



IMMIGRATION UPDATE - MAY 31, 2022

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[DOL Issues Guidance on Employment of H-2B Workers in Unapproved Job](#)

[Classifications](#) – The memo provides information on the "harms inflicted on the U.S. and H-2B workforce" by such employment and provides "guidance on the sanctions and remedies" that the Wage and Hour Division may implement.

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Investors File Lawsuit Against DHS To Stop EB-5 Regional Center Decertifications

A group of investment and capital firms filed a lawsuit on May 24, 2022, against the Department of Homeland Security, arguing that when U.S. Citizenship and Immigration Services (USCIS) decertified existing EB-5 regional centers, it violated the Administrative Procedure Act and misinterpreted the EB-5 Reform and Integrity Act of 2022, which was signed into law following a lapse in authorization for the EB-5 Regional Center Program. Plaintiffs say that by categorically decertifying more than 600 existing EB-5 regional centers and requiring them to recertify, USCIS "eviscerated" the program and determined that a wholly new regional center program was created rather than following congressional intent to reauthorize the program with a few changes and allow existing regional centers to continue their work.

Alleging that USCIS's action was "unlawful for a host of reasons," plaintiffs said the agency's action meant that "all existing regional centers, which already have billions of dollars in invested capital, ongoing development projects, and investors awaiting adjudication of their visa petitions, must effectively pause all revenue-generating operations (while still maintaining regulatory obligations to existing investors) indefinitely until USCIS approves their new applications. At current processing rates, it will take well over a decade for more than 600 programs to become redesignated."

Plaintiffs are represented by H. Ronald Klasko and Daniel B. Lundy, of Klasko Immigration Law Partners LLP, and Paul W. Hughes, Andrew A. Lyons-Berg, and Alex C. Boota, of McDermott Will & Emery LLP.

This is the second lawsuit challenging USCIS's claim that all regional centers must be redesignated. A preliminary injunction hearing in *Behring Regional Center LLC v. Mayorkas*, No. 3-22-cv-02487-VC (N.D. Cal.), will be held June 2.

Details:

- EB5 Capital v. DHS, May 24, 2022, <https://bit.ly/3NKIjlz>
- "DHS 'Decimated' EB-5 Visa Capital Firms, Investors Say," Law360, May 24, 2022, <https://www.law360.com/articles/1496566/dhs-decimated-eb-5-visa-capital-firms-investors-say> (registration required)

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USCIS To Implement Premium Processing for Certain Previously Filed EB-1 and EB-2 Form I-140 Petitions

U.S. Citizenship and Immigration Services (USCIS) said it is implementing premium processing for certain petitioners who have a pending Form I-140, Immigrant Petition for Alien Workers, under the EB-1 and EB-2 classifications. This expansion of premium processing applies only to certain previously filed Form I-140 petitions under an E13 multinational executive and manager classification or E21 classification as a member of professions with advanced degrees or exceptional ability seeking a national interest waiver (NIW), USCIS said. Petitioners who wish to request a premium processing upgrade must file Form I-907, Request for Premium Processing Service.

USCIS said the expansion will occur in phases:

- Beginning June 1, 2022, USCIS will accept Form I-907 requests for E13 multinational executive and manager petitions received on or before January 1, 2021.
- Beginning July 1, 2022, USCIS will accept Form I-907 requests for E21 NIW petitions received on or before June 1, 2021, and E13 multinational executive and manager petitions received on or before March 1, 2021.
- USCIS will continue working toward premium processing availability of additional Form I-140 petitions, Form I-539, and Form I-765 in fiscal year 2022.

USCIS said it will reject premium processing requests for these Form I-140 classifications that are filed before their start date of June 1, 2022, or July 1, 2022. USCIS will not accept new (initial) Forms I-140 with a premium processing request.

For the month of June, USCIS will accept both the 09/30/20 and the 05/31/22 editions of Form

I-907. Starting July 1, the agency will reject the older 09/30/20 edition of Form I-907.

Details:

- USCIS alert, May 24, 2022, <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form-i-140>

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DOL Clarifies Method of Contacting AFL-CIO Required Under Rule Increasing Number of H-2B Visas Available in Second Half of FY 2022

A temporary final rule issued by the Department of Labor (DOL) on May 18, 2022, included additional recruitment requirements for certain employers. One such requirement is that where the occupation or industry is traditionally or customarily unionized, "the employer must contact (by mail, email or other effective means) the nearest American Federation of Labor and Congress of Industrial Organizations office covering the area of intended employment and provide written notice of the job opportunity, by providing a copy of the job order placed ... and request assistance in recruiting qualified U.S. workers for the job."

Examples of such contact provided in the rule include emailing or mailing the job order, along with a request for assistance to recruit workers, to the appropriate AFL-CIO office. To aid employers who must conduct this additional recruitment step, one effective means of contacting the nearest AFL-CIO office covering the area of intended employment is to email the job order and request for assistance to H-2B@aficio.org or contacting the national AFL-CIO by mail at:

AFL-CIO
Attn: H-2B
815 Black Lives Matter Plaza, NW
Washington, DC 20005

DOL said that when received, the agency will distribute these materials to the most appropriate local AFL-CIO office serving the area of intended employment for that job opportunity. DOL said employers "are encouraged to contact the AFL-CIO using the email or mailing address above, though contact directly with the AFL-CIO office covering the area of intended employment is also acceptable. Employers are reminded to retain documentation of contact with the AFL-CIO as required."

Details:

- DOL announcement, May 27, 2022, <https://www.dol.gov/agencies/eta/foreign-labor>

- Temporary final rule, 87 Fed. Reg. 30334 (May 18, 2022),
<https://www.govinfo.gov/content/pkg/FR-2022-05-18/pdf/2022-10631.pdf>

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DOL Issues Guidance on Employment of H-2B Workers in Unapproved Job Classifications

The Department of Labor's Wage and Hour Division (WHD) released a bulletin to the field regarding employment of H-2B workers in unapproved job classifications (i.e., a job classification not listed on the Application for Temporary Employment Certification (TEC), Form ETA-9142B). The memo notes that such employment violates the requirement that employers may not place H-2B workers in positions not listed on the TEC application.

The memo provides information on the "harms inflicted on the U.S. and H-2B workforce" by such employment and provides "guidance on the sanctions and remedies" that the WHD may implement.

Details:

- "Employment of H-2B Workers in a Job Classification Not Listed on the TEC Application (Form ETA-9142B) in the H-2B Visa Program," DOL/WHD Field Assistance Bulletin No. 2022-3, Apr. 13, 2022,
<https://www.dol.gov/sites/dolgov/files/WHD/fab/2022-3.pdf>

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