

Five U.S. Immigration Law Trends to Watch in 2022

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Immigration

A series of significant developments in U.S. immigration law has already marked the beginning of 2022 and more can be expected.

In January, the Biden Administration unveiled a series of policies aimed at attracting and retaining international talent in STEM (science, technology, engineering, and math) fields. U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP) have made strides in rolling out work authorization for dependent spouses of holders of visas in the E (Treaty Trader or Treaty Investor) and L (Intra-company Transfer) categories, thereby eliminating the need for a separate application for work authorization. Meanwhile, the Department of Justice (DOJ) has remained active in enforcement of the Immigration and Nationality Act (INA) immigration anti-discrimination provisions, with several settlements in 2021 involving allegations of discrimination preventing discrimination against U.S. workers and a renewed focus on investigating claims of document abuse in Form I-9 completion, maintenance, and reverification. This overlaps with the continued I-9 flexibility in response to the COVID-19 pandemic granted by Immigration and Customs Enforcement (ICE), which remains in effect until April 2022. All of this follows on the heels of ongoing discussion in Congress of possible immigration reform (as most recently reflected in the Build Back Better bill).

Below are five areas to keep an eye on in the year ahead.

STEM-Related Policy Changes

New policies rolled out by the Biden Administration seek to provide greater predictability and clarity for pathways for international STEM talent, by way of the F-1 student, J-1 exchange visitor, O-1 extraordinary ability, and EB-2 National Interest Waiver Immigrant visa categories:

- *F-1 STEM OPT*: The Department of Homeland Security (DHS) announced 22 new fields of study added to the STEM Optional Practical Training (OPT) program to enhance the contributions of nonimmigrant students studying in STEM fields. These new fields, listed in a *Federal Register* notice, include Bioenergy, Forestry, Human-Centered Technology Design, Cloud Computing, Climate Science, Earth Systems science, Economics, Computer Science, Geobiology, Data Science, and Business Analytics. DHS is also creating a process for the public to request a degree be added or removed from the designated degree list.
- *J-1 Exchange Visitors*: The Department of State will allow J-1 Exchange Visitors enrolled in a pre-doctoral STEM program to qualify for an extension of up to 36 months for purposes of practical training in 2022 and 2023. This expansion of the J-1 program was rolled out in response to a Joint Statement of Principals in Support of International Education and pressure from Department-designated sponsors to increase STEM opportunities for international students.

- *O-1 Visas:* USCIS released [detailed guidance](#) describing how entrepreneurs can qualify for O-1 (Individuals with Extraordinary Ability or Achievement) classification, including references to specific sources of evidence in STEM-related fields. The new guidance also expands on what constitutes a “field” of endeavor to include accomplishments in different but related occupations. In addition, it clarifies the use of comparable evidence to satisfy the regulatory criteria (see [O-1 Visas Abound: USCIS Provides Detailed Guidance on O-1 Visa Eligibility](#)).
- *EB-2 NIW Expansion:* USCIS announced [updated guidance](#) on adjudicating requests for National Interest Waivers (NIW) regarding job offers and labor certification requirements for advanced degree professionals and individuals with exceptional ability, specifically in STEM-related fields. The new guidance grants certain evidentiary considerations to persons with advanced degrees in STEM fields, especially in focused critical and emerging technologies as determined by the National Science and Technology Council or the National Security Council. Under the new guidance, USCIS also considers an advanced degree in a STEM field tied to a proposed endeavor as an “especially positive factor” to show the individual is well-positioned to advance an endeavor of national importance.

E and L Spousal Work Authorization

USCIS announced [new guidance](#) in November 2021 clarifying that L-2 and certain E-2 spouses will no longer need employment authorization documents (EADs) to work. The guidance resulted from a court-approved settlement of ongoing litigation in response to extraordinarily long delays to obtaining EADs. As of January 31, 2022, spouses entering the United States in L-2 or E-2 status may obtain work authorization at the border by asking CBP to give them a “spousal” designation in their I-94 record that can be used for Form I-9 Employment Eligibility Verification purposes.

Department of Justice Immigration Anti-Discrimination Enforcement

While the DOJ and its Immigrant and Employee Rights Section have begun diversifying the scope of investigations, their enforcement of anti-discrimination provisions of the INA remains focused on protecting U.S. citizen workers. Several settlements in 2021 involved allegations of discrimination against U.S. citizen workers. The settlements resolved reasonable cause findings of discrimination against U.S. workers in Program Electronic Review Management (PERM) recruitment methods and H-2B (temporary non-agricultural) visa worker sponsorship programs, respectively. They reflect an ongoing trend following settlements that resolved allegations of discrimination in several companies’ PERM recruitment methods, despite adherence to the Department of Labor’s Labor Certification regulations.

ICE I-9 Flexibility Continues

On March 20, 2020, DHS announced that it would exercise prosecutorial discretion to defer the physical presence requirements associated with the Form I-9 Employment Eligibility Verification. This policy has been [periodically extended](#), most recently to April 30, 2022. Under the guidance, employers can complete the Form I-9 verification process remotely for employees who work exclusively in a remote setting due to COVID-19-related precautions. However, employers must conduct in-person verification of identity and employment eligibility of such employees within three days of returning to the work location.

Immigration Reform

More business immigrant visas would become available under the most recent iteration of the [Build Back Better reconciliation bill](#). If approved by the Parliamentarian and passed as it stands, the bill would make more immigrant visas available by:

- Recapturing unused visa numbers from 1992 to 2021;
- Retaining the availability of Diversity Visas from fiscal years 2017 to 2021; and
- Making it possible for individuals with approved employment-based immigrant visas and priority dates more than two years away to file applications for adjustment of status by paying an additional \$1,500 fee.

The bill also would substantially increase many filing fees. Rather than depositing those fees into the USCIS account, the supplemental fees would be deposited into the U.S. Treasury's general funds. Another attempt at immigration reform has been introduced by House Republicans, the [Dignity Act](#). The Dignity Act proposes paths to permanent residence and citizenship for certain undocumented individuals in exchange for more border security and mandating E-Verify. The fate of immigration reform remains in flux and should be a point of contention in the upcoming elections.

Please contact a Jackson Lewis attorney with any questions about these and other developments.

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