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OCTOBER 2022 VISA BULLETIN ASSESSMENT

COVID processing delays have created an abundance of employment-based immigrant visas (aka Green Cards) for fiscal year 2022 (October 1, 2021 to September 30, 2022). An unprecedented 281,507 employment-based Green Cards are available, more than double the 140,000 allocated under the Immigration and Nationality Act (INA).

Each fiscal year, a minimum of 226,000 family-based Green Cards are available, with the exception that the spouse, children or parents of a U.S. citizen are exempt from this quota. The family-based quota applies to spouses and children and unmarried adult sons and daughters of Permanent Residents, and to the siblings, and married or adult unmarried sons and daughters of U.S. Citizens. Any unused family-based Green Cards in a fiscal year become available to employment-based Green Card quota in the next fiscal year. Additionally, the INA caps the number of Green Cards available for nationals of a particular country to 7%, limiting the total annual family-sponsored and employment-based Green Cards to 25,620 per country. Dependent areas have a total annual family-sponsored and employment-based preference limit of 7,320 Green Cards, 2% of the overall quota. Countries routinely meeting the 7% limitation include: China, El Salvador, Guatemala, Honduras, India, Mexico and the Philippines.

At the beginning of a fiscal year on October 1st, the statutory minimum 140,000 employment-based and 226,000 family-based Green Cards become available. The U.S. Department of State (DOS) allocates these Green Cards by country and employment-based or family-based preference category over the fiscal year. Each month, the DOS publishes a Visa Bulletin which summarizes the availability of immigrant visas for both family and employment-based cases for that given month. Because of the limited number of Green Cards available and the per-country limitations, it may be years before certain individuals become eligible for either an employment-based or family-based Green Card.

A highlight from the October 2022 Visa Bulletin is the following:

The Filing Priority Date for the employment-based second preference (EB-2) category for India retrogressed to May 1, 2012 from January 1, 2015. This means that individuals with priority dates in this category may commence the last stage of the green card process only if their priority dates are now before May 1st, 2012. Additionally, the Final Action Priority Date for the employment-based second preference (EB-2) category for India retrogressed to April 1, 2012 from December 1, 2014.

In a Note in the October 2022 Visa Bulletin, the DOS stated the following about the retrogression of the employment-based second preference (EB-2) category for India:

Rapid forward movements of the India E2 final action and application filing dates during FY-2022 were made to maximize number use under the unprecedented high employment limit of 281,507. As a result, heavy applicant demand has materialized and coupled with significantly lower visa number availability for India E2 for FY-2023 as compared to FY-2022, corrective action was required to keep number use within the maximum allowed under the FY-2023 annual limits. The situation will be continually monitored, and any necessary adjustments made accordingly.

In Fiscal Year 2022, the DOS had an additional 141,000 employment-based Green Cards to allocate due primarily to COVID processing delays in the family-based Green Card categories, as discussed above. Although the DOS has not officially stated how many additional employment-based Green Cards will be available in fiscal year 2023 due to ongoing COVID processing delays, it is estimated that there may be approximately 60,000 additional employment-based Green Cards available. These additional employment-based green cards may allow the DOS to advance the employment-based Green Card categories later in fiscal year 2023.

Additional information about the availability of employment-based green cards and the movement of the employment-based priority dates will be contained in future Business Immigration Monthly updates when they become available.

SIGNIFICANT INCREASES IN DOL PERM PROCESSING TIMES

The U.S. Department of Labor's (DOL) Office of Foreign Labor Certification's (OFLC) PERM processing times have significantly increased over the past few months. The PERM process is the first stage in the employment-based immigrant visa (green card) process for most foreign workers, unless they qualify for one of the limited exceptions to this requirement. In the PERM process, an employer is evidencing that there are no willing, able, qualified or available U.S. workers for the offered position.

Prior to filing a PERM application, an employer has to obtain a prevailing wage determination from OFLC. OFLC has begun to review prevailing wage requests filed in March 2022. However, OFLC still has some requests from January 2022 which are pending. Previously, OFLC would take 4 to 6 months to issue prevailing wage determinations, not 6 to 10 months.

After OFLC issues the prevailing wage determination and assuming that the employer has completed the necessary recruitment and consideration steps to evidence that there are no willing, able, qualified or available U.S. workers for the offered position, the employer then submits the PERM application. OFLC is currently reviewing initially PERM applications filed in January 2022. Previously, OFLC would take approximately 6 months to complete its initial review of PERM applications, not 9+ months.

In the first three quarters of fiscal year 2022, OFLC has experienced a 20% increase in PERM filings in comparison to fiscal year 2021. Based upon the record number of PERM prevailing wage requests received by OFLC, it is assumed that OFLC will announce another significant increase in PERM filings in the fourth quarter of fiscal year 2022 which ends on September 30th. Because OFLC has not received a comparable increase in

funding to process these applications and applications in its other programs, it is predicted that PERM processing times will only continue to increase in fiscal year 2023.

