masuda funai

News & Types: Immigration Monthly Updates

ビジネス移民法ニュース（2023年11月号）（英語版）が発行されました。

11/20/2023

By: ジュリー エメリック, デレク ストレイン

Practices: 移民法

PRESIDENT BIDEN'S EXECUTIVE ORDER ON AI

Although existing since 1956, Artificial Intelligence or "AI", the intelligence of machine-based systems, is the latest hot trend on many levels, including U.S. immigration. On October 30, 2023, President Biden issued an *Executive Order titled Safe, Secure and Trustworthy Development and Use of Artificial Intelligence* and noted eight guiding principles and priorities for the safe and responsible use of AI. Such principles and priorities focus on the safe and secure use of AI including guidance/labeling on AI-generated content; promoting the marketplace for AI on a level basis; investing in education and training of U.S. workers in AI programs; developing AI standards which are non-discriminatory and advance equality and civil rights; enforcing consumer protections for AI use; protecting data privacy; managing the Federal Government's risks when using AI; and promoting responsible and safe AI use globally.

In the area of promoting innovation and competition through the U.S. immigration system, the Executive Order directs the Secretary of State and Secretary of the Department of Homeland Security (DHS) to streamline the visa processing of petitions and visa applications for noncitizens coming to the United States to study, work or conduct research in "AI or other critical and emerging technologies" within 90 days (by 01/28/2024). Additionally, the Secretary of State has been given timelines to consider taking various measures to update the J-1 Exchange Visitor Skills List and criteria to designate countries and skills for the J-1 program (within 120 days); to implement a domestic visa renewal program; and expand such visa renewal processing to J-1 research scholars and F-1 students in STEM fields (within 180 days).

The Secretary of Homeland Security, who has authority over Citizenship & Immigration Services (USCIS), Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), has also been given timelines for various actions including: make an effort to modernize the immigration pathway for experts in AI or other critical and emerging technologies in various nonimmigrant (O-1 Extraordinary Ability) and immigrant (EB1 Extraordinary Ability and EB2 Advanced Degree or Exceptional Ability) classifications and for the International Entrepreneur Rule parole program (within 180 days); continue the regulatory process to enhance the H-1B Specialty Occupation Worker program (within 180 days); consider initiating rulemaking to enhance the process for noncitizens to adjust their status to lawful permanent resident (within 180 days); and collaborate with the Secretary of Labor to consider updating the list of occupations under Schedule A (current

occupations include physical therapists, professional nurses, and individuals having exceptional ability in the sciences, arts or performing arts) to include AI or other STEM-related occupations (within 45 days).

So far, the U.S. Department of Labor (DOL) has sent a pre-rule to the Office of Management and Budget (OMB) about how to expand Schedule A to include more occupations that will be exempt from the PERM process. After OMB completes its review, the DOL will release the pre-rule which will mostly solicit public feedback for a period of 60 days. After the DOL receives feedback through the pre-rule, it is assumed that the DOL will release a proposed regulation expanding the occupations included on the Schedule A list. The DOL will then consider comments to the proposed regulation before potentially implementing the final regulation. Therefore, although the Executive Order indicates a timeline of 45 days for the consideration of the expansion of Schedule A, it will take significantly longer for the DOL to potentially complete the process to modify Schedule A.

Additional information about the implementation of the Executive Order will be contained in future Masuda Funai Business Immigration Monthlies when they become available.

CBP LAUNCHES GLOBAL ENTRY APP

On November 1, 2023, U.S. Customs & Border Protection (CBP) launched a mobile app for Global Entry users arriving at designated airports.

Global Entry allows pre-approved, low-risk travelers expedited clearance upon arrival in the United States.

The designated airports using the CBP app include:

- Chicago Midway International Airport
- Chicago O'Hare International Airport
- Minneapolis-Saint Paul International Airport
- Pittsburgh International Airport
- Washington Dulles International Airport
- Charlotte Douglas International Airport
- Hartsfield Jackson Atlanta International Airport
- Ft. Lauderdale International Airport
- Miami International Airport
- Orlando International Airport
- Tampa International Airport
- Dallas / Fort Worth International Airport
- George Bush Intercontinental Airport (Houston, TX)
- Los Angeles International Airport
- Seattle Tacoma International Airport

Global Entry travelers may launch the app upon arrival, take their photograph using their mobile device and receive a QR code to use at the designated Global Entry inspection area. The QR code is valid for 59 minutes

and it is envisioned that the Global Entry inspection will be completed within that timeframe, depending on the volume of international passengers arriving at the airport.

