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News & Types: Immigration Monthly Updates

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DOS TEMPORARILY EXTENDS IN-PERSON INTERVIEW WAIVERS FOR CERTAIN NONIMMIGRANT VISA APPLICANTS

The U.S. Department of State (DOS) announced on December 23, 2022 that it was temporarily extending the discretionary in-person interview waivers for certain nonimmigrant visa applicants.

DOS, in consultation with the Department of Homeland Security (DHS), first introduced interview waivers for certain F-1, J-1, M-1 and H-2 nonimmigrants in 2021 in an attempt to address significant processing backlogs at the U.S. consulates worldwide caused by closures due to the COVID-19 pandemic. The DOS then decided in December 2021 to expand the interview waiver program to certain temporary workers applying for H-1, H-3, H-4, L, O, P, and Q visas. However, at that time, the DOS indicated that interview waivers would sunset on December 31, 2022.

In the Fall 2022, DOS unofficially indicated that it was consulting with DHS to extend and expand the interview waiver program. However, it appears that DHS only agreed with the extension (not the expansion) of the program. In its December 23rd News Release, DOS indicated that both DOS and DHS agreed to extend the interview waiver program until December 31, 2023 under the terms of the previously approved authority. DOS stated that the interview waiver authority has reduced visa appointment wait times at many consulates by freeing up in-person interview appointments for other applicants who require an interview. DOS also indicated that nearly half of the almost seven million nonimmigrant visas that were issued in Fiscal Year (FY) 2022 were adjudicated without an in-person interview. DOS reminded applicants who qualify for interview waivers that the waivers are discretionary and that the implementation of the waiver authority varies by consulate. DOS indicated that applicants should check the consulate's website where they will be applying prior to applying in order to review if and how the consulate is implementing the interview waiver authority.

REAL ID START DATE DELAYED FOR 24 MONTHS

On December 5, 2022, the DHS announced it was again delaying requirement of the REAL ID until May 7, 2025. The law was previously set to become effective on May 3, 2023. States will now have additional time to

ensure residents have driver’s licenses and identification cards that meet the security standards established by the REAL ID Act.

The REAL ID Act prohibits federal agencies, including the Transportation Security Administration (TSA), from accepting driver's licenses and identification cards that do not meet these federal standards. It establishes minimum security standards for state-issued driver’s licenses and identification cards including incorporating anti-counterfeiting technology, preventing insider fraud, and using documentary evidence and record checks to ensure a person is who they claim to be.

The extension was deemed to be necessary to address the lingering impacts of the COVID-19 pandemic on the ability to obtain a REAL ID driver's license or identification card. Due to backlogs created by the pandemic, REAL ID progress over the past two years has been significantly hindered. Many of these agencies took various steps in response to the pandemic including automatically extending the expiration dates of driver's licenses and identification cards and shifting operations to appointment only, but delays continue to be a problem.

Beginning May 7, 2025, every traveler 18 and older will need a REAL ID-compliant driver's license or identification card, state-issued enhanced driver's license, or another TSA-acceptable form of identification for domestic air travel.

PUBLIC CHARGE UPDATE

Individuals applying for admission to the United States or Permanent Resident status through Adjustment of Status (AOS) on or after December 23, 2022, will be subject to a new “public charge” rule which aims to “create clear and comprehensible adjudicative standards that will lead to fair and consistent adjudications and ensure equitable treatment of similarly situated individuals.”

As background, under §212(a)(4) of the U.S. Immigration and Nationality Act (INA), a visa, admission to the United States, or Permanent Resident status may not be granted to an individual who is likely to become a public charge.

Under this new rule an individual becomes a public charge if primarily dependent on the government for subsistence or long-term institutionalization at the government’s expense. One becomes primarily dependent when actually receiving public cash assistance for income maintenance from any Federal, State, tribal, territorial, or local government entity. Examples of such public cash assistance include Supplemental Social Security (SSI), Temporary Assistance for Needy Families (TANF) or “General Assistance” programs offered at the state-level. Benefits not considered public cash assistance include receipt of Supplemental Nutrition Assistance Program (SNAP) or other nutrition program benefits (WIC), Children’s Health Insurance Program (CHIP), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits. Long-term institutionalization at the government’s expense includes Medicaid-funded uninterrupted, extended stays in a nursing home or mental health institution and does not include short periods of institutionalization for rehabilitation or imprisonment for conviction of a crime, or Home and Community-Based Services (HCBS) under Medicaid.