Due to the continuing increases in processing times, employers should commence the PERM process as early as possible in order to avoid losing an employee if he/she reaches her six-year maximum period of stay in H-1B classification. Please contact one of our firm's Immigration attorneys to discuss how to minimize the impact of ever increasing PERM process on your company and its employees.

USCIS MAKES COVID SIGNATURE POLICY PERMANENT

On July 25, 2022, USCIS announced that its policy to accept reproduced signatures, which began during COVID, would become permanent. The original announcement from March of 2020 indicated USCIS would accept all benefit forms and documents with reproduced original signatures (scanned, faxed, photocopied, or similarly reproduced), provided the copy is of an original document containing an original handwritten signature, unless otherwise specified. This includes all benefit forms and documents, including the Form I-129, Petition for Nonimmigrant Worker, for filings dated March 21, 2020, or later.

The original notice directed applicants to retain the forms bearing the original "wet" signatures as USCIS may, at any time, request the original documents, which if not produced, could negatively impact the adjudication of the immigration benefit.

BIDEN ADMINISTRATION ISSUES DACA FINAL RULE

On August 24, 2022, the Biden administration passed a final rule formalizing the procedures by which certain applicants can continue to apply for Deferred Action for Childhood Arrivals (DACA), as well as employment authorization based upon DACA. The final rule follows publication of a notice of proposed rulemaking on September 28, 2021, and consideration of public comments.

DACA allows immigrants to apply for protection from removal as well as work authorization for renewable two-year periods upon showing they meet certain requirements. These include entering the United Stated before age 16; continuous U.S. residence for at least five years before June 15, 2012, and presence in the U.S. on that date; and an education or military service requirement including either current enrollment in school, graduation from high school, have obtained a GED, or be an honorably discharged from U.S. Coast Guard or Armed Forces. In addition, applicants must have been under 30 years old on June 15, 2012, and not have been convicted of any felony, significant misdemeanor, multiple misdemeanors, and not pose a threat to national security or public safety.

The DACA program was first created by former President Obama's Executive Order of June 15, 2012, and approximately 800,000 individuals have benefited from the program.

Since its inception, legal challenges on the validity of the DACA program continue in the courts. Throughout the years, the U.S. Department of Homeland Security (DHS) has published memos establishing the rules and procedures for processing DACA requests. On August 30th a final regulation was published which goes into effect October 31, 2022. Via this rule the Administration addressed one of the criticisms of the program raised by U.S. District Judge Andrew Hanen of the Southern District of Texas in State of Texas, et al., v. United States of America, et al (S.D. Texas, July 16, 2021) that the program should have gone through notice and

comment under the Administrative Procedures Act (APA). Following this case, DHS continues to accept both initial and renewal applications, but will only grant renewal requests for DACA protection or work authorization. The new rule does not appear to have any impact on the Texas case.

The final regulation does not make any major changes to the DACA program as it has existed for the last 10 years. Many had hoped that the rule would broaden the requirements to allow for persons who were too young to have been in the U.S. by the required date to qualify. The rule also does not address the problem of persons who entered as dependents of parents on nonimmigrant work visas but who "aged out" by turning twenty-one.

Advocates have called on Congress to pass legislation providing a permanent solution for DACA applicants (referred to as Dreamers). However, efforts to pass legislation to provide a pathway to citizenship have consistently failed in Congress for the past 10 years.

TEMPORARY PROTECTED STATUS

Under the INA, the Secretary of DHS has the power to designate countries whose nationals become eligible for temporary protected status (TPS) in the United States. Such designation may be considered due to an armed conflict in the country which would threaten the safety of its nationals; a national or environmental disaster or epidemic in the country and the country has requested the TPS designation for its nationals; or the DHS Secretary determines there are extraordinary and temporary conditions in the country preventing safe return by its nationals.

Current countries designated for TPS include: Afghanistan, Burma (Myanmar), Cameroon, El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Ukraine, Venezuela, and Yemen.

Once a country has been designated for this protection, during TPS period its nationals who are present in the United States may not be detained for an immigration violation or removed/deported. Additionally, TPS designees are eligible to apply for employment authorization and permission to return to the United States from international travel, if not having a valid visa.

TPS itself does not create a pathway to a Green Card or U.S. citizenship. However due to a recent USCIS policy change, an individual who has been granted permission to return to the United States using a new TPS travel authorization document or a previously issued travel document (Advance Parole), will be considered "inspected and admitted" making them eligible to complete the adjustment of status process in the United States if they have a legal basis, such as family or employer sponsorship, to apply for permanent residency.

ESTA TRAVEL – IS YOUR ESTA STILL VALID?

The global COVID pandemic hindered international travel. Before making travel plans, we encourage persons travelling to the United States under the ESTA program to review their ESTA registration. ESTA registration allows persons from designated countries to travel to the United States for business or pleasure and stay no more than 90 days. An ESTA registration is valid for two years or until the passport expires, whichever is earlier. Inability to travel to the United States during the pandemic did not automatically extend an ESTA validity. If an individual has obtained a new passport, or other information in the ESTA registration has changed, a new ESTA registration is needed.

