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Authors:
[Katie M. Collier](#)
[Alicia M. Visse-Kroger](#)
[David Janklow](#)

December Immigration Updates Employers Need to Know

President Biden Issues Travel Restrictions in Response to Omicron

On November 26, President Joe Biden issued Presidential Proclamation 10315. The proclamation suspends and limits certain immigrants and non-immigrants from entering the U.S. if they were physically present in certain countries within the 14-day period preceding their entry or attempted entry into the U.S. The travel suspension went into effect on November 29 and will remain in effect until terminated by the President. The countries include:

- Republic of Botswana
- Kingdom of Eswatini
- Kingdom of Lesotho
- Republic of Malawi
- Republic of Mozambique
- Republic of Namibia
- Republic of South Africa
- Republic of Zimbabwe

The suspension does not apply to U.S. citizens or lawful permanent residents and the following foreign nationals:

- Spouses of U.S. citizens or lawful permanent residents
- Parents or legal guardians of U.S. citizens or lawful permanent residents that are unmarried and under the age of 21
- Siblings of U.S. citizens and lawful permanent residents provided that both are unmarried and under the age of 21
- Children, foster children, or wards of U.S. citizens or lawful permanent residents
- Prospective adoptees entering the U.S. on IR-4 or IH-4 visas
- Foreign nationals invited by the U.S. Government for purposes related to containment or mitigation of the virus

- Foreign nationals entering as air or sea crewmembers
- Foreign nationals entering the U.S. on A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, and NATO-6 visas
- Foreign nationals whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement
- Members of the U.S. Armed Force and their spouses or children
- Foreign nationals entering to further important U.S. law enforcement objectives
- Foreign nationals whose entry would be in the national interest

As a reminder, all air travelers to the U.S., including those exempt from the latest travel suspension, must still comply with the latest vaccination and testing requirements.

USCIS Automatic Extension of the Employment Authorization for Certain Dependent Spouses and the Impact on Form I-9 Requirements

Effective November 12, USCIS is automatically extending the employment authorization for certain H-4, E, or L nonimmigrant dependent spouses. Accordingly, if these individuals present an unexpired Form I-94, a facially expired employment authorized document (EAD), and a Form I-797C (Notice of Action) showing a timely-filed EAD renewal application (for the same classification as their EAD), these documents may be acceptable to evidence of unexpired employment authorization for up to 180 days for Form I-9 purposes. The extension begins upon the expiration of the EAD and generally continues up to 180 days (unless USCIS denies the renewal application).

New Hire Guidance

For a new employee presenting an automatically extended EAD, the employee must complete Section 1 by selecting "(a)n alien

authorized to work until” and entering the date that is 180 days from the “Card Expires” date on their EAD as their expiration date.

For the dependent spouses of E, H-1B, and L nonimmigrants who are new employees presenting an EAD that has been automatically extended, in Section 2, the employer must:

- Enter EAD in the Document Title field
- Enter the receipt number from Form I-797C in the Document Number field
- In the Expiration Date field, enter the date 180 days from either the “Card Expires” on the EAD or the end date of the Form I-94, whichever is earlier.
 - This expiration date may be cut short if USCIS denies the employee’s renewal application before the 180-day period expires.
- Enter the Form I-94 document information in the second Document field.

The employer should also enter EAD EXT in the Additional Information field.

Current Employee Guidance

For a current employee whose EAD has been automatically extended, employers also must enter the receipt number from Form I-797C, enter Form I-94 document information, and update the expiration date on the Form I-9. Employers may provide this information in the Additional Information field. To update the expiration date, employers should enter “EAD EXT” and the 180-day auto-extended date from the “Card Expires” on the EAD, or the end date of the Form I-94, whichever is earlier. Employers may write EAD EXT mm/dd/yyyy. Employers must reverify employment authorization at the end of the automatic extension period.

Employment Authorization Incident to E or L Nonimmigrant Status

Additionally, USCIS has announced that it will consider certain E and L dependent spouses to have employment authorization incident to their valid E or L nonimmigrant status. Once the changes mentioned below have been implemented, E and L dependent spouses will be

eligible to work immediately upon entering the U.S. instead of having to wait for USCIS to process their EAD applications, easing the burden of relocating to the U.S. for many E and L families.

Previously, E dependent spouses and, under the predominant view, L dependent spouses were required to file a Form I-765 (EAD) application and receive an EAD before beginning employment. USCIS will continue to issue EADs to E and L dependent spouses upon request via an EAD application, and such EADs are acceptable List A documents for Form I-9 purposes. USCIS, however, will immediately take steps to modify Forms I-94, evidencing nonimmigrant status, so that E and L dependent spouses can be distinguished from E and L dependent children on the face of the document. The revised Form I-94 containing a notation indicating that the bearer is an E or L dependent spouse will be acceptable as evidence of employment authorization and as a List C document of the Form I-9.

COVID-19 Staffing Shortages are not temporary for H-2B Program

The Department of Labor's Board of Alien Labor Certification Appeals (BALCA) confirmed that staffing shortages due to COVID-19 are not temporary as defined by the H-2B program. The H-2B program allows employers to hire foreign national employees to work in non-agricultural jobs if they can prove a temporary need. Temporary need includes a one-time occurrence or a seasonal, peak load, or intermittent need. To show a temporary employment need, the employer must prove that the need will end in the near and definable future.

In the case before BALCA, a grocery store argued that the COVID-19 pandemic was a one-time occurrence causing a labor shortage and based on that one-time occurrence the store needed to temporarily hire foreign national employees to bag merchandise and run cash registers. BALCA ultimately disagreed and found that since the COVID-19 pandemic did not have a definable end date, it was not temporary for H-2B purposes, and the grocery store was ultimately unable to hire foreign national employees through the H-

2B program to remedy its labor shortage.

Third Random Selection for FY2022 H-1B Cap Registrations

In an unprecedented move, on November 19, USCIS conducted a third round of random selections to reach the fiscal year 2022 H-1B cap. The [electronic registration process](#) was implemented in 2020, and all employers seeking to file H-1B petitions during the H-1B cap are required to electronically register for each worker for whom they want to sponsor. Once enough registrations are received, the USCIS randomly selects from those electronic registrations. This year, previous selection rounds were done in March and July. USCIS conducted a third round because an insufficient number of H-1B petitions were filed with USCIS based on the prior selections.

If an individual's registration was selected in the third round, the corresponding petition must be filed between November 22, 2021 and February 23, 2022.

DOS Provides U.S. Consulates and Embassies Broad Discretion to Prioritize Visa Appointments

In line with President Biden's [proclamation](#) regarding the safe resumption of international travel, the Bureau of Consular Affairs of the Department of State (DOS) is focusing on reducing wait times for all consular services at U.S. Consulates and Embassies. As such, the DOS has issued guidance to U.S. Consulates and Embassies providing them broad discretion to determine how to prioritize visa appointments among the range of visa classes.

If you have any questions relating to the updates listed above, please contact [Katie Collier](#), [Alicia Visse-Kroger](#), [David Janklow](#) or any attorney in Frost Brown Todd's [Immigration](#) practice group.

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