2023. These flexibilities allow employers to use methods other than in-person physical document inspection, such as viewing an employee's identity and work authorization documents over video link, via fax or email, or other remote viewing, when completing the Form I-9 verification process for remote workers. An employer is expected to complete the in-person document verification of employees who physically report to work at a company location on any regular consistent or predictable basis.

If the employment relationship ended before the employer is able to inspect and verify in-person the employee's documents of identity and work authorization, the employer may add a note of the circumstances to the Form I-9.

Since November 7, 1986, newly hired employees are required to complete a Form I-9, Employment Eligibility Verification, on their first day of hire, and within three business days provide documentation of their identity and employment eligibility following a list of acceptable documents. Failure to comply with the Form I-9 requirements subjects an employer to possible fines and penalties should a government audit occur.

USCIS also announced that the current version of the Form I-9, which states in the upper right corner an expiration date of October 31, 2022, may continue to be used while USCIS is working on a new version of the form. We will update you when an updated version of the Form I-9 is released.

THE NUMBER OF H-2B TEMPORARY NONAGRICULTURAL WORKER VISAS TO BE INCREASED FOR FY2023

DHS recently announced that it will soon be issuing a regulation to allow an additional 64,716 H-1B visas for fiscal year (FY) 2023 (October 1, 2022 to September 30, 2023). With this new allocation, 20,000 visas will be reserved for workers from El Salvador, Guatemala, Haiti, and Honduras and the remaining 44,718 visas will be available to workers who had an H-2B visa or H-2B status during the last three fiscal years. Generally, H-2B visas are capped at 66,000 in a fiscal year.

The H-2B visa is available to a foreign worker who would hold a seasonal position or work in a position having a one-time occurrence or intermittent need. Before sponsoring a foreign worker for an H-2 visa or status, the employer must demonstrate to the U.S. Department of Labor (DOL) that there are insufficient U.S. workers willing, able, qualified, or available for the position, and the hiring of a foreign worker will not adversely affect wages and working conditions of U.S. workers in a similar position. The H-2B visa classification is often used by the hospitality and tourism, landscaping, and seafood processing industries.

The Biden Administration has created an H-2B Worker Protection Taskforce to review the H-2B program. It is anticipated that recommendations from the taskforce to improve safeguards in the H-2B program for both foreign workers and U.S. workers will be noted in the forthcoming regulation.

WARNINGS IN THE NOVEMBER VISA BULLETIN UPDATE

The U.S. Department of State (DOS) recently issued the [Visa Bulletin](#) for November 2022. The Visa Bulletin is issued on a monthly basis and summarizes the availability of immigrant visas (a/k/a “Green Cards”) for both family and employment-based cases for a given month. Notable changes in the employment-based categories include the following:

D. EMPLOYMENT FOURTH PREFERENCE (SR) RELIGIOUS WORKERS CATEGORY EXTENDED
H.R. 6833, enacted on September 30, 2022, extended the Employment Fourth Preference Certain Religious Workers (SR) category until December 16, 2022. *No SR visas may be issued overseas, or final action taken on adjustment of status cases, after midnight December 15, 2022.* Visas issued prior to that date will be valid only until December 15, 2022, and all individuals seeking admission in the non-minister special immigrant category must be admitted (repeat admitted) into the United States no later than midnight December 15, 2022. The SR category is subject to the same final action dates as the other Employment Fourth Preference categories per applicable foreign state of chargeability.

Persons in this category must adjust or receive their immigrant visa overseas before December 16, 2022.

E. VISA AVAILABILITY IN THE EMPLOYMENT SECOND CATEGORY (EB-2). *Increased demand in the Employment Second category may necessitate the establishment of a worldwide final action date* in the coming months to hold number used within the maximum allowed under the Fiscal Year 2023 annual limit. This situation will be continually monitored, and any necessary adjustments will be made accordingly.

Please note that if this occurs, the EB2 World category, which has been “Current” for many years, would become limited by a final action date and only those with priority dates before the listed date would be able to adjust or be issued an immigrant visa.

Further information about a retrogression in the EB-2 World category will be contained in future Masuda Funai Business Immigration Updates when it becomes available.

U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT APPROVES THE CONTINUATION OF STEM OPT

The U.S. Court of Appeals for the D.C. Circuit recently confirmed that DHS has the power to determine the time and conditions for an F-1 student’s stay in the United States, including periods of employment

authorization, called Optional Practical Training (OPT). The appellate court recognized that the Immigration and Nationality Act (INA), as amended, specifically allows post-completion practical training and DHS has the authority to determine the duration and conditions of an OPT program, including an OPT extension for graduates of science, technology, engineering, or mathematics (STEM) programs.

