



October 2022 Immigration Legal Update

U.S. Department of Labor Processing of Prevailing Wage Determinations and Labor Certification Applications Continues to Slow

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Employers who sponsor their foreign national workers for permanent residence through the U.S. Department of Labor's (USDOL) labor certification process may have noticed recent slowdowns in the processing of prevailing wage requests and applications for labor certification. In fact, processing times have lengthened by approximately 33% in 2022 according to USDOL's most [recent update](#). These delays are cause for concern for pending, time-sensitive cases. They also highlight the need for more strategic planning for future green card sponsorships.

Labor certification-based green card processing consists of several steps. First, an employer submits a prevailing wage request (Form ETA 9141) to the USDOL to determine the minimum salary the foreign national must be paid upon approval of the green card. After USDOL determines the prevailing wage, the employer tests the labor market to determine if qualified U.S. workers are available and qualified for the role. This process takes at least 60 and up to 180 days. Next, the employer files an application for labor certification (Form ETA 9089) with USDOL. After certification by USDOL, the employer and foreign national continue processing the green card case with U.S. Citizenship and Immigration Services.

Until recently, USDOL was processing prevailing wage requests in 6 months and applications for labor certification in five to six months. Due to many factors, including COVID, staffing issues, and a court-mandated emphasis on other types of filings, USDOL turnaround on these matters is now approximately eight months. Moreover, USDOL officials have indicated that processing times are unlikely to improve in the near future.

The impact of this slowdown will most-acutely impact individuals who are nearing the maximum duration of their nonimmigrant authorization. Foreign nationals with L-1B or H-1B visa status are

generally limited to five or six years of work authorized status, respectively (“the max out date”). A general rule of thumb had been to initiate the labor certification-based green card process no later than 24 months prior to an employee’s max out date. In other words, the end of the L-1B worker’s third year or the H-1B worker’s fourth year. This allowed the employer to weather the USDOL’s six-month processing time for prevailing wages and labor certification, as well as complete other steps on the path to the green card.

With the current eight-month processing times likely to continue indefinitely, employers must re-think the timing of initiating green card sponsorships for foreign national employees in L-1B, H-1B, and other nonimmigrant visa status. Now, these cases should be initiated at least 36 months prior to the foreign national’s max out date.

For pending, time-sensitive cases, employers may also need to implement more aggressive timelines for initiating the labor market test. Most employers prefer to wait for the prevailing wage determination before placing mandatory newspaper advertisements and other postings required by USDOL regulations. But given these extended timelines, employers should consider initiating recruitment steps early – up to two months prior to issuance of the prevailing wage determination.

Medical Exam Waiver Extended

All Adjustment of Status applicants are required to undergo a medical examination by an approved USCIS doctor (“civil surgeon”) before their green card is issued. The immigration medical examinations are documented by Form I-693, Report of Medical Examination and Vaccination Record, and conducted to show that an applicant is free from any conditions that make the applicant inadmissible under health-related grounds. Previously, a civil surgeon had to sign Form I-693 medical exam no more than 60 days before the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status. During the COVID-19 pandemic, USCIS waived this requirement, and recently extended the waiver of the requirement until March 31, 2023.

The USCIS is still encouraging all applicants to complete their medicals as close as possible to the filing of their Form I-485 as the Form I-693 is only valid for two years from the date of the civil surgeon's signature.

Green Card Validity Extension to 24 Months for Green Card Renewals

Due to a delay in processing times, USCIS recently announced that it is automatically extending the validity of green cards to 24 months for any permanent resident that properly files a Form I-90, Application to Replace Permanent Resident Card, to renew an expiring green card.

The I-90 receipt notice will include language that outlines the automatic extension and will indicate that the receipt notice, presented along with an expired green card, is proof of extended status and can be used for work authorization and/or travel purposes.

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

On October 11, 2022, the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced another extension of the COVID-19 I-9 flexibilities that were set to expire on October 31, 2022. Because of ongoing precautions related to COVID-19, DHS has again extended the Form I-9 flexibilities until July 31, 2023. Additional information regarding DHS's Form I-9 flexibilities can be found in our [January 2022 Immigration Update](#).

Employers are still 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.

Department of Homeland Security (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.

USCIS Flexibility for Responding to Agency Requests

On October 24, USCIS extended through January 24, 2023, the previously announced flexibilities for responses to the agency requests listed below.

- 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

Currently, if the issuance date on one of the agency documents listed above is on or between March 1, 2020 and January 24, 2023, USCIS will permit applicants, petitioners, and requestors to have additional time to respond (within 60 calendar days after the response due date).

Additionally, updated flexibilities apply to Form I-290B, Notice of Appeal or Motion, or a Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings, and may be viewed [here](#).

For more information, contact any attorney with Frost Brown Todd's [Immigration](#) practice group.

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