U.S. Citizens, Permanent Residents and select foreign nationals may apply to join the Global Entry program by completing an application online (https://www.cbp.gov/travel/trusted-traveler-programs/global-entry). Thereafter the Global Entry application processing is completed via an interview either at a CBP office, a designated CBP Enrollment Office or when arriving in the United States for Enrollment on Arrival. Global Entry approval is valid for 5 years, may be renewed, and the current application fee is $100.00. Most Global Entry travelers may also qualify for TSA pre-check for domestic travel.

DECEMBER VISA BULLETIN UPDATE

The DOS recently issued the December 2023 Visa Bulletin with few changes from last month.

Who may apply for Adjustment of Status ("AOS") during December 2023?

On a positive note, USCIS has agreed to continue to allow individuals eligible in the family-based and employment-based categories to apply for permanent resident status in the United States through a process call adjustment of status (“AOS”) under the “Dates of Filing Chart” (instead of the Final Action Date chart).

For *employment-based immigration* this allows the following foreign nationals to apply for AOS in December 2023:

First Preference (no changes since October 2023 – following the Department of State’s quarterly projections)

- Persons eligible for the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researcher/Professors or workers recognized for their Extraordinary Ability) who were born in any country other than India or China.
- China-born persons eligible for the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researcher/Professors or workers recognized for their Extraordinary Ability) who filed their Immigrant Petition (Form I-140) before August 1, 2022.
- India-born persons eligible for the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researcher/Professors or Workers recognized for their Extraordinary Ability) who filed their Immigrant Petition (Form I-140) before July 1, 2019.

Second Preference (no changes since October 2023 – following the Department of State’s quarterly projections)

- Persons born in any country other than India or China who are eligible for the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) and who filed their Immigrant Petition (Form I-140), or their employer filed a PERM Labor Certification before January 1, 2023.
- China-born persons who are eligible for the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) and who filed their Immigrant Petition (Form I-140), or their employer filed a PERM Labor Certification before January 1, 2020.

- India-born persons who are eligible for the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) and who filed their Immigrant Petition (Form I-140), or their employer filed a PERM Labor Certification before May 15, 2012.

Third Preference

- Persons born in any country other than India or China who are eligible for the employment-based 3rd preference category (Professionals or Skilled Workers) and whose employer filed a PERM Labor Certification before February 1, 2023.
- China-born persons who are eligible for the employment-based 3rd preference category (Professionals or Skilled Workers) and whose employer filed a PERM Labor Certification before September 1, 2020.
- India-born persons who are eligible for the employment-based 3rd preference category (Professionals or Skilled Workers) and whose employer filed a PERM Labor Certification before August 1, 2012.
- Philippines-born persons who are eligible for the employment-based 3rd preference category (Professionals or Skilled Workers) and whose employer filed a PERM Labor Certification before January 1, 2023.

To be approved for the actual Green Card/Permanent Resident status, an immigrant visa must be available when USCIS approves the AOS application or when the Consular post issues the Immigrant Visa. This is based upon the Final Action Date (not Dates for Filing) chart. There was little change in the Final Action Date Chart with advancement for China only. China-born nationals will benefit from a three-week quota advancement in the employment-based 2nd preference category with movement from October 1, 2029 to October 22, 2019 and employment-based 3rd preference category with movement from January 1, 2020 to January 22, 2020.

DOS, which manages the Visa Bulletin, notes its intention to keep visa issuance within quarterly limits in accordance with the provisions of the Immigration and Nationality Act.

SUPREME COURT REFUSES TO REVIVE LAWSUIT OVER H-1B SPOUSES' WORK PERMITS

On October 30, 2023, the U.S. Supreme Court refused to take up a case on appeal from a D.C. Federal judge's ruling that the DHS in implementing an Obama administration regulation allowing certain H-4 dependent spouses of H-1B visa holders seeking employment-based permanent residency to apply for employment authorization in the U.S.

