



News & Types: Immigration Monthly Updates

# Business Immigration Monthly - April 2023

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Practices: Immigration

## **EMPLOYMENT-BASED GREEN CARD PROCESS TO CHANGE**

The U.S. Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) recently announced that it will be releasing a new PERM application and that the new application will be filed in its FLAG system. The PERM process is the first stage of the employment-based immigration visa ("Green Card") process, unless the individual is exempt from this stage of the process due to the visa category through which he/she is applying.

OFLC will be requiring the use of the new PERM application in FLAG beginning on May 16th. After the new PERM application becomes effective, OFLC will no longer allow the submission of the old PERM application through the legacy PERM CMS system or by mail. The new form will require employers to provide much more detailed information than the current form. The new form will also automatically populate information from the prevailing wage form into the new PERM application and employers will not be able to change this automatically populated information. The implementation date of May 16th is approximately three months earlier than the timeline that OFLC previously indicated on its FLAG website.

Additional information about the new form and its implementation will be contained in future Masuda Funai Business Immigration Monthly updates when they are released by the DOL.

## **COURT UPHOLDS H-4 WORK AUTHORIZATION RULE**

A federal judge has ruled in favor of the Department of Homeland Security (DHS) regulation that allows certain H-4 spouses of H-1B nonimmigrants workers to apply for employment authorization documents.

In 2015, DHS issued a rule allowing certain H-4 spouses of H-1B visa holders to work in the United States. Under the regulation, if an H-1B nonimmigrant has an approved immigrant petition (Form I-140), a spouse in H-4 dependent status is eligible to apply for an employment authorization document (EAD).

The plaintiffs challenged DHS' authority to issue EADs to H-4 spouses. The court found that, contrary to the plaintiff's argument that Congress never gave DHS the authority to provide work authorization to H-4 spouses and other foreign nationals, "Congress has expressly and knowingly empowered [DHS] to authorize employment as a permissible condition of an H-4 spouse's stay in the United States."

Although the plaintiffs have indicated that they will appeal the decision, the decision does further solidify the discretion of DHS to issue EADs to H-4 spouses and other categories.

**CBP SIMPLIFIED ARRIVAL AND STAMPLESS ENTRY PILOT PROGRAMS**

With the goal of streamlining and digitizing the legal entry process to the United States, the U.S. Customs and Border Patrol (CBP) has implemented pilot programs that eliminate passport stamps and utilize biometric facial recognition technology.

The “Simplified Arrival” program, implemented in April 2022, uses facial biometrics to automate the manual document checks that are already required for admission to the United States. Travelers arriving on international flights will pause for a photo at the primary inspection point. A biometric facial comparison process will compare the new photo of the traveler to images that the traveler has already provided to the government, such as passport and visa photos.

Fingerprints of persons who have previously travelled to the United States will no longer be required. However, if the traveler is not matched to a photo on record through the biometric facial comparison, he/she will proceed through the traditional inspection process.

The Simplified Arrival program also includes a “Stampless Entry” program which eliminates ink stamps in passports at entry. The ink stamp can be important evidence of admission dates to the United States and, in theory, CBP officers may continue to stamp passports upon the request of the non-U.S. citizen when he/she is entering the United States. Non-U.S. citizens entering the United States in nonimmigrant status are strongly encouraged to verify their I-94 period of authorized admission through the CBP’s I-94 website. Any errors in the CBP’s online system should be corrected by contacting the Deferred Inspection office of CBP located at international airports or Ports of Entry (POE).

In addition, since arrivals to the United States by Lawful Permanent Residents (LPRs or Green Card holders) are not recorded by CPB in their online system, those considering applying for Naturalization who are entering the United States after travel abroad should maintain documentary evidence of their travel dates.

CBP has confirmed that the pilot programs are likely to continue and to be expanded.

**CONSULAR PROCESSING VISA FEES INCREASE MAY 30, 2023**

The Masuda Funai January 2023 Business Immigration Monthly discussed that on December 29, 2021, U.S. Department of State (DOS) had published a notice of proposed rulemaking (NPRM) in the Federal Register to increase the visa processing fee collected by U.S. Consular Posts. After a review of comments received to the NPRM and further evaluating the increased demand for visa processing as post-COVID travel has increased, the DOS published a final regulation which actually lowers the fee increases which will be charged from the amount proposed.

Effective May 30, 2023, the fees for visa processing will be:

- **\$185.00** - Non-petition-based nonimmigrant visa fees for visitors (B-1/B-2), students and exchange visitors (F-1/F-1, M-1/M-2, and J-1/J-2); transit travelers (C), crew members (D); representatives of foreign media (I), and Border Crossing Cards (BCCs) for Mexican nationals aged 15 or older. This is a \$25 increase, rather than the proposed \$85 increase. 90% of all nonimmigrant visas processed by U.S. Consular posts fall into the non-petition classifications.

