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Trow & Rahal Immigration Newsletter

June & July 2023

Welcome to our June/July newsletter where we discuss the August Visa Bulletin and EB-1 retrogression, I-9 Covid flexibilities, ineligibility for ESTA if traveled to Cuba, and USCIS' new approach to the EB-5 backlog.

AUGUST VISA BULLETIN RELEASED – EB-1 RETROGRESSION!

The August visa bulletin shows significant retrogression including EB-1 India and EB-3 Worldwide for Final Action Dates. The USCIS announced Final Action dates will be used for employment-based cases and we should expect that to continue through the end of the government fiscal year.

EB-1 cut off dates: Most significant is that EB-1 India retrogresses more than 10 years to January 1, 2012. EB-1 Final Action dates for all other countries (except China) retrogress to August 1, 2023; China Final Action date remains the same at February 1, 2022. The U.S. Department of State (DOS) predicts that the EB-1 category will become current as of October 1, 2023, except for India and China, but that there is no guarantee on this.

The DOS also explains in its August visa bulletin that the EB-1 retrogression for India is because India can no longer access unused immigrant visa numbers which were available previously; they would roll over if unused by other countries. Now that there is retrogression worldwide for all countries, there are no longer unused numbers for India to access. However, DOS expects that as of October 1, which is the beginning of the new government fiscal year, it is likely that the final action date will advance to at least the final action date announced in the July Visa Bulletin; however, the date is dependent on the demand for EB-1 visas by Indian applicants and the FY-2024 annual limit on employment-based preference visas.

EB-2 cut off dates: Unlike EB-1 and EB-3, there is not significant movement in EB-2. India will remain at January 1, 2011; China will move forward 1 month to July 8, 2019; and all other countries advance 6 weeks to April 1, 2022.

EB-3 cut off dates: EB-3 Final Action dates for EB-3 worldwide retrogresses almost 2 years for all countries except China which advances by 2 months to June 1, 2019, and India which remains at January 1, 2009. For EB-3, the DOS indicates in the August visa bulletin that further retrogressions cannot be ruled out.

The August visa bulletin can be found by [clicking here](#)

What does this mean? Applicants for EB-1 who have a priority date before August 1, 2023 will continue to be able to file applications to adjust status even with the retrogression in August. Anyone working on filing an EB-1 petition should try to do so in July to get a July 2023 priority date (except India and China nationals).

EB-1 petitions include: EB-1a Persons of Extraordinary Ability; EB-1B Outstanding Researchers and Professors; and EB-1c Multinational Managers and Executives.

NOTE: The USCIS will only accept applications to adjust status for applicants who have a priority date before the cut off date.

REMINDER: COVID-19 FLEXIBILITIES FOR I-9 COMPLETION END JULY 31

As we wrote in our May newsletter, the Covid-19 flexibilities will end on July 31, 2023, and employers must complete in person of I-9 documents for those completed during Covid by August 30, 2023. Employers were given an extra 30 days to conduct physical examination of identity and employment authorization documents for employees hired on or after March 20, 2020, if the I-9s were conducted virtually. This is when the initial flexibilities were implemented and then extended several times after until July 31, 2023. We continue to monitor for more specific guidance on completing these I-9s and provide updates

INELIGIBLE FOR ESTA IF TRAVEL TO CUBA

Customs and Border Protection (CBP) updated its ESTA application on July 6, 2023, to include questions about travel to Cuba on or after January 12, 2021, which is when Cuba was designated as a state sponsor of terrorism. This was done in accordance with the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. ESTA will be revoked for any individuals affected by this who already have an approved ESTA. These individuals will now need to apply for B-1/B-2 visitor visas.

The CBP website indicates exceptions for military personnel and government employees who traveled to Cuba if the travel was to carry out their duties in the military or government. Note that there is not an exception for presence in Cuba if employed by international organizations or if a person has dual nationality with a visa waiver country

and Cuba. The CBP announcement can be found by [clicking here](#).

NEW FORM I-9 & NEW PROCEDURE FOR REMOTE EMPLOYEES

The USCIS has finalized a new regulation issuing a new Form I-9 with an August 1, 2023 effective date, which can be used as of this date but becomes mandatory on November 1, 2023. The new form has not yet been released but is expected to be available by August 1. With the issuance of the new Form I-9, the Department of Homeland Security (DHS) creates a framework for an optional alternative to the in-person physical document examination method that employers must use to examine I-9 documents. Instead, the final rule authorizes remote document examination if the employer meets certain requirements. On the new version of Form I-9, the employer must check a box to indicate when it uses the alternative document examination procedure.

The new regulation allows employers who are enrolled in E-Verify to inspect I-9 documents remotely by conducting a video conference. The alternative remote procedure is only being made available if the hiring site of the employer is enrolled in E-Verify and is in good standing. If the employer chooses to use the new procedure then it must do so consistently for all employees at that site. However, a qualified employer may choose to offer the alternative procedure for remote hires only but continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity if it is not done for discriminatory purposes.

What does the Alternative Procedure require? Within three business days of an employee's first day of employment, a qualified employer (or authorized agent/vendor) who chooses to use the alternative procedure must:

1. Examine copies (front and back if 2-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation appears to be genuine;
2. Conduct a live video with the individual presenting the document(s) to ensure that the documentation appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1) and then present the same document(s) during the live video interaction;
3. Check the box on the new Form I-9 that the alternative procedure was used to examine documentation;
4. Retain, consistent with applicable regulations, a clear and legible copy of the documents presented; and
5. In the event of a Form I-9 audit or investigation by a relevant federal government official, make available the clear and legible copies.

If the employer chooses to use the older version of the Form I-9 after August 1, but uses the new alternative remote procedures, it must indicate “alternative procedure” in the Additional Information Field in Section 2.

To use the new procedure instead of physically inspecting I-9 documents before August 31st for employees hired during the Covid-19 flexibilities, the employer must have been enrolled in E-Verify at the time the employer performed the remote examination of I-9 documents, created an E-Verify case for the employee, and performed remote inspection between March 20, 2020 and July 31, 2023. Without these conditions met, employers cannot use the new alternative procedures and must conduct physical inspection of I-9 documents .

We will continue to monitor and report on this new form and procedure as more guidance becomes available.

USCIS ANNOUNCES NEW APPROACH TO EB-5 BACKLOG

The USCIS announced on July 18th that it will now group backlogged EB-5 petitions based upon the project in which the investment was made (the new commercial enterprise) to gain efficiencies and clear out the backlog. This means that cases with the same project will be assigned to the same adjudicator limiting the number of adjudicators who need to get up to speed on the same project.

The current processing time for an EB-5 petition (Form I-526) is indicated to be between 29.5 and 61 months (as of May 2023). With this new approach to adjudicating petitions, the USCIS should be able to decrease this processing time.

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