



Jul 21, 2021

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June/July Immigration Updates

Employers Need to Know

The attorneys at Frost Brown Todd are here to summarize the most relevant and impactful immigration updates of the month. Our most recent article covers the following topics:

- Biden Administration Initiatives
 - Updated guidance on criteria for and processing of expedite requests
 - Employment authorization extended to two years for certain adjustment of status applicants
- COVID-19
 - Canada and Mexico travel restrictions
 - USCIS extends flexibility for responses
- Guidance/Clarification
 - Documenting relationship between studies and Optional Practical Training position
- I-9s
 - DHS and DOJ provide updated guidance on accepting a receipt for Form I-9
 - Change of H-2B employers and I-9 completion

Updated Guidance on Criteria for and Processing of Expedite Requests

U.S. Citizenship and Immigration Services (USCIS) issued updated policy manual guidance on [criteria](#) for expedited processing of immigration applications and petitions, effective June 9. USCIS considers all requests to expedite on a case-by-case basis and may grant requests for one or more of the following criteria:

- Severe financial loss to a company or person
- Emergencies and urgent humanitarian reasons
- Nonprofit organization whose request is in furtherance of the cultural and social interests of the U.S.

- U.S. government interests
- Clear USCIS error

In all circumstances, supporting documentation is generally required and USCIS retains sole discretion to deny requests without providing justification.

One of the criteria is severe financial loss to a company or person provided the requestor did not fail to timely file for the benefit or respond to requests for evidence unless the failure was due to circumstances beyond the requestor's control. Under this criterion, a company must demonstrate it is at risk of failing, losing a critical contract, or laying off employees. While for individuals, job loss may at times be sufficient to establish severe financial loss, the need to obtain employment authorization by itself, without evidence of other compelling factors, will not warrant expedited processing.

USCIS will also consider requests to expedite for emergencies and urgent humanitarian reasons, as well as national interests, which include urgent needs for federal agencies such as the Department of Defense (DOD), Department of Labor (DOL), and Department of Homeland Security (DHS), or other public safety or national security interests. A claimed national interest must be immediate and substantive, meaning the case at hand is of a scale or uniqueness requiring expedited action to prevent real and serious harm to U.S. interests.

Moreover, organizations designated as a nonprofit by the IRS may request expedited processing when done in furtherance of cultural and social interests of the U.S. and USCIS will consider such requests even when premium processing is available. Lastly, expedited adjudication may be warranted when there is clear USCIS error. Expedited processing for noncitizens in removal proceedings or with final orders of removal is coordinated between USCIS and U.S. Immigration and Customs Enforcement (ICE).

Employment Authorization Extended to Two Years for Certain Adjustment of Status Applicants

Applicants for adjustment of status may also apply for an Employment Authorization Document (EAD) so that he or she can work in the United States while the adjustment application is

pending. Historically, the USCIS issued EADs to adjustment applicants that were valid for only one year. If a timely EAD renewal application was filed, the applicant would receive an automatic 180-day extension of work authorization. However, the current processing times for EADs have significantly increased in the past year, leaving many adjustment applicants with a gap in work authorization. In an effort to reduce processing delays and avoid gaps in work authorization for adjustment applicants, the USCIS [recently announced](#) that it will begin issuing initial and renewal EADs that are valid for two years. This policy is effective immediately and any adjustment applicants should receive an EAD card that is valid for two years.

National Interest Exception– Validity Extension

The Presidential Proclamations suspending entry for certain travelers from China, Iran, India, Brazil, South Africa, Schengen Area, United Kingdom, and Ireland remain in effect. Individuals who provide vital support or executive direction for critical infrastructure; provide vital support or executive direction for significant economic activity in the U.S.; journalists; travel due to extraordinary humanitarian circumstances or travel in support of national security or public health may qualify for a National Interest Exception to enter the U.S. Initially, a National Interest Exception was valid for 30 days and a single entry.

The Department of State [announced](#) that existing National Interest Exceptions (NIE) are now valid for 12 months from the date of approval and for multiple entries [so long as it is used for the purpose under which it was granted](#). In addition, as of June 29, 2021, an approved NIE is valid for 12 months from the date of travel and may be used multiple times for the purpose in the approved NIE.

Canada and Mexico Travel Restrictions

On March 21, 2020, the U.S., Mexico, and Canada temporarily restricted non-essential travel across the land borders. These restrictions have been extended to remain in effect until at least July 21, 2021. These restrictions do not impact individuals who cross the land border for essential work or for other urgent or essential

reasons.

Additionally, these restrictions only apply to land ports of entry (including passenger rail, passenger ferry, and pleasure boat travel). Restrictions do not apply to air travel between the U.S. and Canada, and the U.S. and Mexico.

