



News & Types: Immigration Monthly Updates

Business Immigration Monthly - September 2023

9/26/2023

By: Julie T. Emerick

Practices: Immigration

USCIS SENDS H-1B REFORM REGULATION TO OMB FOR REVIEW

On September 19, 2023, U.S. Citizenship and Immigration Services (USCIS) sent a proposed regulation to the Office of Management and Budget (OMB) for review which may significantly modify the H-1B program.

The exact date when the proposed regulation will be released or when modifications to the H-1B program will be effective are currently unknown. After OMB approves the proposed regulation, USCIS will release the proposed regulation for a 60-day comment period. After the comment period closes, USCIS will consider the comments prior to sending a final regulation to OMB for another review. After OMB approves the final regulation, it may then be implemented by the USCIS (unless a court enjoins the implementation). Therefore, although the exact timing of the implementation of the new H-1B regulation is unknown, there has been indication that USCIS would like the final regulation implemented prior to the next H-1B quota registration process (which should occur in early March 2024) because the regulation may contain major modifications to the registration process.

Although the exact content of the proposed regulation will not be known until the proposed regulation is released by the USCIS, the USCIS has previously indicated in the OMB's 2023 Spring Unified Agenda that the regulation may include the following:

- Revising the definition of "employer-employee relationship";
- Providing flexibility for start-up entrepreneurs;
- Implementing new requirements and guidelines for site visits including in connection with petitions filed by H-1B dependent employers whose basic business information cannot be validated through commercially available data;
- Providing flexibility on the employment start date listed on the petition (in limited circumstances);
- Addressing "cap-gap" issues;
- Bolstering the H-1B registration process to reduce the possibility of misuse and fraud in the H-1B registration system; and
- Clarifying the requirement that an amended or new petition be filed where there are material changes, including by streamlining notification requirements relating to certain worksite changes, **among other provisions.**

Additional information about the proposed changes to the H-1B program will be contained in future Business Immigration Monthly Updates when they become available.

USCIS LAUNCHES ONLINE APPOINTMENT SCHEDULER

USCIS has recently launched a new online form for individuals, attorneys, and accredited representatives to make electronic requests for in-person appointments at their local field offices.

Rather than having to call the USCIS Contact Center, the online appointment form allows individuals or legal representatives to submit an electronic request for an in-person appointment at a USCIS Field Office. Common reasons for such a request include for ADIT stamps (for proof of lawful permanent residence), Emergency Advance Parole requests (for urgent, unexpected travel), Immigration Judge Grants (for producing the green card or providing proof of status), and more. Guidance regarding procedures and the documents needed for each type of appointment can be found [here](#).

Note: This is not a self-scheduling tool and it does not allow individuals to schedule their own appointments with USCIS. Submitted requests are reviewed by the USCIS Contact Center which will confirm and schedule the individual for an available in-person appointment date and time. Individuals may request a specific date and time for an in-person appointment, but USCIS cannot guarantee that the requested appointment date will be scheduled.

ANTI-IMMIGRANT TWEETS LEAD TO A GOVERNMENT I-9 ANTI-DISCRIMINATION INVESTIGATION

On August 23, 2023 attorneys from the Immigrant and Employee Rights Section (“IER”), Civil Rights Division of the U.S. Department of Justice, filed an administrative lawsuit with the Office of the Chief Administrative Hearing Officer (“OCAHO”) against Space Exploration Technologies Corp d/b/a/ SpaceX alleging that the company engaged in a pattern of practice discriminating asylees and refugees, who are considered U.S. workers along with U.S. Citizens and Permanent Residents (Green Card holders). As part of the government’s case, it notes a June 16, 2020 tweet from the company’s CEO, Elon Musk, that “US law requires at least a green card to be hired at SpaceX, as rockets are considered advanced weapons technology”. The government’s complaint also notes that between September 2018 and May 2022 SpaceX’s recruiting team either posted employment opportunities or told job candidates it could only hire U.S. citizens or permanent residents. During this period SpaceX indicated that more than 10,000 persons were hired, none who were asylees or refugees. The government seeks an order from OCAHO that SpaceX should cease and desist its alleged discriminatory practices, pay an appropriate civil penalty, reconsider job applicants rejected for their citizenship status and hire any qualified individuals, and pay any applicable back pay. An OCAHO Administrative Law Judge is responsible for managing the proceedings and issuing a decision.