- **\$205.00** - Petition-based nonimmigrant visa fees for temporary workers (H), intracompany transferees (L), workers having extraordinary ability/achievement (O); athletes, artists, and entertainers (P); international cultural exchange participants (Q); and religious workers (R). This is a \$15 increase, rather than the proposed \$105 increase.
- **\$315.00** – Visa processing for treaty traders (E-1), treaty investors (E-2), Australian workers (E-3) and any dependent family members would increase from \$205 to \$315 per application. The original fee proposed for E visa processing was \$485.

The DOS also reevaluated the proposed processing fee increase for a waiver of the two-year home residence requirement for certain J-1 visa holders and determined a fee increase would not be needed at this time. The DOS J-1 waiver fee remains at \$120, rather than the proposed \$510 fee.

In the final regulation, the DOS did indicate that is exploring options “to make visa processing more efficient and accessible for applicants.” One such option is the processing of visa renewals domestically which is currently being discussed. This service was previously offered by the DOS’ Visa Office in Washington, DC until a biometrics requirement was implemented under the 2002 Enhanced Border Security and Visa Entry Reform Act. As consular posts have expanded the interview waiver program, which enables the reuse of existing biometrics for some visa applicants applying for renew a visa at a U.S. Consular Post, the DOS is assessing the implementation of such an initiative for domestic visa renewal processing in the United States. During the American Immigration Lawyers Association’s (AILA) Midwest Regional Conference, DOS indicated that it is currently exploring implementing a pilot program later this year for domestic visa renewal processing for certain nonimmigrant visas. DOS stated that it should be releasing more information about this pilot program within the next few months. Additional information about the implementation of domestic visa processing will be contained in future Masuda Funai Business Immigration Monthly updates when it becomes available.

### **MAY VISA BULLETIN UPDATE**

The DOS recently issued the May 2023 Visa Bulletin and the trend of high demand for immigrant visas (or “Green Cards”) continues.

Notable changes in the employment-based classifications include the following:

- The employment second preference (“EB-2”) final action priority date for All Chargeability (or “Rest of the World”), Mexico and the Philippines further retrogressed from July 1, 2022 to February 15, 2022.
- For nationals of India in the EB-2 classification, the final action priority date remains on January 1, 2011.
- For nationals of China in the EB-2 classification, the final action date cutoff remains on June 8, 2019.
- In the employment third preference (“EB-3”) for All Chargeability (or “Rest of the World”), Mexico, and the Philippines, a final action priority date was set at June 1, 2022. On a positive note, nationals of China will benefit from a five month advancement of the EB-3 final action priority from November 1, 2018 to April 1, 2019.
- In the employment fourth preference (“EB4”) classification, including but is not limited to Religious workers, Afghan or Iraqi translators and Special Immigrant Juveniles, a cutoff for All Chargeability (or “Rest of the World”) of September 1, 2018 remains in place.

As the DOS and U.S. Citizenship and Immigration Services (USCIS) continue to see high demand for Green Cards, the DOS has indicated that priority date advancement will be slow (if at all) for the remainder of FY2023 which ends September 30th. Additionally, the DOS may have to retrogress more categories in order to ensure that the number of Green Cards issued in each category do not exceed statutory limits.

### **USCIS UPDATES POLICY MANUAL ALLOWING SELF-SELECTION OF GENDER**

On March 31, 2023, USCIS announced that it is updating its USCIS Policy Manual to allow benefit requestors to select their gender on USCIS forms, or to change a gender that was previously selected, without having to provide additional documentation or evidence. The gender marker selected does not need to match the gender marker indicated on other supporting documentation. The change is effective immediately and applies to all cases filed or pending on or after March 31, 2023.

This change is consistent with a growing number of states that allow for self-certification of gender for driver's licenses and ID cards. It follows policies already in place within other DHS components and federal agencies such as the Transportation Security Administration (TSA) or the DOS.

The change intends to ensure that all secure identity documents and biographic data are accurate, especially for those who were unable to accurately state their gender in their initial applications or who may need to update to their gender selection, removing the burden of having to publicly discuss or provide documentation regarding the gender listed on their identity documents to obtain a benefit or service. The change is also intended to reduce barriers to travel, employment, services, and benefits by eliminating delays and preventing discrimination and harassment due to inconsistent identity documents.

### **MFEM NEWS**

#### **Mr. Bob White to Participate in Two Conferences with DOL's OFLC to Discuss PERM Process**

Mr. Bob White, a Partner in the MFEM Immigration Group, will be participating in two panels with the DOL's OFLC Leadership to discuss the various OFLC programs, including the PERM program.

On Friday, April 28th, Mr. White will participate in a DOL OFLC panel at the American Immigration Lawyers Association's (AILA) Spring Conference in Washington, D.C. During this Conference, Mr. White will be one of panelists discussing prevailing wage and PERM topics and issues with OFLC.

On Friday, May 5th, Mr. White will be leading the DOL OFLC panel at the Federal Bar Association's (FBA) Annual Immigration Law Conference in Arlington, Virginia. During this Conference, Mr. White will be discussing questions and potential issues with the new PERM application and process discussed above with OFLC.