



FBT Immigration Update: June/July 2017

Aug 02, 2017

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Authors:
[Mary \(Peggy\) G. Shukairy](#)

USCIS Continues to Incrementally Resume H-1B Premium Processing

On July 24, 2017, U.S. Citizenship and Immigration Services (USCIS) announced that, effective immediately, it would resume premium processing for H-1B petitions filed by:

- An institution of higher education.
- A nonprofit related to or affiliated with an institution of higher education.
- A nonprofit research or governmental research organization.

In addition, premium processing is again available for H-1B petitions filed on behalf of beneficiaries that will be employed at a qualifying cap-exempt institution, organization, or entity.

This follows USCIS' move on June 26 to resume H-1B premium processing for J-1 Physicians filing for a change of status, who are under the Conrad 30 Waiver Program or who have an Interested Government Agency Waiver. These two moves indicate that USCIS is taking the steps necessary to resume premium processing for all H-1B petitions within six months of April 3, 2017, the timeframe stated in the initial March 3, 2017, announcement regarding the suspension.

While petitioners, specifically private employers, wait for additional relief, they are reminded that they may continue to seek expedited processing if one of the following criteria can be met:

- Severe financial loss to company or [person] □
- Emergency situation. □
- Humanitarian reasons. □
- Nonprofit organization whose request is in furtherance of the cultural and social interests of the United States□□

- Department of Defense or National Interest Situation. (These particular expedite requests must come from an official U.S. government entity and state that delay will be detrimental to the government.)
- USCIS error.
- Compelling interest of USCIS.

Approval for expedited processing is discretionary and USCIS will review such requests on a case-by-case basis. Upon receipt of a request for expedited processing, USCIS should make a decision as to whether to grant or deny the request within three to five days.

The Trump Administration Delays the Implementation of the International Entrepreneur Final Rule

Through a notice published by the Department of Homeland Security (DHS) in the Federal Register on July 11, 2017, the Trump Administration delayed the implementation of the International Entrepreneur Final Rule, which was set to go into effect on July 17, 2017.

According to the notice, the DHS announcement was prompted by Executive Order (E.O.) 13767, "Border Security and Immigration Enforcement Improvements."

Section 11(d) of the E.O. requires the DHS Secretary to "take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole."

As the International Entrepreneur Final Rule utilizes parole authority (it permits USCIS to parole qualifying entrepreneurs of startup companies into the U.S.), DHS delayed its implementation and indicated it will issue a Notice of Proposed Rulemaking to solicit comments from the public regarding a proposal to rescind the rule.

This is a setback to the efforts started under the Obama Administration to, in the absence of comprehensive immigration reform, encourage entrepreneurs that are able to demonstrate substantial and documented potential for rapid business growth and job creation, to start their promising business activities within the U.S. and not elsewhere.

For more information on the International Entrepreneur Final Rule, please see our prior [immigration update from January 2017](#) (“Status of USCIS final rules affecting the employment-based immigration system.”)

Form I-9 Revised Again

USCIS released a revised Form I-9 on July 17, 2017, that all employers must use starting on September 18, 2017. Until then, employers can use the new version with a revision date of 07/17/17 N or the prior version with a revision date of 11/14/16 N. In addition to relatively minor changes to the form’s instructions, USCIS has added the Consular Report of Birth Abroad (Form FS-240) to List C, Documents that Establish Employment Authorization. The CIS has issued a revised Handbook for Employers M-274, which reflects these revisions.

NLRB Issues Decision Concerning Timing of I-9 Audit

An NLRB Administrative Law Judge (ALJ) recently held an employer violated the law by reverifying employees’ work authorization in the context of a union organizing campaign. In *Cinelease, Inc.*, Case No. 31-CA-166005, a company’s employees, many of whom were lawful permanent residents (green card holders) were seeking to organize a union. During the organizing campaign the company decided, for the first time ever, to audit its I-9s and reverify the work authorization of all current employees. The union filed an unfair labor practice charge, and the ALJ agreed the company’s actions violated the National Labor Relations Act (NLRA). While an I-9 audit, in and of itself, is not only lawful but often good practice, the ALJ was struck by the *timing*. The company had never performed an I-9

audit before, and decided to do the audit only after the union organizing campaign had begun. The company's attempts to reverify the work authorization of its lawful permanent resident employees violated immigration laws, and so the ALJ found this was further evidence that the company was not acting in good faith. Finally, the I-9 audit and reverification had a dramatic impact on the employees—many stopped showing up to the organizing meetings, and although the organizing drive was ultimately successful, the ALJ found the company's actions were nevertheless retaliatory and had the effect of chilling activity protected by the NLRA.

This decision was driven by the specific facts of the case, but it also serves as a cautionary tale to employers. Reverifying an employee's work authorization, scrutinizing an employee's work authorization, or other actions such as attempting to get an unauthorized worker deported may be legal in a vacuum, but can also be considered unlawful retaliation in a variety of employment contexts. Employers should also remember that the bar for retaliatory actions under many employment laws is fairly low, and an action can be considered retaliatory if it would dissuade a reasonable employee from taking some action the company wanted to discourage.

USCIS Increases H-2B Cap Limit for Remainder of FY2017

On July 19, 2017, USCIS [announced](#) that it has made an additional 15,000 H-2B visas available for the remainder of FY2017. USCIS made it clear that the increase is a one-time occurrence. Thus, for FY2018, employers should plan for the standard annual H-2B cap that permits up to 66,000 H-2B visas per fiscal year (33,000 for the first half of the fiscal year and 33,000 for the second half of the fiscal year).

On March 13, 2017, the H-2B cap limit was reached, eliminating their availability for the remainder of the fiscal year (i.e. until October 1, 2017). USCIS increased the cap to relieve pressure on employers that rely on H-2B visas to fill temporary nonagricultural jobs to address one-time, seasonal, peak-load, or intermittent needs. In addition to showing a qualifying need, employers have to go through

a multi-step process with the Department of Labor and USCIS that involves demonstrating that (1) there are not enough U.S. workers able, willing, qualified, and available to do the work and (2) the H-2B worker will not adversely affect wages and working conditions of similarly employed U.S. workers.

Department of State Employment Verification Emails

In an apparent new trend, Department of State contractors are sending emails to employers to confirm the employment of foreign national visa applicants and the services they perform. The Department of State's Visa Office confirmed to the American Immigration Lawyers Association that these emails are legitimate. Employers receiving emails from clientverification@state.gov should timely respond in order to avoid delays or issues with the processing of the foreign national's visa application.

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