October 2023 Immigration Update

Labor Shortage? Many U.S. Employers Could Benefit from the H-2B Visa Program

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The H-2B visa program allows U.S. employers who meet specific regulatory requirements to bring foreign nationals to the U.S. to fill temporary, full-time, non-agricultural jobs (agricultural jobs are covered by the H-2A program). To qualify for H-2B nonimmigrant classification, the petitioner must establish, among other things, that it has a temporary need for the workers that is a one-time occurrence, seasonal need, peak load need, or intermittent need.

The H-2B visa process involves three steps. First, the U.S. employer applies for temporary labor certification to the U.S. Department of Labor (DOL). Second, if DOL certifies the application, the U.S. employer files an I-129 petition with U.S. Citizenship and Immigration Services (USCIS). Third, if USCIS approves the petition, prospective workers apply for visas at the U.S. consulate in their home country (if applicable) and/or admission to the U.S. to begin work.

Congress has established an H-2B "cap" of 66,000 temporary workers per fiscal year, with 33,000 set aside for the first half of the fiscal year (fall and winter jobs with start dates between October 1 and March 31) and 33,000 for the second half of the fiscal year (spring and summer jobs with start dates between April 1 and September 30). Due to increased demand in 2023, an additional 20,000 H-2Bs were authorized for citizens of El Salvador, Guatemala, Honduras, and Haiti, and more than 44,000 additional H-2Bs were made available to "returning workers" approved for H-2B visa status during one of the last three fiscal years. These supplemental allocations were limited to U.S. employers who could demonstrate they were suffering or would suffer irreparable harm due to labor shortages. It is unknown if similar supplemental allocations will be available in 2024.

Applications for temporary labor certification must be submitted within a three-day window for each half of the year (July 1-3 for fall and winter cases and January 1-3 for spring and summer cases). In

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advance of temporary labor certification, however, U.S. employers must obtain a prevailing wage determination for each position offered. Because prevailing wage determinations can take 45 to 60 days, U.S. employers must plan ahead and start now for any H-2B visa workers needed in the spring or summer of 2024.

USCIS to Issue Employment Authorization Documents (EADs) with 5-Year Validity

On September 27, 2023, USCIS announced that it would "increase the maximum validity period to 5 years for initial and renewal Employment Authorization Documents (EADs) for certain noncitizens who are employment authorized incident to status or circumstance, including those admitted as refugees, paroled as refugees, and granted asylum, as well as recipients of withholding of removal." The maximum validity period will also be increased to five years for "certain noncitizens who must apply for employment authorization, including applicants for asylum or withholding of removal, adjustment of status under INA 245, and suspension of deportation or cancellation of removal."

Under current procedure, initial and renewal EADs are typically issued for one or two years. Increasing the maximum EAD validity period should significantly reduce the number of I-765 Applications for Employment Authorization that USCIS receives, which should help reduce associated processing times and backlogs.

Israel Becomes the 41st Country Member of the Visa Waiver Program

On September 27, 2023, Secretary of Homeland Security Alejandro Mayorkas, in consultation with Secretary of State Antony Blinken, announced the designation of Israel as the 41st country that is eligible to participate in the Visa Waiver Program (VWP). The program allows eligible citizens, nationals, and passport holders from VWP-participating countries to apply for admission to the U.S. at U.S. ports of entry as nonimmigrant noncitizens for a period of 90 days or less for business or pleasure without first obtaining a nonimmigrant visa. A participating country must meet various

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requirements related to counterterrorism, law enforcement, immigration enforcement, document security, and border management to be considered for designation in the VWP.

The Electronic System for Travel Authorization (ESTA), an automated system that determines the eligibility of visitors to travel under the VWP, will be updated no later than November 30, 2023, to allow citizens of Israel to apply under the program. Authorization through ESTA does not determine whether someone is admissible to the U.S. Rather, Customs and Border Protection officers determine admissibility upon travelers' arrival. ESTA authorizations are generally valid for two years and can be renewed. Additionally, all travelers must have an e-passport to use the VWP.