The totality of the circumstances is to be considered for a public charge determination. Current or past receipt of public benefits alone, is not sufficient for a finding that an individual would be inadmissible under the public charge rule. When determining whether an individual would become a public charge, the government will consider the totality of the circumstances including such factors as the individual's "age, health, family status, assets, resources and financial status, and education and skills."

THE NUMBER OF AVAILABLE H-2B TEMPORARY NONAGRICULTURAL WORKER VISAS INCREASES FOR FY2023

USCIS recently provided updated guidance to employers who seek to petition for the additional 64,716 H-2B visas available for fiscal year (FY) 2023 (October 1, 2022 to September 30, 2023). H-2B visas are available to employers needing seasonal temporary non-agricultural labor – such as in the areas of hospitality and tourism, seafood processing or landscaping; or who have a one time, intermittent or peak-load need for additional workers. The H-2B visa process requires a temporary labor certification be issued by the Department of Labor (DOL) after the employer evidences its temporary need, that there are no qualified U.S. workers for the offered position and that at least the prevailing wage for the position will be offered.

To centralize processing, these H-2B requests are filed with the USCIS California Service Center. Premium processing of the supplement H-2B requests, either initial or upgrades, will not be available until January 3, 2023. Premium processing continues to remain available for other H-2B petitions, including extension requests.

This additional allocation of H-2B visas nearly doubles the number available to 130,716. Of this new allotment, 20,000 visas are reserved for workers from El Salvador, Guatemala, Haiti, and Honduras. The remaining 44,716 visas are reserved for workers previously held an H-2B visa or H-2B status during the last three fiscal years.

N-400 APPLICANTS NO LONGER NEED TO EXTEND EXPIRING GREEN CARD

USCIS issued a Policy Alert on December 9, 2022, indicating they are updating their Policy Manual to automatically extend the validity of an expiring green card for Lawful Permanent Resident applicants filing their Applications for Naturalization on or after December 12, 2022.

Current immigration law requires Lawful Permanent Residents (LPRs or "green card holders) to have their green cards in their possession as proof of their LPR status. If the card is expired or lost, the LPR is generally required to file an application for an extension or replacement card. Due to lengthy processing times, USCIS now issues 24-month extensions of the green cards for LPRs filing either Form I-90 (to renew an expiring green card or replace a lost card) or Form I-751 (petition to remove conditions on residence). The extension generally appears in the language of the receipt notice issued by USCIS upon the filing of either of these forms.

Beginning December 12, 2022, presentation of the USCIS receipt for Form N-400 (Application for Naturalization) along with the expired green card, will be considered valid, unexpired evidence of LPR status, as well as identity and employment authorization under List A of Employment Eligibility Verification for I-9 purposes, if presented before the expiration of the 24-month extension period.

The Alert also explains that Naturalization applicants will not need to file Form I-90 while their Form N-400 is pending with USCIS if their green card expires before their N-400 is adjudicated as a result of the 24-month extension provided by the receipt notice.

UPDATES ON FY 2023 EMPLOYMENT-BASED ADJUSTMENT OF STATUS

USCIS recently updated its guidance regarding employment-based (EB) AOS for FY2023.

Each month, the DOS publishes a Visa Bulletin with cut-off dates that indicate visa availability in the family based (FB) and employment-based (EB) categories and per-country cap. The per-country cap limits 7% of immigrant visas (a.k.a. green cards) to individuals from a single country annually. The five EB categories also have fixed percentage allocation limits by law. The EB-1, EB-2, and EB-3 categories each receive 28.6% of the total annual limit, and the EB-4 and EB-5 categories each receive 7.1% of the total annual limit. When the amount of demand for a particular category or a country within a category exceeds the supply of visa numbers available, the category/country is considered “oversubscribed” and DOS applies a cut-off date. Usually, the cut-off dates move forward, but the dates occasionally retrogress, which happened in October and December 2022. Such retrogression happens when the demand for visas is higher, or the availability of visas is lower, than DOS’s estimation. Because of the per-country limits, the EB visas are not necessarily distributed to applicants with the earliest priority dates. For example, as of December 2022, Green Card applicants born in China and India are experiencing lengthy backlogs in EB visa availability due to the many applicants from each country and the per-country cap.

