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Trow & Rahal Newsletter

March 2023

T&R is honored to bring you the most recent updates in U.S. immigration law. This month's newsletter includes information on H-1B Cap Registrations, delays in PERM cases, the March Visa Bulletin, and USCIS policy updates.

H-1B Cap Registration has Started!

H-1B registration opened on March 1st and goes through March 17th. If you have any employees or know anyone that needs H-1B status, they should be placed into the H-1B cap lottery for which the registration period is now open. At the end of the registration period, the USCIS will conduct the random selection and announce who has been selected in the H-1B lottery before April 1st. Once selected in the H-1B lottery, petitioners have 90 days to submit the H-1B petition.

What do clients need to do? If you are already working with us on H-1B cap registrations for your employees, we will need you to review and confirm the registration when members of our team contact you. Please reply promptly as we want to complete registration as early as possible.

Contact T&R immediately if you still have employees or know anyone who needs to be registered for the H-1B lottery.

Contacting T&R during this busy time: Please note that the H1B registration and cap period is an immigration law firm's busy time of year – analogous to an accountant's tax return filing time. We kindly ask that you are patient when contacting T&R as the time to return emails may be a little longer than usual.

U.S. Department of Labor (DOL) Long Delays in PERM Cases

The US Department of Labor (DOL) has long backlogs at two points in the processing of PERM labor certification applications:

1. Prevailing wage requests (PWR) – current processing time is about 6-8 months.
2. PERM applications (Form 9089) – current processing time is about 9 months.

It is usually recommended to wait to start recruitment for a PERM application until the prevailing wage determination (PWD) is received to ensure that the recruitment does not go stale and that the employer can meet the determined wage. Therefore, with the PWR at 6-8 months and then the recruitment at a minimum of 2 months, it can take 8-10 months to file a PERM application and almost 18 months get a PERM application approved.

Why does this matter? A person has a maximum of 6 years in H-1B status unless the first step of a green card is filed before the person's 5th year in H-1B status. The PERM application is usually the first of three steps to obtain permanent resident status. If the PERM application is filed prior to a person's 5th year in H-1B status, then the person can get extensions of the H-1B status beyond the six years.

As it is taking up to 10 months to get a PERM application filed from the time of filing the PWR, plus the time it takes to gather documents and finalize the strategy of the application, clients need to plan to start PERM applications at least 12 months before an employee's 5th year anniversary in H-1B status. However, this is a minimum and we would recommend starting 18 to 24 months prior in case processing times get longer, DOL issues an audit, or any other issue arises during a PERM application.

Contact T&R if you are an employer with an employee who is at or beyond 3 years in H-1B status and you wish to retain them by starting a PERM application.

USCIS Returns to Bundling I-539/EAD

As of January 30, 2023, the USCIS returned to its prior policy of adjudicating Form I-539 for family members and corresponding work authorization (EAD) applications with the principal H-1B or L-1 petition. This is a result of a lawsuit settlement and a reversal of a 2019 policy that caused long delays in obtaining EAD cards as well as separating the adjudication of family member applications. Now the family member applications will

be adjudicated at the same time as the principal, even when using premium processing as long as it is requested with the initial filing.

This new policy only applies if the I-539 form for the family members and the corresponding I-765 applications for work authorization are filed concurrently with the Form I-129 for the principal. It does not apply if they are filed separately.

March Visa Bulletin

The USCIS announced the use of Dates of Filing for accepting applications to adjust status (Form I-485) for the month of March; these dates for the employment based first (EB-1), second (EB-2) and third (EB-3) preference categories remain unchanged from the prior month. In February, a cutoff date of June 1, 2022 was established for the Employment First Preference category, which remains the same in March. You can find the March visa bulletin here.

NOTE: The March visa bulletin highlights the possibility that there can be retrogression or cut off dates for the “worldwide” EB-3 profession / skill worker category which has traditionally be current with no cutoff date.

USCIS Revises CSPA Policy to Protect More Children from "Aging Out"

The USCIS announced a significant change in its Child Status Protection Act (CSPA) policy to ensure that fewer children “age out” when waiting in the backlog for permanent resident (green card) status. Effective on February 14, 2023, the policy changes how the USCIS interprets when an immigrant visa number “becomes available” which is significant in the CSPA.

Under the new policy the USCIS will use the Dates of Filing chart of the Department of State’s monthly Visa Bulletin rather than the Final Action Dates which are usually further behind. Therefore, this allows some children to file an application to adjust status to permanent resident sooner, and possibly still under the age of 21 as calculated under the CSPA. If an application to adjust status is already pending, they can still calculate the age of the child under the CSPA using the Dates of Filing which will help prevent some children from “aging out” while the application is pending.

Enacted in 2002, the CSPA provides a formula for calculating a child's age for immigration purposes that allows them to still obtain a green card based upon a parent's application even if they have already turned 21. They are allowed to subtract from their real age the time an I-130 or I-140 petition remained pending with the USCIS before adjudication. They use this calculation when an immigrant visa number becomes available. If that calculation yields an age less than 21, then the child is still able to file an application to adjust status if an immigrant visa number is available.

In the past, when the immigrant visa number became available was determined under the Final Action Dates chart; now under the new policy it is under the Dates of Filing chart. A person has one year from the date the immigrant visa number becomes available to "seek to acquire" their permanent resident status either by filing an application to adjust status or an immigrant visa at a US consulate.

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