USCIS Updates EB-1 Eligibility Guidance

On September 12, 2023, USCIS updated its Policy Manual to elaborate on the types of evidence that it may evaluate to determine eligibility for extraordinary ability (E11) and outstanding professor or researcher (E12) EB-1 immigrant visa classifications. The EB-1 is a first-preference visa that is available to petitioners who can establish certain statutory evidentiary criteria or produce comparable evidence. The recent Policy Manual update is aimed to assist petitioners in providing appropriate evidence to establish eligibility for this visa. In summary, the policy updates include the following:

- Adds clarifying guidance describing examples of evidence that may satisfy the relevant evidentiary criteria or qualify as comparable evidence, as well as considerations for evaluating such evidence, with a focus on science, technology, engineering, or mathematics (STEM) fields.
- Clarifies how officers evaluate the totality of the evidence to determine eligibility for E11 extraordinary ability and E12 outstanding professor or researcher petitions and provides examples of positive factors that officers may consider.

This updated guidance is effective as of September 12, 2023. The guidance and additional information are available in the Policy Manual.

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Deferred Action for Childhood Arrivals (DACA) New Rule Found Unlawful; Injunction Continues

On September 13, 2023, Judge Andrew Hanen of the U.S. District Court for the Southern District of Texas ruled that the 2022 DACA final rule was unlawful. Judge Hanen previously deemed the DACA program unlawful in 2021, a decision upheld by the Fifth Circuit in October 2022 and that resulted in the program being vacated, along with an injunction barring the approval of new applications. The most recent order extends the existing U.S. district court injunction and vacatur order of the program and broadens its scope to encompass the 2022 DACA regulation put forth by the Biden administration. In essence, Judge Hanen determined that the new rule was not materially different from the prior program and did not remedy the legal deficiencies that the court previously found. This ruling will most likely be appealed to the U.S. Supreme Court.

DACA began in 2012 and has since provided protection from deportation, as well as employment authorization, to certain individuals who entered the U.S. as children but are considered undocumented. While the legality of DACA continues to be litigated, current recipients will retain DACA status and related employment authorizations, both of which will remain valid until they expire. Thus, employers may continue to employ DACA recipients with valid authorization. Additionally, this decision preserves the deportation safeguards for thousands of DACA recipients.

USCIS will also maintain processing of renewal requests from current DACA recipients and associated requests for employment authorization. However, while the injunction remains in effect, USCIS will be unable to process any initial DACA requests and related initial employment authorization applications.

DHS Announces New Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras

Effective July 7, 2023, the U.S. Department of Homeland Security (DHS) announced the implementation of new family reunification

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parole (FRP) processes for Colombia, El Salvador, Guatemala, and Honduras, adding four more countries to the FRP programs previously established for Cuba and Haiti.

Through the FRP processes, nationals of Colombia, El Salvador, Guatemala, Honduras, Cuba, and Haiti who are the principal beneficiaries of an approved Form I-130 immigrant petition filed by their U.S. citizen or lawful permanent resident family members may be granted, along with eligible derivatives, parole for up to three years.

The FRP processes begin with the U.S. Department of State (DOS) issuing a written invitation to the petitioning U.S. citizen or lawful permanent resident family member whose I-130 petition on behalf of a beneficiary that is a national of a covered country has already been approved. The petitioning family member can then initiate the process by filing Form I-134A, Online Request to be a Supporter and Declaration of Financial Support and follow a series of steps with both USCIS and U.S. Customs and Border Protection for the beneficiary and eligible family members to be considered for advance travel authorization and parole. Qualifying beneficiaries must be outside the U.S., meet all requirements, including screening, vetting and medical requirements, must not have already received an immigrant visa, and must travel by air and apply for parole at an interior U.S. port of entry. Once paroled into the U.S., the beneficiary is eligible to apply for discretionary employment authorization from USCIS under the (c)(11) category.

The FRP processes, which are reviewed on a case-by-case basis and intended to promote family unity, are part of the new measures announced by DOS and DHS to provide lawful pathways for families to unite in the U.S.

For more information, please contact any attorney with Frost Brown Todd's Immigration practice.

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