The D.C. Judge upheld the DHS policy accepting the argument that the rule simply sped up the timeframe for spouses entering the labor market and did not result in any new additions to the workforce. The workers who brought the lawsuit, former workers from the electric utility Southern California Edison and the organization Save Jobs USA, argued they were losing job openings to temporary visa holders due to the regulation and that the DHS had acted beyond the bounds of its authority and contrary to the Immigration and Nationality Act. The Judge disagreed noting that even if every eligible H-1B dependent received work authorization in the first year, they would make up less than 0.12% of the U.S. workforce.

APPLE SETTLES $25 MILLION LAWSUIT OVER DISCRIMINATION IN PERM PROCESS

On November 9th, the Department of Justice (DOJ) announced a $25 million agreement requiring Apple to pay $6.75 million in civil penalties and create an $18.25 million backpay fund for potential discrimination claimants as part of the employer-sponsored green card process.

According to the DOJ, in addition to the monetary penalties, the settlement agreement also requires Apple to ensure that its recruitment for PERM positions in the employment-based immigrant visa (aka green card process) more closely matches its standard recruitment practices. The DOJ found Apple did not advertise positions it sought to fill through the PERM program on its external job website, even though its standard practice was to post other job positions on this website. It also required all PERM position applicants to mail paper applications, though it normally permitted electronic applications for other positions. The DOJ alleged the company did not consider some applications for PERM positions submitted electronically by Apple employees.

The investigation found Apple engaged in a pattern or practice of citizenship status discrimination in recruitment for PERM positions, and that the company's unlawful discrimination prejudiced U.S. citizens, U.S. nationals, lawful permanent residents, and those granted asylum or refugee status. These less effective recruitment practices, such as requiring applicants to apply by mail, deterred protected workers from applying for positions the company preferred to fill instead with PERM beneficiaries.

Apple contests the allegations against it, stating that "any failures were the result of inadvertent errors and not discrimination." According to the settlement, in addition to the monetary penalties, Apple is required "to conduct more expansive recruitment for all PERM positions, including posting PERM positions on its external job website, accepting electronic applications, and enabling applicants for PERM positions to be searchable in its applicant tracking system."

DISCRIMINATORY ADVERTISEMENTS RESULT IN CIVIL PENALTY AGAINST COX COMMUNICATIONS

The Department of Justice also announced an agreement with Cox Communications to pay civil penalties for violating the anti-discrimination provisions of the Immigration and Nationality Act (INA) by using a Georgia Institute of Technology (Georgia Tech) on-campus recruiting platform to post dozens of discriminatory job advertisements that unlawfully excluded students and alumni based on their citizenship status.

The INA's anti-discrimination provision, passed as part of the Immigration Reform and Control Act in November 1986, prohibits employers and recruiters from limiting jobs based on citizenship or immigration status unless required by a law, regulation, executive order or government contract. The INA protects those granted asylum or refugee status, recent lawful permanent residents, U.S. citizens and U.S. nationals from citizenship status discrimination in hiring, firing and recruitment or referral for a fee.

The investigation began after a Georgia Tech student, then a lawful permanent resident, complained about a U.S. citizens-only internship advertised on Georgia Tech's on-campus job recruitment platform. The investigation found dozens of other discriminatory advertisements on the platform, including several posted by Cox Communications that unlawfully excluded workers granted asylum or refugee status, lawful permanent residents and, in one instance, U.S. citizens. The investigation also determined Cox Communications used

features of the platform to deter and automatically exclude qualified students from applying based on citizenship status.

As a result of the settlement, Cox Communications is required to pay a civil penalty of $459,895 and to train its recruiting staff on the INA's anti-discrimination provision. The agreement prohibits Cox Communications from including specific citizenship or immigration status designations in campus job postings unless the restrictions are legally required.

MFEM NEWS

Bob White To Participate on Panel with DOL Officials at the Practice Law Institute (PLI) Conference in New York

Bob White, an attorney in the Masuda Funai Immigration Group, will be speaking with leaders from the DOL's Office of Foreign Labor Certification (OFLC) during a panel at the Practice Law Institute's (PLI) annual conference in New York on November 28, 2023. The focus of the discussion will be on the continued implementation of the new PERM process by OFLC. The PERM process is the first stage of the employment-based green card process. OFLC changed the PERM process in June 2023 and employers are waiting for initial adjudications of their PERM applications filed through the new PERM process.