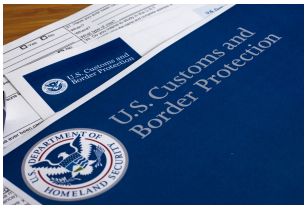

April 2022 Immigration Legal Update

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FY 2023 H-1B Cap Season Update

The FY 2023 H-1B cap season is well underway. The H-1B registration period closed on March 18, 2022, and U.S. Citizenship and Immigration Services (USCIS) notified all selected registrants by March 31.

For petitioners with selected registrations, USCIS started accepting FY 2023 H-1B cap-subject petitions on April 1 and the filing window will be open for at least 90 days – the exact timeframe is specified on the selection notice. The H-1B cap-subject petition must indicate a start date of October 1 or later, and the filing must be for the beneficiary named in the selected registration notice. USCIS has advised that there may be delays in the issuance of receipt notices for these filings due to the high volume. Its March 29 update specifies what petitioners should and should not do while waiting on receipts.

Finally, USCIS has not announced whether it will conduct additional random selections, but, for the FY 2022 H-1B cap season, USCIS conducted two additional selections: the first occurred in July 2021 and the second in November 2021.

USCIS Issues Updated Guidance on Employment Authorization for E and L Dependent Spouses

On March 18, USCIS issued updated guidance to address the documentation that certain E and L dependent spouses may use as List C evidence of employment authorization. This long-awaited step from USCIS follows its initial November 2021 policy guidance announcing that certain E and L dependent spouses have employment authorization incident to their valid nonimmigrant status.

USCIS will mail updated notices with the new spousal designation to E or L dependent spouses (age 21 or older) who have an unexpired Form I-94 that USCIS issued before January 30, 2022. This updated notice, along with an unexpired Form I-94 reflecting E-1, E-2, E-3, E-

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3D, E-3R, or L-2 nonimmigrant status, will serve as evidence of employment authorization. For E or L dependent spouses under the age of 21, a request for an updated notice must be made to E-L-married-U21@uscis.dhs.gov

Please note that USCIS will only issue updated notices to eligible E or L spouses with approval notices issued by USCIS. E or L dependent spouses who received their unexpired Form I-94 from U.S. Customs and Border Protection (CBP) should follow CBP's current policies regarding Form I-94 issuance.

USCIS To Expand Premium Processing

On March 30, USCIS published a Final Rule amending the premium processing regulations to codify statutory changes made by the Emergency Stopgap USCIS Stabilization Act. Premium processing is an expedited adjudication service that is currently only available to petitioners filing a Form I-129, Petition for a Nonimmigrant Worker, and certain employment-based immigrant visa petitioners filing a Form I-140, Immigrant Petition for Alien Workers.

The amended regulation will expand premium processing service to additional case types, including Form I-140 petitions requesting EB-1 immigrant classification as a multinational manager or executive (EB-1C) and EB-2 immigrant classification as a member of professions with advanced degrees or exceptional ability seeking a national interest waiver (NIW), Form I-765 Employment Authorization Applications, and certain Form I-539 Applications to Change or Extend Status.

Premium processing service under 8 C.F.R. § 106.4 allows a person to request USCIS to adjudicate certain employment-based immigration benefits requests in an expedited timeframe (currently within 15 calendar days). To request the expedited process, a request must be submitted on Form I-907, Request for Premium Processing Service with the required fee to the appropriate USCIS filing address.

The Department of Homeland Security (DHS) plans on a phased implementation strategy lasting at least three years and dependent on DHS's capacity. The first phase will expand the service to certain

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categories of Forms I-539, I-765, and both of the new I-140 classifications in FY 2022, which ends on September 30, 2022.

While additional eligible immigration benefit requests and applicable fees and timeframes are designated under the USCIS Stabilization Act, DHS has the authority to define "all prerequisites for adjudication" to determine when the required timeframe begins based on the benefit request and what is required to fully adjudicate it. Thus, the details regarding the length of the actual wait time and documentation requirements for newly eligible immigration benefits requests under the premium processing service remain to be seen.

USCIS's Efforts to Reduce Backlogs and Provide Relief to EAD Holders

In addition to the impact the premium processing expansion discussed above will have, USCIS announced two additional efforts to increase efficiency and reduce burdens on the U.S. immigration system. First, USCIS is establishing new internal cycle time goals this month. These goals are simply internal metrics that guide USCIS officers in the effort to reduce USCIS's backlog. The new cycle time goals are available here.

Second, USCIS continues to work towards finalizing a temporary final rule that will continue the agency's recent efforts to improve timely access to employment authorization documents (EADs), such as, extending validity periods for certain EADs and providing expedited work authorization renewals for healthcare and childcare workers.

DHS Seeks Comments on Proposed Revisions to Form I-9

DHS is soliciting comments on proposed revisions to Form I-9. Proposed changes included revised instructions, condensing the form into fewer pages, and separating Section 3 for reverification onto a supplement page that can be repeated as needed.

While employers may have expected DHS to trend toward permanent adoption of temporary measures enacted during COVID

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permitting remote inspection of employees' documents, the proposed changes suggest otherwise. DHS proposes to change the requirement for an employer to "*review*" employees' documents to state that an employer must "*physically examine*" the documents.

DHS is Ending the COVID-19 Temporary Policy for List B Identity Documents

Beginning May 1, 2022, employers will no longer be able to accept expired List B documents, which include driver's licenses. Notably, if an employee presented an expired List B document between May 1, 2020 and April 30, 2022, employers are required to update their Forms I-9 by July 31, 2022. Please visit the USCIS website for more information.

The U.S. Department of Homeland Security Designates Afghanistan for Temporary Protected Status (TPS)

On March 16, 2022, the U.S. Department of Homeland Security (DHS) designated Afghanistan for Temporary Protected Status (TPS) for 18 months. TPS designation will provide legal protections for Afghan nationals who have continuously resided in the U.S. as of March 15, 2022 or earlier. It may also offer additional protection to the Afghan evacuees through the Operation Allies Welcome program who were paroled into the United States for humanitarian reasons last year. All eligible individuals will be protected from deportation and will be authorized to work.

According to DHS, Afghanistan's 18-month designation will go into effect on the publication date of a forthcoming *Federal Register* notice, which will provide instructions for applying for TPS and employment authorization. TPS applicants must meet all eligibility requirements and undergo security and background checks.

For more information, contact Matt Hoyt, Katie Collier, Michelle Xu, or any attorney with Frost Brown Todd's Immigration practice group.

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