



News & Types: Immigration Update

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Practices: Immigration

## EFFECTS OF GOVERNMENT IMMIGRATION BACKLOGS AND DELAYS

All government agencies involved in immigration processing continue to struggle with case backlog and processing delays. Multiple reasons have been cited including the impact of the COVID-19 pandemic, a hiring freeze, staff attrition, an increase in the number of cases filed and changes in policy. The U.S. Citizenship and Immigration Services (USCIS) Ombudsman and Members of Congress have taken notice.

On June 30, 2022, USCIS Ombudsman Phyllis A. Coven delivered her office's [Annual Report](#), which makes recommendations for USCIS operational and administrative policies and practices, to Congress. The Ombudsman cited USCIS for its severe and unprecedented backlog noting as of April 2022, USCIS has an inventory of 8.5 million applications/petitions to process, of which more than five million are backlogged cases. In the backlog metrics reported by USCIS on average it has capacity to process approximately 13% this fiscal year. For this election year, of the 839,635 pending applications for naturalization, USCIS projects processing only 10%. USCIS Ombudsman Coven opined that government reduction efforts may not be forthcoming, stating, "While the agency [USCIS] is doing much to reduce its backlog, it is unlikely to change quickly or even as immediately as the agency intends."

In a July 7, 2022 [bipartisan letter](#) to Department of Labor (DOL) Secretary Martin J. Walsh, Senator Amy Klobuchar (D-MN) and Senator Susan N. Collins (R-ME) asked what steps the DOL was undertaking to decrease its unprecedented 7 month [processing times](#) for prevailing wage determinations, which are needed for some temporary worker and employment-based Green Card classifications. Notably the Senators advised Secretary Walsh, "As businesses across the country continue to face workforce shortages, taking long-term efforts to decrease processing backlogs and delays will help ensure that employers will be able to find the help that they need."

Visa Units of U.S. Embassies and Consulates globally are still recovering from limited services due to COVID closures and former Presidential Proclamations of 2020. Current nonimmigrant visa processing has concentrated on students and temporary workers, including agricultural workers. Approximately 800,000 nonimmigrant visa applications are processed each month, which is about 80% of pre-pandemic levels. While the Department of State has been creative in its efforts to process more visa applications, empowering Visa Units to [waive the applicant interview](#), the reality shows overall visa processing may be longer. For example, interview waiver processing at the U.S. Embassy in London is averaging twenty-one working days, while

receiving the visa post-interview is averaging 7 days. On August 10, 2022, Julie Stufft, Deputy Assistant Secretary for Visa Services with the Bureau of Consular Affairs with the State Department, provided an [update](#) on U.S. consular operations reporting that visa applicants can apply anywhere in the world where there's an [appointment available](#); expedite requests are being entertained to accommodate business travel urgent humanitarian travel, or medical travel; and a previously paid nonimmigrant visa application (MRV) fee may be used until September 30, 2023. While such efforts by Consular Posts are welcome, there are some considerations for visa applicants: if not applying in your home country, a separate visa may be required to enter the country where the Consular Post is located; for an expedite request, very often an appointment must first be scheduled; and MRV fees may not be readily transferrable between Consular Posts in different countries due to exchange rates and have the payment was processed.

### **USCIS CONTINUES COVID-19 FLEXIBILITIES FOR RFES, NOIDS, NOIRS AND APPEALS**

On July 25th, USCIS [announced](#) an extension of its COVID-19 policy regarding flexibility with responding to USCIS Requests for Evidence (RFE), Notices of Intent to Denial (NOID), Notices of Intent to Revoke (NOIR) and appeals of adverse decisions. Under this policy, which was implemented March 1, 2020, USCIS will continue to consider a response timely filed if received within 60 calendar days after the due date set forth in RFEs, NOIDs and NOIRs, provided the request or notice was issued between March 1, 2020, and Oct. 23, 2022. In addition, Forms I-290B, Notice of Appeal or Motion, and N-336, Request for a Hearing on a Decision in Naturalization Proceedings, will be considered if the form was filed up to ninety calendar days from the issuance of a decision, and the decision was made between November 1, 2021, and October 23, 2022.