After the Obama Administration extended the length of the STEM OPT program from 17 months to 24 months, the plaintiffs in the lawsuit challenged DHS's authority to grant OPT contending such program "requires employers to provide foreign guest workers OPT mentoring without requiring that such program be provided to American workers." The court noted OPT is an opportunity for foreign students "to achieve the objectives of their courses of study by allowing them to gain valuable knowledge and skills through on-the-job training that may be unavailable in their home countries" and students have been authorized to "work at jobs related to their studies since at least 1947".

Under OPT, some F-1 students may be authorized to work up to three years -- an initial one-year period of regular OPT authorization is available to certain F-1 students; then students who received a degree in a designated (STEM) field and whose employer is registered in E-Verify may be eligible for an additional 24-month extension of OPT.

IT'S TIME FOR THE "GREEN CARD" LOTTERY!

The DOS has released its instructions for the Diversity Immigrant Visa "Green Card" Lottery Program (DV-2024) for fiscal year 2024 (October 1, 2023, through September 30, 2024). The Lottery Program for DV-2024 registration will be open for only 34 days from October 5, 2022, at noon (EST) through close at noon (EST) on November 8, 2022. Applicants from eligible countries are encouraged to apply. While there is no fee to apply for the Lottery Program, only one application per individual is permitted.

The DOS makes 55,000 "Green Cards" available annually to persons from countries having low rates of immigration to the United States and who have either completed a 12-year course of formal elementary and secondary education, or who within the past five years have two years of work experience in an occupation that requires at least two years of work experience to perform. Applicants for Diversity Visas are chosen by a computer-generated random lottery drawing. Beginning in May 2023, applicants can check the status of their registration online via Entry Status Check at <https://dvprogram.state.gov> to determine whether they were selected (a/k/a "winning the lottery"). The Entry Status Check is the ONLY manner in which entrants will be notified of their selection. The DOS will NOT mail or email any selection notification or correspondence to the lottery winners. Furthermore, the Entry Status Check will be the only way in which selected individuals will be provided further instructions on Immigrant Visa procedures – how to convert the lottery win to a Green Card.

Additional detailed information on the FY2024 Diversity Immigrant Visa Lottery is available in a Masuda Funai Client Alert - <https://www.masudafunai.com/articles/dv-2024-green-card-lottery-open-from-october-5th-to-november-8th-for-eligible-applicants>.

USCIS EXTENDS TEMPORARY VALIDITY OF “GREEN CARD” RENEWALS DUE TO PROCESSING DELAYS

As noted in the [2022 Annual Report of the USCIS Ombudsman](#), as of December 31, 2021, U.S. Citizenship & Immigration Services (USCIS) had 725,418 applications to renew or correct a Permanent Resident Card (“Green Card”) to process. USCIS processed only 82,609 of such applications in the first quarter of FY2022. Noting heavy backlogs and limited processing capacities, USCIS is automatically extending the validity of the cards to 24 months for Lawful Permanent Residents (LPR) who apply to have filed a [Form I-90, Application to Replace Permanent Resident Card](#).

An LPR who properly filed a Form I-90 to replace the Green Card receives a receipt notice which grants an interim extension of the validity of the Green Card. These receipt notices can be presented with an expired Green Card as evidence of continued permanent resident status for employment and international travel.

Previously, the Form I-90 receipt notice provided a 12-month extension of the validity of the Green Card. Now, with newly filed Forms I-90, the USCIS is extending the validity of a Green Card for 24 months. For those LPRs whose Form I-90 remains pending as of September 26, 2022, USCIS will be mailing out amended receipt notices indicating the Green Card is valid for 24 months post expiration. This extension is expected to help the applicants affected by longer USCIS processing times by providing them with proof of lawful permanent resident status as they await their renewed Green Card.

An LPR who no longer has the Green Card (lost, stolen, or for other reasons) and needs evidence of permanent resident status while awaiting the issuance of the replacement Green Card, may request an appointment with a USCIS Field Office by contacting the [USCIS Contact Center](#) for issuance of an Alien Documentation, Identification, and Telecommunication (ADIT) stamp.