USCIS Extends Flexibility for Responses

The USCIS has again extended the response due date for notices, requests and decisions if the issuance date is between March 1, 2020, and September 30, 2021, inclusive. USCIS will consider a response to the following if received within 60 calendar days after the due date set in the request, notice, or decision:

- Requests for Evidence
- Continuations to Request Evidence (N-14)
- Notices of Intent to Deny
- Notices of Intent to Revoke
- Notices of Intent to Rescind
- Notices of Intent to Terminate regional centers
- Motions to Reopen an N-400 Pursuant to 8 CFR 335.5, Receipt of Derogatory Information After Grant
- Filing date requirements for Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)
- Filing date requirements for Form I-290B, Notice of Appeal or Motion.

In addition, USCIS will consider a Form N-336 Request for a Hearing on a Decision in Naturalization Proceedings or Form I-290B Notice of Appeal or Motion received up to 60 calendar days from the date of the decision.

Documenting Relationship between Studies and OPT position

F-1 non-immigrant students may apply for authorization to engage in Optional Practical Training (OPT), which is temporary employment that is directly related to the F-1 student's major area of study. This "directly related" requirement is to ensure the OPT employment supplements the student's educational studies. The Student and

Exchange Visitor Program (SEVP) recently published [guidance](#) on how to document if the employment is directly related to the student's studies. F-1 students are responsible for providing a description of how their employment directly relates to their major area of study. The student should list their regular duties and the link between those duties and the major area of study. As an example, the guidance provides the following:

"Bachelor's degree in Electrical Engineering: I work full time as an electrical engineer at ABC Corp., a government contractor. In my job, I analyze client requirements for electrical systems and provide them with cost estimates of such systems. My work requires understanding of electrical circuit theory, which I studied in-depth at the University of ABC."

This information should be listed in the free text section in Student and Exchange Visitor Information System (SEVIS), or in the alternative, the school should obtain this explanation and retain it in the F-1 student's records.

DHS and DOJ Provide Updated Guidance on Accepting a Receipt for Form I-9

[Previous](#) Form I-9 guidance indicated that an employee could present a receipt showing that they applied to replace a List A, B, or C document that was lost stolen or damaged IF they showed the employer the replacement document for which the receipt was given within 90 days.

The updated guidance acknowledges that it is not always possible to obtain the replacement document within that timeframe. Therefore, the new guidance provides that the employer may now accept another acceptable document (or documents) to demonstrate the employee's identity and/or employment authorization, within the 90-day period. If the employee presents a document (or documents) other than the actual replacement document, the employer should complete a new Section 2 and attach it to the original Form I-9. In addition, the employer should provide an explanation either in the Additional Information box on page 2 of the Form I-9 or as a separate attachment.

Change of H-2B Employers and I-9 completion

The DHS and the DOL published a [temporary final rule](#) which did the following:

- Provides a temporary increase in H-2B nonagricultural temporary worker visas. 16,000 H-2B visas will be available for returning H-2B applicants, who were granted H-2B status in FY 2018, 2019, or 2020, and who will work for employers that would suffer irreparable harm if all of the H-2B workers it requested are not granted.
- Allows eligible H-2B workers who are in the U.S. to begin working for a new H-2B employer once a non-frivolous H-2B petition on their behalf is received by USCIS, for a period of up to 60 days (“H-2B portability”).
 - H-2B petition received before May 25 and pending on May 25: The new employer may employ the H-2B worker while the H-2B petition is pending, for 60 days, beginning on the employment start date on the petition or May 25, whichever date is later. **Or**
 - USCIS receives the H-2B petition between May 25 and Nov. 22, 2021: The 60-day period begins on the received date indicated on Form I-797, or if the start date of employment occurs after the I-797 received date, it begins on the start date of employment indicated in the H-2B petition.

To qualify for H-2B portability, an eligible H-2B worker must have been lawfully admitted, currently hold valid H-2B status, and not have worked without authorization after being admitted. During the 60-day period, employment authorization based on portability ends 15 days after USCIS denies the H-2B petition or the petition is withdrawn.

Employers who plan to employ H-2B workers pursuant to H-2B portability must prepare a Form I-9. An unexpired I-94 (showing H-2B status) and the employee’s foreign passport qualify as a List A document. The Additional Information section of Form I-9 should include the note “60-Day Ext.” and the date of submission of Form I-129 (H-2B extension of stay). The employer must re-verify the employee’s employment authorization and complete Section 3 by

the end of the 60-day period or once a decision has been issued, whichever comes first.

Finally, H-2B portability will end on November 11, 2021.

For more information, please contact [Mary \(Peggy\) Shukairy](#) or any attorney with Frost Brown Todd's [Immigration](#) practice group.

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