On September 18, 2023 SpaceX filed its own lawsuit in the U.S. District Court for the Southern District of Texas against two OCAHO Administrative Law Judges and the U.S. Attorney General seeking to enjoin and dismiss the administrative proceedings contending they are unconstitutional and that SpaceX is entitled to a jury trial under the Seventh Amendment. SpaceX states in its complaint that during the period of September 2018 to May 2022 its Starbase facility in Boca Chica, Texas advertised for 1,451 positions and “received approximately 72,000 applications (of whom about 170 were from self-identified refugees and asylees).” SpaceX challenges the appointment and authority of OCAHO Administrative Law Judges and contends the

proceedings, which seek money damages and civil penalties, if continuing, should be held in a Federal Article III Court. Interestingly, the complaint does not make any claim that Mr. Musk's tweet is protected by the First Amendment.

IER COLLECTS SIGNIFICANT FINES FOR DISCRIMINATORY PRACTICES

IER also has collected more than \$1.6 million in civil penalties from 30 employers who followed discriminatory practices by using a job recruiting platform hosted by Georgia Institute of Technology. Such job postings unlawfully excluded certain non-U.S. citizens, and/or limited recruitment opportunities for certain non-U.S. citizen students based on their citizenship status. Some of the employers receiving a six-figure fine include Georgia Institute of Technology (\$500,000), KPMG LLP (\$306,656), Keyot LLC (\$256,928), Honeywell International Inc. (\$191,995), CarMax (\$186,480), Deluxe Corporation (\$183,065), and Area-I Inc. (\$103,600).

Other recent IER actions include:

- A settlement with a Maryland-based staffing services company which agreed to pay a civil penalty of \$4,465 for rescinding a job offer to an individual based upon "unfounded suspicions that his citizenship status would delay the hiring process". The candidate was also awarded back pay of \$3,360 plus interest.
- A settlement with an employer who agreed to pay a civil penalty of \$7,588 for violating the Form I-9 procedures by requesting employees provide specific documentation of their identity and employment eligibility rather than having the employee decide which documentation to provide from the Form I-9 List of Acceptable Documents.
- A settlement with an employer who posted a job advertisement stating job applicants "must be under OPT visa right now" thereby excluding U.S. workers. This employer agreed to pay a civil penalty of \$3,855 and prepare or revise its employment policies and training materials to ensure compliance with U.S. laws.
- A settlement for a civil penalty of \$25,000 with an employer charged with citizenship discrimination when its job advertisement announced a preference for foreign workers having temporary visas and national origin discrimination when at least one job opportunity cited a preference for workers from India.
- A settlement with General Motors Corporation that agreed to pay a civil penalty of \$365,000 as a result of an investigation into its Form I-9 document verification practices and hiring practices, which the government believed to favor U.S. citizens.

OCTOBER VISA BULLETIN UPDATE

The DOS recently issued the October 2023 Visa Bulletin for the start of FY-2024 (October 1, 2023 to September 30, 2024).

The call by 58 bipartisan members of Congress, led by Congressmen Raja Krishnamoorthi (D-IL) and Larry Bucshon, M.D. (R-IN), to push the Biden Administration to allow all employment-based Green Card applicants to apply for adjustment of status during October 2023 was unsuccessful.

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

On a positive note, USCIS has agreed 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 October 2023:

First Preference

- 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

- 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 or the Philippines 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.

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.

The Department of State (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. There are also projections that during FY-2024 there will be an additional 25,000 employment-based visas available from unused family-based categories in FY-2023.

DHS PROPOSES TEMPORARY REAL ID ACT WAIVER FOR MOBILE DRIVER'S LICENSES

The Department of Homeland Security (DHS) recently published proposed rules in the Federal Register which would temporarily waive some federal requirements for agencies accepting state-issued mobile driver's licenses. The idea behind the proposed rule is to reduce the burden on the public as more states introduce digital identification.

