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Practices: 移民法

U.S. SUPREME COURT CONFIRMS AUTHORITY OF CONSULAR OFFICERS IN VISA PROCESSING

The U.S. Supreme Court recently confirmed the discretionary power of Consular Officers in visa processing when it upheld the doctrine of consular nonreviewability. This doctrine precludes judicial review of a denial of a visa application by a U.S. Consular Post.

Under the immigration laws, one reason a visa application may be denied is if the Consular Officer “knows or has a reasonable ground to believe” the visa applicant seeks to enter the United States to engage in any “unlawful activity.”

The plaintiff, a national of El Salvador and undocumented in the United States, was not permitted to complete his Green Card processing in the United States, even though he is married to a U.S. citizen. To obtain a visa which would allow him to become a Permanent Resident of the United States and join his U.S. citizen spouse, he needed to apply in his home country. During his interview at the U.S. Embassy in San Salvador, the Consular Officer became aware that the Plaintiff had tattoos. His tattoos depict Our Lady of Guadalupe, Sigmund Freud, a ‘tribal’ pattern with a paw print, and theatrical masks with dice and cards. From such tattoos the Consular Officer believed the Plaintiff was a member of La Mara Salvatrucha, also known as MS-13, a transnational criminal gang whose members have been involved in violent criminal and unlawful activities. MS-13 has been functioning in the United States for more than forty years, originated to protect Salvadoran immigrants from other gangs in the Los Angeles area. Common MS-13 tattoos are a devil’s head with a halo and two horns, the number 13, and the Salvadoran Flag.

The Supreme Court held that “[a] citizen does not have a fundamental liberty interest in her non-citizen spouse being admitted to the country.” Marriage to a U.S. citizen is not an automatic right for a non-citizen to obtain a Green Card. This decision also confirms the doctrine of consular nonreviewability and prohibits judicial review of the Plaintiff’s visa denial. The dissent noted the burden this decision has on the U.S. citizen’s right to marriage and the right to live in the United States with her husband.

USCIS OMBUDSMAN ANNUAL REPORT – CASE VOLUME AND BACKLOGS

The Acting Citizenship and Immigration Services Ombudsman recently delivered his office’s Annual Report to Congress. Of note:

- During FY-2023 (October 1, 2022 to September 30, 2023) USCIS received 10.9 million filings and the Ombudsman's office received 23,585 requests for assistance.
- U.S. Citizenship and Immigration Services (USCIS) was able to reduce processing times and its overall backlog by 15%, but many petitions and applications remain outside processing time goals.
- USCIS conducted 146,00 interviews of individuals encountered at the U.S border who expressed a fear of returning to their home country. If the government agrees that the individual has a credible fear, the individual may be eligible to apply for asylum or benefits under the Convention Against Torture.
- USCIS processed 238,000 parole requests to enter the United States for humanitarian reasons for nationals of Cuba, Haiti, Nicaragua and Venezuela and more than 150,000 requests for nationals of Ukraine.
- There is a substantial backlog and processing delay of more than four years for the Form I-601A, Application for Provisional Unlawful Presence Waiver. Once approved, this application allows a foreign national, who was present in the United States without inspection, to request a waiver of this ground of inadmissibility based upon demonstrating extreme hardship that their U.S. citizen or lawful permanent resident spouse or parent would suffer due to lengthy family separation during the Green Card processing. To help reduce its backlog, USCIS has created a new dedicated processing center – Humanitarian, Adjustment, Removing Conditions, and Travel Documents (HART) which has a goal of processing the Form I-601A within 12 months of the end of FY-2025 (September 30, 2026).
- USCIS continues to have a substantial backlog of Forms I-765, Application for Employment Authorization (EAD) which is used by individuals, such as students, asylum applicants, spouses of E, H or L visa holders and individuals with applicants for adjustment of status to permanent resident, among others, to obtain documentation of interim work authorization. At the end of FY-2023 (September 30, 2023), USCIS had 976,765 initial and 567,209 renewal applications pending. For the upcoming fiscal year, USCIS anticipates receiving 4.6 million Forms I-765.

CIVIL PENALTIES INCREASE FOR EMPLOYER SANCTIONS

Effective June 28, 2024 civil penalties for violations of the Form I-9 Employment Eligibility Verification process have increased.

Fines for first-time Form I-9 paperwork violations now range from $281.00 to $2,789.00 per employee.

The penalty range for knowingly employing an unauthorized worker is from $698.00 to $5,579.00 per worker for a first offense. For a second offense, the penalty range is from $5,579 to $13,946. For a third or subsequent offense, the penalty range is from $8,369 to $27,894.