Number of EB Immigration Visas in FY2022 and FY2023

The DOS determined that 281,507 employment-based (EB) visas were available during FY2022, which is more than double of the typical annual limits due to unused family-based (FB) visa numbers from FY2021. USCIS announced that USCIS, DOS and the Executive Office for Immigration Review (EOIR) used and approved all of these EB visas for FY2022, apart from 6,396 EB-5 visas that Congress has allowed to carry over to the next fiscal year.

DOS currently estimates that the FY2023 annual limit for EB visas will be approximately 197,000, adding 57,000 unused FB visas from FY2022. The FY2023 EB visa annual limit of 197,000 is higher than before the COVID-19 pandemic but lower than FY2021 and FY2022.

Retrogressions Do not Affect Approved Visas, 180-Day Portability, and Validity of Biometrics Check

In its guidance, USCIS made clear that when an individual's AOS application is approved, and then the Final Action Date for the category and country of chargeability later retrogresses, such retrogression has no effect on the approved lawful permanent residency.

For those pending applications for Permanent Resident status, visa retrogression does not reset the 180-day portability clock. Green Card applications in the first three EB categories may continue even if the sponsored applicant changes employers, provided the new job is in the same or similar occupation classification and the Green Card application/adjustment of status has been pending for more than 180 days.

USCIS also announced that the biometrics collected by USCIS in connection with a pending AOS application do not expire due to retrogression. While biometrics-based background checks are valid for 15 months, USCIS

refreshes the background check associated with the pending AOS application by resubmitting the previously provided biometrics.

Visa retrogression also does not impact the ability of an AOS applicant to apply for interim employment authorization (EAD) or Advance Parole (AP) travel permission. Additionally visa retrogression also does not impact the eligibility of Green Card applicants who are protected under the Child Status Protection Act or start the accrual of unlawful presence while the application is pending.

POLICY PAPER EXPLAINS CHALLENGES CONFRONTING DOL IN TIMELY PROCESSING PERM AND PREVAILING WAGE APPLICATIONS

The Cato Institute, a non-profit public policy research organization, recently published a policy paper discussing the challenges confronting the DOL in timely processing applications in its temporary and permanent immigration programs, titled “Labor Dept's Immigration Backlog Continues Shocking Increases.”

The paper explains that the DOL's Office of Foreign Labor Certification (OFLC) has a narrow niche within the U.S. immigration system, namely certifying that employers have met the requirements to petition for their workers to receive certain temporary visas or green cards. However, significant increases in OFLC processing times have adversely impacted the entire employment-based immigration system.

The paper analyzes the root cause of the increases in OFLC processing times, namely the substantial increase in filings by U.S. employers in both the temporary, prevailing wage and PERM programs. In 2022, the OFLC's backlog was nearly 250,000 cases—up from about 96,000 in 2019. The largest increases occurred among the PERM and prevailing wage applications. Because the OFLC is required to prioritize the temporary worker programs, their backlogs have always remained a small percentage of the total number of applications received. As a result, PERM prevailing wage determinations and PERM applications account for over 90 percent of OFLC backlog.

The paper then highlights that although OFLC made concerted efforts in 2010 and again in 2016 to reduce its PERM backlog, that backlog has reached the highest level since the office created the current more streamlined PERM process in 2004. Additionally, although OFLC reformed and centralized the prevailing wage determination process in 2010 to streamline it, OFLC currently has a record high backlog of PERM prevailing wage requests.

The paper notes that bigger backlogs have translated into longer wait times for employers seeking to sponsor foreign workers. Wait times for the PERM prevailing wage determination grew from an average of 67 days in 2016, quarter 1, to 189 days in 2022, quarter 4. PERM processing times improved dramatically in 2016, eventually reaching a low of 96 days in 2019, quarter 2, but they have exploded again in the past 3 years, reaching 263 days in 2022, quarter 4. The combined wait time to receive a PERM prevailing wage determination and then a PERM approval was 452 days in 2022, quarter 4.

The paper does not propose solutions to the ever-increasing backlogs and processing times in the PERM prevailing wage and PERM application programs. The Biden Administration did request an approximately 20% funding increase for OFLC in its FY2023 budget so that OFLC could hire additional analysts and contractors to reduce its backlogs. The House Appropriations Committee initially agreed with this request. However, the

FY2023 Omnibus Appropriations Bill which recently passed Congress, reduced this funding request to an approximately 5% increase. Therefore, although OFLC may be able to hire some additional staff with this funding increase, the impact on the backlogs will be measurably less because this reduced funding increase will most likely be offset by the anticipated continued growth in the prevailing wage and PERM programs.

