

IMMIGRATION LAW UPDATES THAT IN-HOUSE COUNSEL NEED TO KNOW

By: Melanie Gurley Keeney and Luke Phillips of Tueth Keeney Cooper Mohan & Jackstadt P.C.

From work authorization issues to I-9 compliance standards, immigration law has significant legal and practical implications for large and small businesses. As you likely know, handling immigration issues in the workplace is often complex, due to the ever-changing legal landscape. Particularly in a time of labor shortages, it is crucial to understand the rules affecting foreign-national workers. In addition, recent changes described below, have opened the possibility for employing foreign nationals in various categories. With that in mind, we have provided the following update on “hot” topics to assist you in issue spotting important changes and updates that may impact your organization.

1. Premium Processing Now Available for Certain Employment-Based “Green Card” Petitions

For many years, we have waited for the U.S. Citizenship and Immigration Services (“USCIS”) to allow for premium processing of immigrant visa applications for Multinational Executives and Managers. Processing times have been taking 1-1 ½ years for regular processing. We are happy to report that USCIS is now implementing a premium processing option for these E13 (“EB-1C”) Multinational Executive and Manager petitions. USCIS is phasing in the program, and currently petitions that were filed on or before March 1, 2021, may be “upgraded” to premium processing.ⁱ Starting August 1, 2022, USCIS will allow petitions received on or before July 1, 2021 to be premium processed. USCIS has guaranteed that such EB-1C petitions will be processed within 45 days of receiving the requests.ⁱⁱ The filing fee for premium processing of these petitions is \$2,500.

In addition, USCIS is also now accepting premium processing requests for E21 (“EB-2”) National Interest Waiver (“NIW”) immigrant visa petitions. Employers filing NIW petitions request that the USCIS waiver of the job offer and Labor Certification requirements for applicable cases. NIWs may be available for advanced degree holders or those with exceptional ability in the sciences, arts, or business. As described above, USCIS is phasing in the premium processing option. Currently, NIW petitions that were filed on or before June 1, 2021, may be upgraded to premium processing.ⁱⁱⁱ Starting August 1, 2022, USCIS will accept premium processing requests for NIW petitions received on or before August 1, 2021. USCIS has guaranteed that such EB-2 NIW petitions will be processed within 45 days of receiving the requests.^{iv} The filing fee for premium processing of these petitions is \$2,500.

2. Extension of Flexibility Policy for Responding to USCIS Requests for Evidence

USCIS often issues Requests for Evidence (often referred to as “RFEs) for petitions seeking both nonimmigrant visas (H-1Bs, L-1s, TNs, O-1s, etc.) and immigrant visa petitions (Multinational Executive and Managers, NIWs, PERM Labor Certification-based case, etc.). Since March 2020, due to the COVID pandemic, USCIS has applied a flexibility policy in which it will consider a response received within 60 days after the due date set forth in a Request for Evidence (“RFE”), Continuation to Request Evidence (“N-14”), Notice of Intent to Deny (“NOID”), and in certain other notices before taking any action. On July 25, 2022, USCIS announced that it will extend this flexibility policy through October 23, 2022.^v

3. Extension of Form I-9 In-Person Verification Flexibility Until October 31, 2022

U.S. Immigration and Customs Enforcement (“ICE”) has extended of the flexibility policy regarding the in-person verification of identity and employment eligibility documentation for Form I-9. The policy has been extended until October 31, 2022.^{vi}

Since April 1, 2021, the requirement that employers inspect employees’ Form I-9 identity and employment eligibility documentation in-person has only applied to those employees who physically report to work at a company location on any regular, consistent, or predictable basis. An employee who works exclusively in a remote setting due to COVID-19-related precautions is temporarily exempt from the Form I-9 physical inspection requirements until non-remote employment is commenced on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.^{vii}

All employees who were onboarded using remote verification and who begin non-remote work on a regular, consistent, or predictable basis must report to their employer within three business days of commencing such non-remote work for in-person verification of identity and employment eligibility documentation for Form I-9. Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. Any audit of subsequent Forms I-9 would use the “in-person completed date” as a starting point for these employees only.^{viii}

Employers are encouraged to begin, at their discretion, the in-person verification of identity and employment eligibility documentation for employees who were hired on or after March 20, 2020, and who presented such documents for remote inspection in reliance on the I-9 flexibility policy. It is crucial for employers to monitor the DHS and ICE websites on a regular basis for updates regarding future extensions or potential termination of the I-9 flexibility policy.^{ix} Failure to follow I-9 guidelines may result in significant penalties.