When determining the penalties for Form I-9 paperwork violations, the government considers five factors: the size of the business, the employer's good faith compliance efforts, the seriousness of the violation, whether the I-9 was for an unauthorized worker, and whether the employer had a history of prior violations. Regarding the size of the business, an employer having less than one hundred employees is eligible for leniency. A Form I-9 for an authorized worker, including a worker who provides a false Social Security Number, is an aggregating factor for penalty assessment. An employer having prior I-9 violations is subject to a higher penalty range.

Form I-9 paperwork violations continue until corrected or the employer is no longer required to maintain the Form I-9.

Please reach out to a Masuda Funai immigration attorney with questions regarding I-9 compliance, including completing a compliance audit of the company's I-9 forms and records.

AUGUST 2024 VISA BULLETIN UPDATE

The U.S. Department of State (DOS) recently issued the August 2024 Visa Bulletin.

For employment-based immigration only the following foreign nationals may either apply for permanent resident status through adjustment of status ("AOS") or have their AOS application approved if all qualifying and documentation requirements are met in August 2024. Also, the following foreign nationals who will complete the Immigrant Visa processing at a U.S. Consular Post and who have submitted all the required documentation become eligible to have their interview scheduled in August 2024.

First Preference

- Persons eligible for the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researchers/Professors or workers recognized for their Extraordinary Ability) who were born in any country other than India or China – still Current.
- China-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researchers/Professors or workers recognized for their Extraordinary Ability) whose priority date is before November 1, 2022 – no change from July 2024.
- India-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 1st preference category (Multinational Managers/Executives, Outstanding Researchers/Professors or Workers recognized for their Extraordinary Ability) whose priority date is before February 1, 2022 – no change from July 2024.

Second Preference

- Persons born in any country other than India or China having an approved Immigrant Petition (Form I-140) in the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) whose priority date is before March 15, 2023 - no change from July 2024.
- China-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) whose priority date is before March 1, 2020 – no change from July 2024.
- India-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 2nd preference category (Advanced Degree Professionals, workers recognized for their Exceptional Ability, or individuals qualifying for a National Interest Waiver) whose priority date is before June 15, 2012 – no change from July 2024.

Third Preference

- Persons born in any country other than India or China having an approved Immigrant Petition (Form I-140) in the employment-based 3rd preference category (Professionals or Skilled Workers) whose priority date is before December 1, 2021 - no change from July 2024.
- China-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 3rd preference category (Professionals or Skilled Workers) whose priority date is before September 1, 2020 – no change from July 2024.
- India-born persons having an approved Immigrant Petition (Form I-140) in the employment-based 3rd preference category (Professionals or Skilled Workers) whose priority date is before October 22, 2012 – an advancement of one month from July 2024.

As we approach the end of the government's fiscal year on September 30, 2024, the DOS anticipates that the allotment of immigrant visas in the Third Preference category will be used prior to the end of the fiscal year. Additionally, it is unlikely that there will be further movement in the preference categories until at least the beginning of the next fiscal year on October 1, 2024. On October 1st, 140,000 or more employment-based immigrant visas will become available.

STATE DEPARTMENT ISSUES GUIDANCE TO CLARIFY NONIMMIGRANT VISA WAIVER ELIGIBILITY FOR CERTAIN US COLLEGE GRADUATES

On July 15, 2024, following the White House announcement regarding actions to promote family unity and help Dreamers (as previously reported in our June Immigration Update Newsletter), the DOS issued clarification of its existing guidance to consular officers regarding when they should consider recommending that the U.S. Department of Homeland Security (DHS) grant a waiver of ineligibility, where applicable.

The June 18, 2024 White House announcement would allow DACA recipients who are US college graduates and who have been sponsored by a US employer for a nonimmigrant employment-based visa, to apply for such a visa at the US consulate abroad. Depending on the circumstances of the individual applicant, the applicant could be legally required to also seek a nonimmigrant waiver under Section 212(d)(3) of the Immigration and Nationality Act (INA) in order the receive the visa.

The Section 212(d)(3) waiver can waive a range of grounds of inadmissibility to the United States, including unlawful presence. An approved 212(d)(3) waiver removes that bar for temporary visa purposes, allowing the applicant to obtain the employment-based temporary visa, such as an H-1B visa, at a U.S. consulate abroad, and then enter the United States in valid status with work authorization for a temporary period.

The DOS clarifies, in an update to the Foreign Affairs Manual (FAM), the procedures and circumstances Consular Officers are to follow in evaluating such cases and waiving inadmissibility on an expedited basis in appropriate cases. The update clarifies when consular officers should consider recommending that DHS grant a waiver of ineligibility. The update makes clear that this guidance does not confer any new benefit and applies to all visa applicants.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.