

2019 Immigration Updates Employers Need to Know

The world of immigration policy is changing fast, and Frost Brown Todd is here to inform you of the latest developments you need to know.

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Categories:

Publications

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Department of Labor Issues Memo Clarifying Labor Condition Application (LCA) Notice Requirements

The U.S. Department of Labor clarified certain aspects of the LCA notice requirements for electronic postings and postings at third-party sites in a memorandum released March 15, 2019.

Background

The applicable regulations require a H-1B petitioner filing a LCA for a H-1B visa worker to notify all affected employees of their intent to hire that H-1B worker. The employer may satisfy the notice requirement using one of three methods:

- give notice to a bargaining representative if applicable (for example, a union representative); (2) post a hard copy notice at the physical place of employment, or
- provide electronic notification.

This memo seeks to further clarify the posting requirements for two of these methods.

Hard Copy Notice Requirement and Third-Party Worksites

To satisfy this requirement, the employer must post the LCA notice "in at least two conspicuous places at the place of employment so the affected workers can easily see and read the posted notices." 20 C.F.R. 655.734(a)(1)(ii)(A)(1). Employers usually meet this requirement by printing a copy of the LCA and posting it at a

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location at the place where the H-1B worker will be employed and most employees can see it, like the break room or the kitchen. Posting an LCA in "the custodial closet or little-visited basement" would not satisfy this requirement, as these locations may be difficult to access by all affected employees.

For employers placing the H-1B visa worker at a third-party worksite, the H-1B petitioner must be aware that the posting notice requirements extend to the third-party worksite regardless of who operates the location. In these cases, the H-1B petitioner must post the LCA in a location that is accessible by its own employees, and the "affected workers employed by the third-party" entity. For example, if Company A's employees work at Company B's location, and Company A posts an LCA in Company B's premises in a breakroom only available to Company A's workers, then the posting notice requirement has not been met. Company B's affected workers did not have access to that LCA, and therefore were not provided proper notice under the H-1B regulations.

Electronic Posting Notice Requirement

The electronic posting notice requirement can be satisfied by providing notice via "any of the means it ordinarily uses to communicate with its workers about job vacancies or promotion opportunities." These "means" may include a notice on the company's home page or an electronic bulletin board, or even sending an email to all employees notifying them of the LCA. The website or other electronic location where the LCA is posted must be readily accessible to all affected employees. The H-1B petitioner is responsible for notifying via a hard copy posting if affected employees lack practical computer access or if it has not taken steps to make its employees aware of the existence or the location of the electronic notifications.

For employers whose workers are placed at third-party locations, the electronic posting notice needs to be made available to the H-1B petitioner's employees and to the employees of the third-party company. Therefore, in the example above, if Company A posts an LCA on their intranet site that is available to their own employees, but it is not accessible to any of the workers of the third-party,

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Company B, then the notice is insufficient.

The H-1B petitioner may post the LCA electronically in their public website, which would be accessible to its own employees and the employees of any third-party entities where H-1B workers are located. However, the H-1B petitioner needs to be sure that all affected workers can determine which LCA notice is applicable to their worksite(s). The H-1B petitioner can do this in a number of ways, for example by including a menu bar or search option to lookup posted LCAs for a particular location, posting the link to the electronic notices for a particular third-party worksite in the intranet site of the third party company, or emailing all affected employees at a worksite the link to the electronic posting.

Ultimately, H-1B petitioners need to be mindful that they must use the best notice method that provides appropriate notice to all affected workers at a particular worksite. When in doubt, an H-1B petitioner may default to the hard copy notice requirement.

Israel added to Countries Qualified for E-2 Treaty Investor Visa

As of May 1, 2019, Israeli citizens are now eligible to apply for the E-2 Treaty Investor visa. The E-2 allows nationals of a treaty country, such as Israel, who have invested a substantial amount of capital in a U.S. business to be admitted. Employees of the investor or of a qualifying organization, who have the same nationality, may also be eligible for E-2 visa classification.

The E-1 Treaty Trader visa has been available to Israeli citizens since 1949, but the requirements are more difficult to meet since companies need to demonstrate that they have been engaged in substantial trade with the U.S. The E-2 visa negotiations date back to 2012 and involved legislation that would establish eligibility for the E-2 visa classification if Israel reciprocated the same status to U.S. citizens. The B-5 visa in Israel is the equivalent to the E-2 visa in the United States, and its recent implementation met the requirements set by the law.

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E-2 visas will be processed at the U.S. Embassy in Tel Aviv where applicants will need to submit all relevant documentation and wait to be contacted to schedule an appointment. Please reach out to your FBT attorney for assistance with applying for an E-2 visa.