TERMINATION OF EMPLOYMENT FROM AN IMMIGRATION PERSPECTIVE: OPTIONS FOR THE TERMINATED EMPLOYEE

In last month's Business Immigration Monthly, we highlighted the risks an employer faces when not carrying out a “bona fide termination” of an H-1B Specialty Occupation Worker, H-1B1 Singapore or Chilean Worker, or E-3 Australian Worker. We now offer some insights for those H-1B, H-1B1 or E-3 visa holders who have been terminated.

The sponsoring H-1B, H-1B1 or E-3 employer is required to offer return transportation to the worker. The required offer of return transportation does not apply to dependent family members. This offer can be rejected if the H-1B, H-1B1 or E-3 visa holder opts to remain in the United States. Such workers also have a discretionary grace period to remain in the United States of either the underlying status expiration date or 60 days from the termination date, whichever is earlier. For example, if the H-1B worker was terminated on December 30th, 2022, and the underlying status expires February 15, 2023, the grace period is limited to February 15, 2023, not the 60th day of March 1, 2023.

During the grace period, the terminated employee may seek sponsorship from another employer or file an immigration petition to change status to a different visa classification, such as visitor (B-2) or student (F-1). Employment is not generally permitted, however an H-1B visa holder may be eligible for employment under H-1B portability rules if a new H-1B petition is filed before the grace period ends and the portability requirements are met.

Termination of H-1B, H-1B1 or E-3 employment is not an automatic end to any Green Card processing. If sponsorship for permanent resident status has commenced, workers are encouraged to speak with the employer to learn what action the employer may take. H-1B employees can continue to rely upon an I-140 petition which has been approved for more than 180 days to obtain H-1B approval beyond the six-year max; and an H-4 dependent spouse continues to remain eligible for work authorization based on the I-140 approval.

MFEM NEWS

SAVE THE DATE – MFEM Immigration Group to Hold Complimentary Annual Immigration Seminar on Thursday, February 23rd

The MFEM Immigration Group will be hosting its next complimentary immigration seminar on the morning of Thursday, February 23rd at the DoubleTree Hotel in Arlington Heights, Illinois. Topics for this year’s seminar will include:

- Is Your Company Ready for the FY2024 H-1B Quota Lottery?
- All Is Not Lost - Viable Options if the H-1B Quota Registration is Not Selected
- Why Is It Taking So Long for the Government to Review Cases?
- Crossroads Between Remote Work and Immigration Rules

- Hot Topics – Managing the Past and Preparing for the Future
- There will also be two Q&A sessions during which time attendees can ask their immigration questions to one of the MFEM Immigration Attorneys.

Additional information about the seminar (including how to register for the seminar) is available in the News and Events Section of the MFEM website (link).

BRYAN FUNAI AND BOB WHITE SPEAK AT THE AILA FUNDAMENTALS CONFERENCE AND THE AILA BUSINESS SCHOOL FOR IMMIGRATION ATTORNEYS CONFERENCE IN LAS VEGAS

Mr. Bryan Funai and Mr. Bob White, both attorneys in the MFEM Immigration Group, recently spoke at the American Immigration Lawyers Association's (AILA) Fundamentals Conference and the AILA Business School for Immigration Attorneys Conference in Las Vegas.

During the AILA Business School for Immigration Attorneys Conference, Mr. Funai discussed challenges being encountered by employers with remote work and offered solutions to these challenges.

During the AILA Fundamental Conference, Mr. White has the discussion leader for the PERM panel. Mr. White and the other panelists educated new immigration practitioners and their staff on how to properly complete PERM applications and the myriad of issues which they may have to address during the PERM process.

FAZILA VAID LED DISCUSSIONS WITH THE CHICAGO REGIONAL OFFICE OF THE SOCIAL SECURITY ADMINISTRATION

Ms. Fazila Vaid, an attorney in the MFEM Immigration Group, is the Chair of the Social Security Administration (SSA) Committee of the AILA's Chicago Chapter. Ms. Vaid, along with other members of the Committee, recently met with leaders of the SSA's Chicago Regional Office to obtain updates regarding processing times, SAVE and other issues that impact foreign nationals.