ESTA travelers will need their passport valid for at least 6 months beyond their arrival date; documentation that they plan to depart within 90 days; and documents supporting the reason for their trip.

Travelling to the United States without a visa under the ESTA program does have risks. If the Customs and Border Protection (CBP) Officer determines the purpose of the visit is not for business or pleasure or if the traveler intends on remaining for more than the allotted 90 days, the traveler's application to enter the United States may be denied. If denied entry under ESTA, the traveler will be returned to the country of origin on the next flight and will be permanently banned from traveling to the United States without a visa. Obtaining a visa from a U.S. Consular Post may be a current challenge due to visa processing delays.

The global remote working environment has heightened the concern that doing work while in the United States may be an ESTA violation. This determination may depend on the particular circumstances, who benefits from the remote work, and the frequency of travel to the United States. A U.S. taxation rule may also be triggered.

Please consult with a Masuda Funai immigration attorney with ESTA travel questions or concerns prior to traveling to the United States.

EXPEDITED REMOVAL

For non-ESTA travelers, those travelling with a visa, as well as visa-exempt Canadians, a separate travel risk must be considered. If during the immigration processing, the CBP officer determines that the traveler has made a misrepresentation or lacks the appropriate documents and is not eligible for a waiver, the individual may be issued an "expedited removal" order.

Under an expedited removal order, the individual is deported from the United States without a hearing and is banned from applying to enter the United States for five years, unless granted a waiver. On July 23, 2019, the prior Administration expanded the availability of expedited removal orders to individuals present anywhere in the United States for less than a continuous 2-year period, who had not entered the United States legally. The Biden Administration has since rescinded the broader geographic scope of expedited removal, and the focus is now on persons arriving at air and land ports of entry.

As travel to the United States increases, it becomes more important for travelers to have with them appropriate documentation for U.S. immigration purposes to reduce the application of this border enforcement tool.

THE SOUTHERN BORDER, TITLE 42 EXPULSIONS AND THE BUSING OF MIGRANTS

In March of 2020, relying upon the COVID-19 pandemic, the previous Administration invoked Section 265 of Title 42 of the U.S. Code to turn back "caravans" of migrants arriving at the U.S. Southern border. Title 42 empowers the U.S. Surgeon General to prohibit persons and property from designated countries or places from arriving to the United States due to the existence of a communicable disease, such as COVID-19. Since March 20, 2020, over 1.8 million non-citizens, the majority from El Salvador, Guatemala, Honduras and Mexico, have been denied entry or expelled to Mexico under Title 42.

Individuals denied entry under Title 42 are not given an opportunity to challenge the denied entry or raise a claim of asylum or credible fear of torture or persecution if forced to return to their home country.

In April 2022, the current Administration, with support of the Center for Disease Control (CDC), sought to terminate the Title 42 limitation as COVID-19 prevention measures had slowed the spread of the pandemic. While international travel to the United States has resumed, the Title 42 limitation still remains in place at the U.S. southern border due a nationwide injunction. The legal challenge to retain the Title 42 restriction is led by twenty-four states, only two, Texas and Arizona, of which share a border with Mexico.

While the Title 42 litigation is ongoing, various governors independently have been transporting migrants arriving in their states to ”sanctuary” cities, including but not limited to Chicago, New York and Washington, D.C. Sanctuary cities welcome immigrants regardless of their immigration status and do not participate in federal immigration enforcement strategies. These states are now coordinating donations and volunteers to welcome and assist the arriving migrants.

MFEM NEWS

Bob White Speaking at NAFSA Region V Annual Conference in Milwaukee

Bob White, a partner in the Masuda Funai Immigration Group, has been invited to speak to colleges and universities on H-1B issues and trends at the NAFSA Region V Annual Conference in Milwaukee. Normally, approximately 500 representatives from colleges and universities in the Midwest attend the NAFSA Region V Conference. NAFSA is the world's largest nonprofit association dedicated to international education and exchange serving the needs of more than 10,000 members and international educators worldwide at more than 3,500 institutions, in over 150 countries. In addition to speaking on H-1B issues, Mr. White has been tasked with leading the government sessions with government speakers from the Immigration and Customs Enforcement’s (ICE) Student and Exchange Visitor Program (SEVP), Customs and Border Protection (CBP), U.S. Department of State’s (DOS) Visa Office and DOS Exchange Visitor Program (EVP). During the government sessions, the government speakers will be giving updates and answering questions about their programs.

Multiple Masuda Funai Attorneys Nominated as 2023 Best Lawyers and Super Lawyers in the Field of Immigration Law

Masuda Funai Immigration attorneys, Bryan Funai, Bob White and Derek Strain, have been nominated as 2023 Best Lawyers in America. Bryan Funai and Bob White were also designated as Super Lawyers. Both Best Lawyers in America and Super Lawyers highlight top legal talent after completing an extensive selection process which includes independent research, peer nominations and peer evaluations. In 2022, Mr. White was nominated as Lawyer of the Year for Immigration (Chicago) by Best Lawyers in America. This year, Mr. Funai has also been nominated as a Thought Leader in Who’s Who Legal.