### **EXPANSION OF PREMIUM PROCESSING**

USCIS is continuing its efforts of a phase-in the expansion of Premium Processing for certain petitions as required under the Emergency Stopgap USCIS Stabilization Act. Effective August 1, 2022, USCIS is accepting Premium Processing upgrades of Form I-140 petitions for Multinational Executives and Managers (EB-13 classification) received on or before July 1, 2021, and National Interest Waivers (EB-21 classification) received on or before August 1, 2021. Under Premium Processing for these categories, USCIS is to review the petition within forty-five calendar days (not 15 calendar days as is available for many other categories eligible for Premium Processing). [Standard processing](#) is ranging from 13 to 16.5 months for Multinational Executives and Managers and from 15 to 20.5 months for National Interest Waivers. Additional information about the Premium Processing Expansion is available in a previous MFEM Client Alert at [USCIS Announces Actions to Phase in an Expansion of Premium Processing and to Reduce Backlogs | Masuda Funai](#).

### **VISA BULLETIN UPDATE**

On August 8, 2022, the United States State Department issued the [Visa Bulletin](#) for September 2022. The Visa Bulletin is issued on a monthly basis and summarizes the availability of immigrant visas for both family- and employment-based cases for a given month.

The September Visa Bulletin contained the following note:

#### **D. AVAILABILITY OF EMPLOYMENT-BASED VISAS DURING SEPTEMBER**

**There has been a steady increase in both USCIS and Department of State demand patterns for employment-based visas during the fiscal year. As a result, most employment-based preference category limits and/or the overall employment-based preference limit for FY 2022 are expected to be reached during September. If at any time an annual limit were reached, it would be necessary to immediately make the preference category “unavailable” and no further requests for numbers would be honored.**

Please note that if this occurs, and any categories become “Unavailable”, the new immigrant visa numbers should become available again at the start of the government’s next fiscal year on October 1st, 2022, which would likely be reflected in the October Visa Bulletin.

### **USCIS ANNOUNCES THAT H-1B QUOTA FOR FISCAL YEAR 2023 HAS BEEN MET AFTER ONLY ONE SELECTION PROCESS**

The H-1B quota random selection process (aka H-1B quota lottery) for fiscal year (FY) 2023 (October 1, 2022 to September 30, 2023) was completed on March 29, 2022, when [USCIS announced](#) it had received enough electronic registrations during the initial registration period to reach the FY 2023 H-1B numerical allocations (65,000 numbers for regular H-1B cap with an additional 20,000 numbers for the U.S. advanced degree exemption). Additional information about the FY2023 H-1B quota lottery results is available in a previous MFEM Client Alert at [USCIS Announces Results of the FY2023 H-1B Quota Registration Selection Process | Masuda Funai](#).

The number of registrations initially selected (127,600) for FY2023 was significantly higher than previous years. In contrast, for FY2022 (October 1, 2021 to September 30, 2022), USCIS initially selected only 87,500, after which the USCIS had to conduct two additional random selection processes in order to ensure that the available quota numbers were used during the fiscal year. Last year, the results of a second random selection process were announced on July 28, 2021, and results of a third random selection process were announced in November 2021.

On August 23, 2022, the USCIS indicated that the H-1B quota for FY2023 has been met. Therefore, the USCIS will not conduct any additional random selection processes this year. Additionally, the USCIS has updated its on-line system to indicate that registrations which were not selected in the initial selection process are now officially “Not Selected” in the FY2023 H-1B quota lottery.

The next H-1B quota registration period for the FY2024 H-1B quota lottery should open in early March 2023. Employers are encouraged to contact our firm in early February 2023 for additional information about the FY2024 H-1B quota lottery and registration process.

