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Categories:

Publications

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May 2024 Immigration Updates

USCIS Increases Automatic Extension of Certain EADs

On April 4, 2024, U.S. Citizenship and Immigration Services (USCIS) announced a temporary final rule increasing the automatic extension period for certain employment authorization documents (EADs) to up to 540 days (from up to 180 days). The final rule is effective April 8, 2024, through September 20, 2027, except for the amendments to 8 CFR 274a.13(d)(5), which are effective from April 8, 2024, through October 15, 2025.

Noncitizens in certain employment eligibility categories who timely file Form I-765 (the Application for Employment Authorization) to renew their EADs may qualify for an automatic extension of their expiring EAD while their application remains pending. To be eligible for the automatic extension, (1) the Form I-765 must be properly and timely filed before the applicant's current EAD expires (except certain applicants with Temporary Protected Status (TPS) or a pending TPS application); (2) the renewal application must be under a category that is eligible for automatic extension (the list of categories can be found here); and (3) the category on the applicant's current EAD must match the "Class Requested" listed on the Form I-797C, Notice of Action, Receipt Notice.

The final rule increases the automatic extension period to up to 540 days for the following eligible EAD applicants: (1) applicants who timely and properly filed Form I-765 on or after October 27, 2023, if the application is still pending on April 8, 2024; and (2) applicants who timely and properly file their Form I-765 on or after April 8, 2024, and on or before September 30, 2025. As such, eligible renewal EAD applicants who meet one of these two categories may now receive up to 540 days of temporary work authorization while their renewal applications remain pending.

USCIS Publishes Data from the March 2024 H-1B Visa Lottery

USCIS has announced that it selected 114,017 beneficiaries from a pool of 470,342 eligible registrations in the most recent H-1B cap

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visa lottery conducted in March 2024 for fiscal year (FY) 2025, resulting in an overall selection rate of 24%. Notably, total registrations were down 38.6% from the previous lottery in March 2023 for FY 2024. USCIS attributes the decrease to its efforts to prevent companies from submitting multiple registrations for the same registrant to boost someone's odds of selection. An excerpt of the data published by USCIS is set forth below:

Cap Fiscal Year	Eligible Registrations*	Registrations for Beneficiaries with No Other Eligible Registrations	Registrations for Beneficiaries with Multiple Eligible Registrations	Selected Registrations
2021	269,424	241,299	28,125	124,415
2022	301,447	211,304	90,143	131,924
2023	474,421	309,241	165,180	127,600
2024	758,994	350,103	408,891	188,400
2025	470,342	423,028	47,314	120,603

USCIS opined that the lower number of initial selections in FY 2025 compared to previous lotteries is due to "higher anticipated petition filing rates" based on the revised "beneficiary-centric" selection process. Employers and registrants who were not previously selected hope that USCIS is incorrect and that a subsequent lottery will be conducted later this year.

USCIS Formally Incorporates DOL's Definition of "Science or Art" for Schedule A and Group II Cases, Aiming for Consistent Cross-Agency Adjudication

On April 10, 2024, USCIS announced that it has adopted the U.S. Department of Labor's (DOL) definition of "science or art" in certain contexts. Effective immediately, the DOL definition of "science or art" is added for Schedule A, Group II cases in the USCIS Policy Manual. Schedule A cases include occupations for which the DOL has recognized a shortage of U.S. workers and determined that employers are not required to undergo a lengthy labor certification process.

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For many employment-based second and third preference (EB-2 and EB-3) immigrant petitions, the first step of the process is for employers to obtain a permanent labor certification from the DOL, whereby the DOL certifies to USCIS that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment. For certain occupations, referred to as Schedule A occupations, the DOL has predetermined that there are not sufficient U.S. workers who are able, willing, qualified, and available. For these occupations, employers submit the labor certification directly to USCIS, bypassing DOL review. Currently, the DOL has designated two groups of occupations under Schedule A: registered nurses and physical therapists (Group I); and beneficiaries with exceptional ability in the "sciences or arts" (except performing arts) and beneficiaries with exceptional ability in performing arts (Group II).

The definition of "science or art" at times became a contentious issue when USCIS reviewed this Schedule A, Group II category more narrowly than the DOL regulations, which broadly define science or art as "any field of knowledge or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge or skill." USCIS now references this regulatory definition of "science or art" to maintain uniformity with the DOL's regulations.

DOL Publishes Farmworker Protection Final Rule to Strengthen Worker Protection for H2A Temporary Agricultural Workers

On April 29, 2024, the DOL published a final rule titled "Improving Protections for Workers in Temporary Agricultural Employment in the United States." The initial Notice of Proposed Rulemaking was issued in September 2023, followed by a 60-day public comment period. The published final rule will take effect on June 28, 2024.

The H-2A Temporary Agricultural Workers program allows U.S. employers or U.S. agents to bring foreign nationals to the United States from a list of designated countries to fill temporary agricultural jobs when the DOL determines there is a lack of able, willing, and qualified U.S. workers. The final rule aims to strengthen protections for H-2A temporary agricultural workers and to prevent

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abuse of these workers.

Some notable changes include:

- **New protections for worker self-advocacy:** The final rule improves workers' ability to engage in advocacy regarding their working conditions by expanding the range of activities protected by anti-retaliation provisions.
- **"For cause" termination clarification:** The final rule clarifies that an employer can terminate a worker for cause when the worker either fails to comply with employer policies or fails to perform job duties satisfactorily after, in most cases, the transparent application of a system of progressive discipline.
- **Increasing transparency of foreign labor recruitment**: The final rule imposes new disclosure requirements including a copy of all agreements with any agent or recruiter they engage or plan to engage, the name and location of any person or entity working for the recruiter who will solicit prospective H-2A workers and name, location, and contact information of the workplace's owners, operators and managers. This measure aims to improve transparency around foreign worker recruitment.
- **Timely wage changes for H-2A workers**: The final rule designates the effective date of updated adverse effect wage rates as of the date of publication in the Federal Register.
- **Improving transportation safety**: The final rule includes a seat belt requirement to reduce the hazards associated with the transportation of farmworkers.
- **Preventing labor exploitation and human trafficking**: The final rule clarifies that employers are prohibited from holding or confiscating a worker's passport, visa, or other identification documents.
- **Employer accountability:** The final rule updates procedures for discontinuing employment services for employers that have failed to meet the DOL's requirements and also streamlines the procedures for applying debarment to a successor who carries forward a debarred company.

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For more information or assistance as it relates to any of the developments above, please contact the authors or any attorney with Frost Brown Todd's Immigration practice.

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