EXTENSION OF TEMPORARY WAIVER OF “60-DAY RULE” FOR PHYSICIAN SIGNATURE ON A REPORT OF MEDICAL EXAMINATION AND VACCINATION RECORD (FORM I-693)

Individuals applying for Permanent Resident status (“Green Card”) while in the United States via a process called “adjustment of status” are required to provide USCIS with results of a medical examination to demonstrate they are free from any public health grounds that render the applicant inadmissible under [INA 232](#) and [INA 212\(a\)\(1\)](#). A USCIS-approved physician/civil surgeon must sign the completed *Report of Medical Examination and Vaccination Record (Form I-693)*, no more than 60-days prior to the submission of the Green Card application to USCIS.

To accommodate applicants’ difficulties in completing the medical examination during the COVID pandemic and related processing delays by the USCIS, on December 9, 2021, USCIS waived the requirement that the medical examination results be signed by the physician within 60 days of submission. USCIS is now extending this temporary waiver until March 31, 2023.

The medical examination results continue to only be valid for two years from the date the physician/civil surgeon signs the Form I-693. If USCIS is unable to approve the adjustment of status application before the medical examination expires, the adjustment of status applicant is required to complete a new medical examination.

SPECIAL IMMIGRATION PROCESS FOR VENEZUELAN NATIONALS

DHS recently launched a program for nationals of Venezuela to come to the United States under a humanitarian process.

To qualify, the Venezuelan national must not be a permanent resident or dual national in any other country; not have been ordered removed from the United States within the past 5 years or be subject to an inadmissibility bar based upon a prior removal; not have unlawfully crossed the Mexican or Panamanian borders after October 19, 2022; not have crossed irregularly into the United States between ports of entry after October 19, 2022; and satisfy U.S. security vetting. The spouse or common-law partner and their unmarried children under age 21 of the Venezuelan national may also qualify for this humanitarian process. Children under the age of 18 must be traveling with their parent or legal guardian.

The process to request the travel authorization is commenced by a U.S.-based supporter filing a *Declaration of Support (Form I-134)* on-line for each individual with U.S. Citizenship & Immigration Services. The U.S. supporter must be a U.S. citizen or national, lawful permanent resident, asylee, or hold Temporary Protected Status or be a recipient of deferred action, such as DACA, or Deferred Enforced Departure (DED). The U.S. supporter must demonstrate sufficient financial and other resources to support the Venezuelan national during the parole period of up to two years, and also satisfy U.S. security vetting. Additional non-financial support to be contemplated may include arranging for safe and appropriate housing, assisting with access to education, English language studies, ensuring healthcare needs are met and facilitating the completion of required paperwork to be able to work in the United States.

If Department of Homeland Security deems the I-134 is sufficient, it will contact the Venezuelan national via email with instructions on the next steps. Each Venezuelan national must attest to having been vaccinated for measles, polio and the first dose of a COVID-19 vaccine or is eligible for an exception to the vaccine requirements. Also, each traveler must have a valid, unexpired passport. Arrival to the United States must be to a U.S. airport, not a land border.

Upon arriving in the United States, the Venezuelan national may apply for work authorization. The authorization to remain in the United States is limited to two years. Separate authorization is needed for any international travel.

MFEM NEWS

KATHLEEN GABER SPEAKING AT THE ALLIOTT ALLIANCE WORLDWIDE CONFERENCE

Ms. Kathleen Gaber, a partner in the Masuda Funai Immigration Group, will be speaking on a panel at the Alliot Alliance Worldwide Conference being held in Washington, D.C. from November 6-9, 2022. The Alliot Global Alliance is one of the world's fastest-growing global alliances with 215 law and accounting member firms in 95 countries. Ms. Gaber will be speaking on a panel with Mary Katherine Ham, a nationally prominent journalist, author, and CNN political commentator, about how American Populism influences and affects global policy and trends.

BOB WHITE PRESENTED ON AN H-1B PANEL AND COORDINATED GOVERNMENT SESSIONS DURING THE NAFSA REGION V CONFERENCE

Mr. Bob White, a partner in the Masuda Funai Immigration Group, participated in a session on H-1B Current Trends during the NAFSA: Association of International Educator's Region V Conference in Milwaukee, Wisconsin. As part of the session, Mr. White discussed the current issues with the H-1B program, including increased prevailing wages, qualifying occupations, audits, and consular processing delays.

Additionally, Mr. White is one of the Regulatory Liaisons for NAFSA Region V. As such, Mr. White coordinated the government sessions for the Conference with numerous representatives from the USCIS Ombudsman's Office, DOS Visa Office/Consular Affairs, DHS Student and Exchange Visitor Program (SEVP), Customs and Border Protection (CBP) and the Commerce Department. A record number of government speakers participated in this year's Conference as it was the first in-person conference since prior to the COVID pandemic.