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May 2022 Immigration Legal Update

H-1B 2022 Cap Lottery Registration Update

It was a record-breaking year for new H-1B visa cap submissions. USCIS has [disclosed](#) that more than 483,000 registrations were submitted in the March 2022 lottery for one of the 85,000 new H-1B visas for Fiscal Year 2023 (starting October 1, 2022). This appears to be the largest number of submissions for new H-1B visas in history. By comparison, U.S. employers submitted 308,000 registrations in March 2021.

USCIS also selected a record number of registrations for further action (127,600) in the March 2022 lottery. By comparison, in March 2021 USCIS selected only 87,500 registrations. It added another 43,000 selections in subsequent lottery rounds. The increase in initial selections for FY2023 suggests USCIS is attempting to avoid the need for subsequent lottery rounds, as it is highly likely to fill the 85,000 quota for new H-1Bs from the 127,600 submissions already selected.

Those who missed out on the FY2023 H-1B lottery should not delay planning for alternatives. Individuals with F-1 OPT or STEM OPT work authorization valid until April 1, 2023 or later may benefit from registering again for the March 2023 H-1B lottery. Other common visa options in lieu of the H-1B include the J-1 trainee or intern visa for qualified individuals, the O-1 visa for individuals with extraordinary ability, and TN visa status for Canadian and Mexican nationals in relevant occupations. Current F-1 students may also consider re-enrolling in school to pursue an advanced degree.

USCIS Increases Automatic Extension Period of Certain Work Permits

As the effects of COVID and other factors continue to impact USCIS operations and processing times, the agency has [announced](#) a temporary final rule that increases the automatic extension period for Employment Authorization Documents (EAD) for certain renewal applicants to up to 540 days (roughly 18 months). Effective May 4,

2022, this change is intended to “help avoid gaps in employment for noncitizens with pending EAD renewal applications and stabilize the continuity of operations for U.S. employers.”

This temporary final rule will benefit individuals who were previously eligible for an automatic EAD extension of 180 days, including but not limited to Temporary Protected Status (TPS) holders, E-2 spouses, L-2 spouses, and certain H-4 spouses. Specifically, the temporary increase is available to eligible renewal applicants with pending applications if a Form I-765 renewal application was filed:

- Before May 4, 2022, and the 180-day automatic extension has since expired; or
- Before May 4, 2022, and the 180-day automatic extension has not yet expired; or
- Between May 4, 2022, and Oct. 26, 2023, inclusive of these dates.

Such applicants will now receive an additional year of work authorization while waiting for the approval of a pending EAD renewal. EAD renewal applications filed after October 26, 2023 are expected to benefit from the previous 180-day extension.

Extension of Form I-9 Flexibilities due to COVID-19

The U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced an extension of the flexibility in complying with Form I-9 requirements due to COVID-19. The temporary guidance was set to expire on April 30, 2022, but because of ongoing precautions related to COVID-19, DHS has extended the Form I-9 flexibilities until October 31, 2022. Additional information regarding DHS’s Form I-9 flexibilities can be found in our [January 2022 Immigration Update](#).

Employers are encouraged to prepare for in-person verification if they relied upon or are relying upon a COVID-19 Form I-9 flexible policy. When employees undertake non-remote employment on a regular, consistent, or predictable basis, or the COVID-19 Form I-9 flexibility policy ends (whichever is earlier), employers must then complete in-person verification. Employers have the discretion to start the in-person verification process earlier, but it must be done in a consistent and non-discriminatory manner across the

workforce.

When completing in-person verification following remote verification, employers should enter “COVID-19” and “documents physically examined” with the date of inspection to the Section 2 Additional Information field on the Form I-9. DHS acknowledges that there may be instances where employers are unable to complete in-person verification following remote verification for employees hired since the start of the COVID-19 Form I-9 flexibility policy on March 20, 2020. In such cases, DHS advises employers to memorialize the reasons for this inability in a memorandum retained with each affected employee’s Form I-9. DHS will evaluate the reasons on a case-by-case basis, in the event of a Form I-9 audit.

Extension of eligibility date for TPS Ukraine

Earlier this year, the Department of Homeland Security (DHS) [announced](#) that Ukraine was designated for TPS for 18 months. To qualify for TPS, a Ukrainian national must meet certain criteria, including physical presence in the United States since the effective date of the TPS designation and continuous residence in the U.S. since a specific date.

The original TPS announcement indicated that Ukrainian nationals who have continuously resided in the U.S. since March 1, 2022, may apply for TPS. Recently, DHS extended the arrival cutoff date to April 11, 2022. Consequently, Ukrainians who traveled to the U.S. between March 1 and April 11 are now able to apply for TPS.

EAD/AP Combo Cards

USCIS recently announced that it would begin issuing EAD and Advance Parole (AP) cards separately for certain adjustment of status applicants. Until this announcement, the USCIS issued a combo card for an adjustment of status applicant that concurrently filed Form I-765 (Application for Employment Authorization) and Form I-131 (Application for Travel Document). This new policy is intended to reduce EAD processing times that are currently backlogged and causing work authorization gaps for many foreign nationals.

A foreign national with an EAD card that does not also serve as advance parole will only be able to use their card for work authorization purposes, not to travel abroad. A separately issued AP document would cover international travel.

DHS extends COVID-19 vaccination requirements at the Canada and Mexico borders

DHS announced that it will extend its temporary requirements and continue to require non-U.S. travelers entering the United States via land ports of entry and ferry terminals at the U.S.-Mexico and U.S.-Canada borders to be fully vaccinated against COVID-19 and provide related proof of vaccination upon request. These requirements apply to non-U.S. travelers who are traveling for both essential and non-essential reasons, but do not apply to U.S. citizens, lawful permanent residents, or U.S. nationals.

Non-U.S. travelers entering via land ports of entry and ferry terminals must continue to:

- Verbally attest to their COVID-19 vaccination status;
- Provide, upon request, proof of a CDC-approved COVID-19 vaccination, as outlined on the [CDC website](#);
- Present a valid [Western Hemisphere Travel Initiative](#) (WHTI)-compliant document, such as a valid passport, Trusted Traveler Program card, or Enhanced Tribal Card; and
- Be prepared to present any other relevant documents requested by a U.S. Customs and Border Protection (CBP) officer during a border inspection.

COVID-19 testing is not required to enter the United States via a land port of entry or ferry terminal.

For more information, please contact [Matt Hoyt](#), [Katie Collier](#), [Alicia Visse-Kroger](#), or any attorney with Frost Brown Todd's [Immigration](#) practice group.

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