Form I-539 Available to File Online for Certain Nonimmigrants

In May 2019, U.S. Citizenship and Immigration Services (USCIS) made Form I-539, Application to Extend/Change nonimmigrant status, available for online filing for certain nonimmigrant categories. To take advantage of online filing, an applicant must be filing to extend their stay, apply as a single applicant (no co-applicants or legal or accredited representation), and hold one of the following statuses:

- B-1 temporary visitor for business;
- B-2 temporary visitor for pleasure;
- F-1 academic student with a specific status expiration date;
- F-2 spouse or child of an academic student with a specific expiration date;
- M-1 vocational student; or
- M-2 spouse or child of an M-1 student.

According to the USCIS website, applicants filing Form I-539 online will need to set up a USCIS online account. The account will allow them to complete the application electronically, pay the fee online, submit the application to USCIS, and receive prompt notification once USCIS receives the application. After filing the application, USCIS will use the online account to notify the applicant of biometric appointment notices and provide case status updates. Similarly, the applicant will be able to respond to a Request for Evidence (RFE) and update their contact information via the online account.

Please note that even if Form I-539 was filed online, applicants will still receive a Form I-797, (Notice of Action) and Form I-94 (Arrival-Departure Record) via regular mail. Applicants should retain these original notices as evidence that their status was granted by USCIS.

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Updates on Temporary Protected Status for Nationals of Nepal

On May 10, 2019, USCIS published a notice in the Federal Register which extends the Temporary Protected Status and work permits for TPS holders from Nepal through March 24, 2020, pursuant to a court order. The U.S. District Court for the Northern District of California issued an order in the case of *Bhattari v. Nielsen,* which challenged the termination of TPS for Honduras and Nepal. A settlement in that lawsuit protects TPS holders from these two countries while appeals are pending in the case of *Ramos v. Nielsen*.

As previously reported, on March 1, 2019, USCIS published a separate Federal Register Notice (FRN) that extended TPS designation for El Salvador, Haiti, Nicaragua, and Sudan while the temporary injunction in *Ramos v. Nielsen* is in effect.

The notice automatically extended TPS-related Employment Authorization Documents (EAD), I-797 (Approval Notices) and I-94 (Arrival/Departure Record) for TPS beneficiaries through March 24, 2020, provided that an individual's TPS is not withdrawn due to ineligibility. The automatic extension only applies to TPS holders from Nepal. TPS holders from Honduras are not impacted by the notice because they remain in status until January 5, 2020.

Human Resource personnel are reminded of the following when handling I-9s:

- An unexpired EAD or an EAD with a validity period that is auto-extended by the FRN or individual notice that auto-extends the EAD is acceptable to prove both identity and eligibility to work.
- When re-verifying I-9s, the employer should enter for the expiration date field the date the automatic extension period expires, not the expiration date on the face of the EAD.
- An employee cannot be required to prove they are a national of a country that has been designated for TPS.

H-1B Cap Fiscal Year 2020 Update

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On May 17, 2019, USCIS announced that they completed all data entry for all selected H-1B cap petitions for Fiscal Year 2020. If your petition was selected, petitioners will be receiving a receipt notice with a receipt number to track the H-1B petition. Case status for petitions that have receipt numbers can be viewed online. Selected petitions may also receive RFE notices, which will require petitioners to provide additional information based on the request from USCIS. RFE notices may further delay the adjudication of the H-1B petition.

If your petition was not selected, USCIS has begun to return all H-1B cap petitions. There is no specific timeline for when this process will conclude. We expect to receive return notices as late as the end of summer 2019.

Additionally, USCIS has also notified petitioners and their legal representatives that some petitions may be transferred to different service centers to balance workloads at the various service centers.

Immigrant and Nonimmigrant Visa Applications Now Require Social Media Account Information

Beginning June 2019, the U.S. State Department will begin requiring social media account information from U.S. visa applicants. This change is in line with a memo published by the Executive Office of the President on March 2017 directing relevant agencies to implement "uniform screening and vetting standards for all immigration programs." The new requirements will affect applicants for immigrant and nonimmigrant visas, an estimated 15 million people according to some news outlets.

Applicants will need to provide information on all social media accounts they have used in the past five years. Applicants will need to provide the type of social media provider or platform and the corresponding username, handle, screen name or other identifier used in that particular website or application. The application will allow applicants to add as many social media providers or platforms as needed. If an applicant does not use any social media, they can simply select "none." Please refer to the sample excerpt from Form DS-160.

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