4. Termination of Form I-9 Flexibility Policy regarding Expired List B Documents

Due to the COVID-19 pandemic and the associated difficulties many individuals experienced with renewing documents, DHS previously adopted a policy that allowed employees to present

expired documents to satisfy the List B requirements for purposes of Form I-9 verification. On May 1, 2022, DHS ended this flexibility policy. Employers must now only accept unexpired List B documents. If an employee presented an expired List B document between May 1, 2020 and April 30, 2022, employers are required to update their Forms I-9 by **July 31, 2022**.^x

5. Updates on Employment Authorization for E and L Spouses

USCIS now considers certain E and L nonimmigrant spouses to be ***employment authorized “incident” to their status***. This is an important change in immigration policy. Accordingly, USCIS updated its policy regarding evidence of employment authorization for certain E and L spouses. USCIS and U.S. Customs and Border Protection are now issuing Forms I-94 with new Class of Admission codes for certain E and L spouses: E-1S, E-2S, E-3S, and L-2S. An unexpired Form I-94 indicating one of these codes is ***acceptable as evidence of employment authorization for spouses under List C of the Form I-9***. E and L spouses who are 21 or over and who have unexpired Form I-94s that USCIS issued before Jan. 30, 2022, should receive a notice in the mail from USCIS. This notice, along with an unexpired Form I-94 reflecting E-1, E-2, E-3, E-3D, E-3R, or L-2 nonimmigrant status, will serve as evidence of employment authorization. E and L spouses that have not received a notice from USCIS, and E and L spouses that under 21, should email E-L-married-U21@uscis.dhs.gov to request a notice.^{xi}

6. New Automatic Extension Period for Certain EADs

On May 4, 2022, USCIS published a Temporary Final Rule authorizing an increase of the automatic extension period applicable to expiring Employment Authorization Documents (“EADs”) for certain ***renewal applicants*** who have filed a Form I-765, Application for Employment Authorization. **This is a big change!** The automatic extension period will be raised from up to 180 days to ***up to 540 days*** from the expiration date displayed on the EADs of eligible renewal applicants.^{xii} Under this USCIS rule, the increase will apply to eligible renewal applicants with pending Forms I-765 as of May 4, 2022, including those applicants whose employment authorization lapsed following the initial 180-day extension period, as well as those applicants who file renewal Forms I-765 during the 540-day period beginning on or after May 4, 2022, and ending October 26, 2023. Not every EAD applicant is eligible for this extension, so please confirm whether the rule applies prior to allowing for continued work authorization. For instance, this rule does not apply to individuals applying for initial EADs.^{xiii}

7. Opportunity for Ukrainians to Enter the U.S. and Apply for Work Authorization

The U.S. government has announced a new policy, “Uniting for Ukraine,” which provides a pathway for Ukrainian citizens and their immediate family members who are outside the U.S. to come to the U.S. and stay temporarily in a ***two-year period of parole***. Ukrainians participating in this process must have a supporter in the U.S. who agrees to provide them with financial support for the duration of their stay in the U.S. and files a Form I-134 on their behalf.^{xiv}

Applicants for parole under the “Uniting for Ukraine” process will be eligible if they:

- **Resided in Ukraine immediately before the Russian invasion** (through February 11, 2022) and were displaced as a result of the invasion
- Are a Ukrainian citizen and possess a valid Ukrainian passport (or are a child included on a parent's passport)
 - If not a Ukrainian citizen, they must be an immediate family member of a Ukrainian citizen beneficiary of Uniting for Ukraine with a valid passport
- Have a supporter who filed a Form I-134 on their behalf that USCIS has vetted and confirmed as sufficient
- Clear biographic and biometric security checks.^{xv}

After beneficiaries are paroled into the U.S., they are eligible to apply for employment authorization. To apply for employment authorization, they must submit Form I-765, Application for Employment Authorization, using the (c)(11) category code.^{xvi} Please note, these applications often take many months to process.