As reported in our March 2023 Business Immigration Monthly Update, the final rule delays the requirement of REAL ID compliant documents until May 7, 2025, thereby allowing States 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. 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.

In 2020, Congress passed the REAL ID Modernization Act, allowing DHS to accept electronic transmission of user identity information, opening the possibility that novel digital technologies could be used for identity purposes. As a result, mobile driver's licenses (or "mDLs") are slowly being introduced in some States.

The Transportation Security Administration (TSA) now proposes to amend the REAL ID regulations to waive, on a temporary and State-by-State basis, the regulatory requirement that mobile or digital driver's licenses or identification cards be compliant with REAL ID requirements to be accepted by Federal agencies for official purposes when full enforcement begins on May 7, 2025. The rule would establish minimum standards for mDLs, adding definitions for mobile driver's licenses and mobile identification cards which would provide an explanation of those terms as they appear in the REAL ID Act which only applies to State issued cards.

In addition, the rule would establish a temporary waiver process to permit Federal agencies to accept mDLs for official purposes when enforcement begins on May 7, 2025, if certain conditions are met. These include requiring that the mDL holder must also possess a valid REAL-ID compliant physical ID or driver's license from a REAL-ID compliant State which has received a waiver from the TSA.

STATE DEPARTMENT ANNOUNCES DIGITAL VISA AUTHORIZATION PROGRAM

The DOS has announced that it is developing the capability to issue a digital visa authorization (DVA) instead of the traditional visa printed and placed in applicants' passports. The DVA is being introduced on a limited basis initially at the U.S. Embassy in Dublin, Ireland. The embassy is conducting a limited DVA *proof of*

concept or pilot program with a small number of K-1 (fiancé(e)) visas. If successful, the DVA may be extended to other visa classes and additional posts in the future.

The DOS explained that K-1 visas were selected for the proof of concept, as they are single-entry (single use) visas and will only be issued to travelers who plan to travel directly to the United States from Dublin. Dublin was selected for the initial DVA trial due to the historically strong partnership with the Irish government, the consular section at the embassy there, the presence of U.S. Customs and Border Protection (CBP) pre-clearance procedures at Dublin Airport, and the participation of airlines flying out of Dublin directly to the United States who are already enrolled in CBP's Document Validation program.

More information about the DVA program will be contained in future Business Immigration Monthly Updates when they become available.

2023 DIVERSITY VISA PROGRAM UPDATE

The DOS announced that, as of September 7, 2023, it has issued all available Diversity Visas for the 2023 Diversity Visa (DV) Program.

The DOS makes 55,000 "green cards" available annually to persons from countries with low rates of immigration to the United States. Applicants for Diversity Visas are chosen by a computer-generated random lottery drawing. Selection does not guarantee that an applicant will receive a visa interview or a visa. Selection merely means the person may be eligible to participate in the DV program and may potentially apply for a visa, but it is not a guarantee.

The Diversity Visa "green cards" are available only to citizens of countries with lower rates of immigration and no visas are available to citizens of countries sending more than 50,000 immigrants to the United States in the past five years. Within each region, no country may receive more than 7% of the available Diversity Visa "green cards" in any one year. Each year, the State Department publishes a list of the countries that are not eligible to participate in the program.

The 2025 Diversity Visa program entry period will open in early October of this year. Interested and eligible individuals are encouraged to apply.

USCIS Exempts Biometric Services for All Form I-539 Applicants

USCIS recently announced that it will be exempting the biometrics requirement for all Form I-539 Applications to Extend/Change Nonimmigrant Status beginning October 1, 2023. Additionally, the \$85 biometric filing fee will no longer be required as part of the I-539 application.

The notice indicates that, in most cases, applications filed after October 1st will not be scheduled for a biometric services appointment. Applicants who filed before October 1st and who have received biometric services appointments are instructed to attend any scheduled appointments.

The fee exemption will apply to all applicants filing on or after October 1, including those applicants filing Form I-539 requesting an extension of stay in or change of status to H-4, L-2, or E nonimmigrant for whom USCIS had previously suspended the biometrics requirement through September 30, 2023. Filings mistakenly submitted with the fee, if combined with another form payment, will be rejected.