### **INVESTIGATIONS**

Within the U.S. Department of Justice’s (DOJ) Civil Rights Division, the Immigrant and Employee Rights Section (IER) investigates unfair immigration-related employment practices. Such investigations generally arise from complaints of discrimination in the hiring process or Form I-9 compliance.

During FY2022, IER has been active in its investigations which have resulted in penalties for employers:

- On July 1, 2022, a Virginia-based IT staffing and recruiting company, Technology Hub Inc., was found to have discriminated in the hiring process when its job advertisements sought only H-1B workers, U.S. citizens or lawful permanent residents. As part of the settlement, the company agreed to pay a \$12,000 fine; revise its employment policies and practices; provide additional training for employees on the anti-discrimination provisions; and undergo a three-year monitoring period of its hiring and employment practices.
- On June 27, 2022, IER reached a \$832,944 civil penalties settlement with sixteen private employers, including KPMG LLC and American Express Company, who posted employment opportunities excluding non-U.S. citizens with Georgia Institute of Technology's (Georgia Tech) online job recruitment platform. Use of a campus placement office or on-campus recruiting may be a form of additional recruitment steps in the PERM Labor Certification process when an employer sponsors a foreign national for permanent residency [20 CFR §656.17(e)((1)(ii)(D) or (H). Those employers also agreed to cease stating citizenship or immigration status preferences or discourage applications from work-authorized individuals in their job postings and have their recruitment staff receive training on the anti-discrimination obligations under the U.S. immigration law. The IER investigation of discriminatory advertisements by employers is ongoing and has expanded to other colleges and universities.
- On June 23, 2022, a California-based IT staffing company, SpringShine Consulting, Inc., was sanctioned for advertising job opportunities for H-1B workers, preferring foreign workers over U.S. workers, on an internet site. As part of the settlement, the company agreed to pay a \$17,000 fine; cease suggesting or stating a citizenship or immigration status preferences in all of its advertisements; revise its employment advertisement and hiring practices and provide additional training for employees on the anti-discrimination provisions in the recruitment and hiring process. The press release of this settlement was also posted in the Hindi language.
- On June 6, 2022 IER reached a settlement with a synagogue, Temple Beth El, and its associated school in Florida which requested employees to provide specific documents to demonstrate authorization to work when completing the Form I-9, *Employment Eligibility Verification*. The synagogue agreed to pay \$4,144 in civil penalties; have all persons involved in the employment process, including all officers, board member and managers, participate in Form I-9 and anti-discrimination training; revise existing or develop new compliant employment policies to be reviewed by IER; undergo a Form I-9 audit every four months over a two-year period, as well as comply with any follow-up requests by IER.

## **MFEM NEWS**

### **BOB WHITE RE-APPOINTED AS VICE CHAIR OF AILA DOL COMMITTEE FOR PERM AND H-1B LCA ISSUES**

Bob White, a partner in the MFEM immigration group, was recently re-appointed as Vice Chair of the American Immigration Lawyers Association (AILA) DOL Committee. This is the second year that Mr. White has been Vice Chair of the Committee and his 8th year as a member of the Committee. Mr. White is coordinating response to identified issues by AILA members in the PERM process (which is the first stage of the employment-based "green card" process) and in H-1B Labor Condition Application (LCA) audits. The DOL

Committee meets with various national DOL agencies involved in numerous immigration programs through stakeholder meetings and participating in conference panels.

**FAZILA VAID APPOINTED TO THE AILA VERIFICATION COMMITTEE**

Fazila Vaid, a partner in the MFEM immigration group, was recently appointed to the AILA Verification Committee. This is the first year that Ms. Vaid was appointed to this national committee. Previously, Ms. Vaid has been appointed to various local AILA Committees, including the Social Security Administration (SSA) Committee. On the Verification Committee, Ms. Vaid will assist AILA members with I-9 issues, SSA issues and IER issues, to name a few. The Verification Committee regularly meets with USCIS E-Verify, USCIS FDNS, Immigration and Customs Enforcement (ICE) and IER.