



September 2022 Immigration Legal Update

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Authors:

[Yan \(Michelle\) Xu](#)

[Katie M. Collier](#)

[Matthew W. Hoyt](#)

U.S. Citizenship and Immigration Services (USCIS) Continues Push to Approve Employment-Based Green Cards by Fiscal Year-End

With the fiscal year-end of September 30 approaching, U.S. Citizenship and Immigration Services (USCIS) continues its push to approve the maximum annual allotment of employment-based immigrant visas (“green cards” or “lawful permanent residence”). The Immigration and Nationality Act dictates that 140,000 employment-based green cards may be approved each year by USCIS and the U.S. Department of State (USDOS). Due to several factors, including the impact of COVID-19, the supplies of employment-based green cards in 2020 and 2021 were not exhausted. Last year, for example, 25% of the annual allotment was unused. As these numbers carry over, the limit for the current fiscal year (281,507) is more than double the typical number.

According to [USCIS](#), through July 31, USCIS and USDOS have used 210,593 employment-based immigrant visas (74.8% of the 2022 limit). USCIS alone approved more than 10,000 employment-based I-485 applications in the week ending August 14. Rather than see these numbers go unused, USCIS is pushing to complete processing for individuals with pending I-485 applications to adjust status. Individuals with pending requests for evidence are being encouraged to respond as soon as possible to support approval by September 30.

USCIS Announces It Has Reached the Limits of the H-1B Cap for Fiscal Year 2023

On August 23, USCIS [announced](#) that it reached the congressionally mandated cap of 85,000 new H-1Bs for Fiscal Year 2023 (October 1, 2022 – September 30, 2023). As a result, there will be no further lottery selections.

As discussed in our [May 2022 update](#), USCIS selected significantly more H-1B cap registrations in the March 2022 lottery than in previous years. This was expected to eliminate the need for subsequent lottery rounds. The August 23 update confirms that USCIS will fill the 85,000 quota for new H-1Bs from the 127,600 submissions originally selected in March. USCIS has begun to notify employers of non-selected registrations.

Temporary Waiver of “60-Day Rule” for Medical Exam Set to Expire on September 30, 2022

Effective December 9, 2021, USCIS temporarily waived the requirement that the civil surgeon’s signature on the Report of Medical Examination and Vaccination Record (Form I-693) be dated no more than 60 days before an applicant files a Form I-485, Application to Register Permanent Residence or Adjust Status. This temporary waiver is set to expire on September 30, 2022.

In general, Form I-693 must be used by those who apply for permanent residence while in the U.S. to show they do not have any health-related conditions that would make them inadmissible under the Immigration and Nationality Act. USCIS considers a completed Form I-693 to retain its evidentiary value for 2 years after the date the civil surgeon signed it as long as the civil surgeon’s signature is no more than 60 days before the applicant files his or her application. This is commonly referred to as the “60-day rule.”

While USCIS may extend the waiver, applicants may want to consider the possibility the 60-day rule may come back when deciding when to obtain medical exams.

DHS’s Proposed Rule Regarding Form I-9 Flexibility

On August 18, the Department of Homeland Security (DHS) published a proposed rule that could offer employers (or agents acting on an employer’s behalf) optional alternatives for examining the documentation presented by individuals for the purposes of completing the Form I-9, Employment Eligibility Verification.

The alternative procedures could include making permanent the COVID-19 flexibilities for remote examination (currently effective

until October 31, 2022), such as by conducting examination over video, fax, or email. DHS may require an employer relying upon an alternative procedure to mark a box or boxes on an updated Form I-9, indicating that it was using such procedure. Additionally, DHS may authorize the use of alternative procedures on the condition that participating employers engage in certain activities, such as enrolling in E-Verify, retaining images of the Form I-9 documents, or completing certain training.

Such proposed procedures could be implemented by DHS as part of a pilot program, upon the Secretary of Homeland Security's determination that the alternative procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency as declared by the Secretary of Health and Human Services. In sum, the proposed rule provides DHS significant flexibility in determining whether, when, and how alternative examination procedures are implemented.

Comments regarding the proposed rule must be submitted on or before October 17, 2022. After the public commentary period closes, DHS will review all comments and, should it decide to move forward, publish the final rule.

DHS's Final Rule Fortifying DACA

DHS issued a final rule that codifies the Deferred Action for Childhood Arrivals (DACA) policy. DACA was first established in 2012, setting forth the policy that DHS will consider granting "deferred action" on a case-by-case basis for certain eligible noncitizens. Deferred action is a longstanding practice where DHS exercises its discretion to forbear from, or assign a lower priority to, removal action in certain cases. DACA has primarily impacted and given opportunities to younger individuals, and, since 2012, more than 825,000 people have received deferred action under the DACA policy.

The final rule codifies existing DACA policy, with minimal changes, and replaces the DACA policy guidance set forth in the 2012 Napolitano memorandum. [The final rule:](#)

- Maintains the existing threshold criteria for DACA;

- Retains the existing process for DACA requestors to seek work authorization; and
- Affirms the longstanding policy that DACA is not a form of lawful status but that DACA recipients, like other deferred action recipients, are considered “lawfully present” for certain purposes.

While the final rule is effective Monday, October 31, 2022, the U.S. District Court for the Southern District of Texas issued an injunction on July 16, 2021 which currently prohibits DHS from granting *initial* DACA requests and related employment authorization under the final rule. The injunction has been partially stayed, however, which allows DHS to continue to grant DACA renewal requests under the final rule.

For more information, please contact [Matt Hoyt](#), [Katie Collier](#), [Michelle Xu](#), or any attorney with Frost Brown Todd’s [Immigration](#) practice group.

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