8. Recent TPS Designations/Extensions

The Department of Homeland Security (“DHS”) may designate a foreign country for Temporary Protected Status (“TPS”) due to conditions in the country (such as war, environmental disaster, or epidemic) that temporarily prevent the country's nationals from returning to that country safely. USCIS may grant TPS to eligible nationals **who are already in the U.S.** Eligible individuals without nationality who last resided in the designated country may also apply for TPS.^{xvii}

During a designated period, TPS beneficiaries are not removable from the U.S and may apply for employment authorization (which, as noted above, may take many months to process). TPS does not lead to permanent residency or any other immigration status. However, registration for TPS does not prevent applying for nonimmigrant status, filing for adjustment of status based on an immigrant petition, or applying for any other immigration benefit or protection.^{xviii}

Recent TPS Designations/Extensions:

- Ukraine
 - Must show continuous physical presence in the U.S. since April 19, 2022.
 - Registration period runs through October 19, 2023.^{xix}
- Afghanistan
 - Must show continuous physical presence in the U.S. since May 20, 2022.
 - Registration period runs through November 20, 2023.^{xx}
- Sudan
 - Must show continuous physical presence in the U.S. since April 19, 2022.
 - Registration period runs through October 19, 2023.^{xxi}
- South Sudan
 - Must show continuous physical presence in the U.S. since March 3, 2022.
 - Registration period for first-time applicants runs through November 3, 2023.^{xxii}

- Cameroon
 - Must show continuous physical presence in the U.S. since June 7, 2022.
 - Registration period runs through December 7, 2023.^{xxiii}

As you can see, there have been many important recent updates in the employment-based immigration area. We hope that you find these immigration updates helpful. If you need any additional information, please feel free to reach out to a Tueth Keeney immigration team member at <https://tuethkeeney.com/practice-areas/immigration-law/>.

ⁱ <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form-i-140>

ⁱⁱ <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-second-phase-of-premium-processing-for-certain-previously-filed-eb-1-and-eb-2>

ⁱⁱⁱ <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form-i-140>

^{iv} <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-second-phase-of-premium-processing-for-certain-previously-filed-eb-1-and-eb-2>

^v <https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities>

^{vi} <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3>

^{vii} *Id.*

^{viii} *Id.*

^{ix} <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-may-1-2022#:~:text=The%20Department%20of%20Homeland%20Security,to%20expire%20April%202030%2C%202022%202>.

^x <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/reminder-dhs-to-end-covid-19-temporary-policy-for-expired-list-b-identity-documents#:~:text=DHS%20is%20ending%20the%20COVID,during%20the%20COVID%2D19%20pandemic.>

^{xi} <https://www.uscis.gov/newsroom/alerts/uscis-updates-guidance-on-employment-authorization-for-e-and-l-nonimmigrant-spouses>

^{xii} For a listing of individuals whose EADs are included in this new rule, please refer to <https://www.uscis.gov/eadautoextend>.

^{xiii} <https://www.federalregister.gov/documents/2022/05/04/2022-09539/temporary-increase-of-the-automatic-extension-period-of-employment-authorization-and-documentation>

^{xiv} <https://www.uscis.gov/ukraine>

^{xv} *Id.*

^{xvi} *Id.*

^{xvii} <https://www.uscis.gov/humanitarian/temporary-protected-status>

^{xviii} *Id.*

^{xix} <https://www.uscis.gov/humanitarian/temporary-protected-status/TPS-Ukraine>

^{xx} <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-afghanistan>

^{xxi} <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan>

^{xxii} <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-south-sudan>

^{xxiii} <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-cameroon>