



## IMMIGRATION UPDATE - MARCH 06, 2023

*Posted on March 6, 2023 by Cyrus Mehta*

### Headlines:

[USCIS Reaches H-2B Cap for Second Half of FY 2023, Announces Filing Dates for Supplemental Visas](#) – U.S. Citizenship and Immigration Services (USCIS) has received enough petitions to meet the H-2B cap for the second half of FY 2023. USCIS also announced the filing dates for supplemental H-2B visas for the remainder of FY 2023 made available under the FY 2023 H-2B supplemental visa temporary final rule.

[USCIS to Start Collecting Hefty Fees for 'EB-5 Integrity Fund'](#) – The fee is \$20,000 for regional centers with more than 20 investors and \$10,000 for those with 20 or fewer investors.

[DOS Issues Final Rule Updating Regulation on Signed Photos for Visa Processing](#) – The final rule clarifies that immigrant and nonimmigrant visa applicants may upload digital photographs electronically as part of the online visa application process in lieu of submitting ink-signed photographs.

[USCIS Updates Guidance on On-Site Inspections for Religious Worker Petitions](#) – For special immigrant and nonimmigrant religious worker petitions, the guidance explains that USCIS randomly selects religious worker petitions for on-site inspections, which normally occur after the approval of the petition, and which include inspections of the work locations to verify the religious worker's work hours, compensation, and duties.

[DOL Final Rule Revises AEWG Methodology for H-2A Non-Range Occupations](#) – The Department of Labor issued a final rule effective March 30, 2023, revising the methodology by which it determines the hourly Adverse Effect Wage Rates for non-range occupations (i.e., all occupations other than herding and production of livestock on the range).

[USCIS Issues Guidance on Eligibility for O-1B Visa Classification](#) – USCIS clarified how it evaluates evidence to determine eligibility for O-1B nonimmigrants of extraordinary ability in the arts and nonimmigrants of extraordinary achievement in the motion picture or television industry.

[ABIL Global: Australia](#) – Australia grants thousands of refugees permanent visas after a decade of uncertainty.

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## **USCIS Reaches H-2B Cap for Second Half of FY 2023, Announces Filing Dates for Supplemental Visas**

U.S. Citizenship and Immigration Services (USCIS) announced on March 2, 2023, that it has received enough petitions to meet the congressionally mandated H-2B cap for the second half of fiscal year (FY) 2023. USCIS also announced the filing dates for supplemental H-2B visas for the remainder of FY 2023 made available under the FY 2023 H-2B supplemental visa temporary final rule.

### **H-2B Cap for Second Half of FY 2023**

February 27, 2023, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date on or after April 1, 2023, and before October 1, 2023. USCIS continues to accept H-2B petitions that are exempt from the congressionally mandated cap, including petitions for:

- Current H-2B workers in the United States who wish to extend their stay and, if applicable, change the terms of their employment or change their employers;
- Fish roe processors, fish roe technicians, and/or supervisors of fish roe processing; and
- Workers performing labor or services in the Commonwealth of the Northern Mariana Islands and/or Guam (until December 31, 2029).

### **Filing Dates for Supplemental Visas**

The Departments of Homeland Security (DHS) and Labor (DOL) jointly published a temporary final rule on December 15, 2022, increasing the numerical limit (cap) on H-2B nonimmigrant visas by up to 64,716 additional

visas for all of FY 2023. These supplemental visas are available only to "U.S. businesses that are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H-2B workers requested in their petition," USCIS said, as attested by the employer on DOL Form ETA 9142-B-CAA-7. These supplemental H-2B visas are for U.S. employers seeking to petition for additional workers at certain periods of the fiscal year before September 15, 2023.

The USCIS alert details the filing start dates for each of the remaining supplemental visa allocations under the temporary final rule.

USCIS previously announced that it had received enough petitions to reach the cap for the additional 18,216 H-2B visas made available for returning workers for the first half of FY 2023 with employment start dates on or before March 31, 2023.

#### Details:

- USCIS alert (Mar. 2, 2023).  
<https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2023-and-announces-filing-dates-for-the-second-half-of>
- DHS/DOL temporary final rule, 87 Fed. Reg. 76816 (Dec. 15, 2022).  
<https://www.govinfo.gov/content/pkg/FR-2022-12-15/pdf/2022-27236.pdf>
- "Temporary Increase in H-2B Nonimmigrant Visas for FY 2023," USCIS webpage (updated Mar. 2, 2023).  
<https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2023>

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### **USCIS to Start Collecting Hefty Fees for 'EB-5 Integrity Fund'**

The Department of Homeland Security (DHS) published a Federal Register notice on March 2, 2023, announcing annual fees to be collected for the "EB-5 Integrity Fund." U.S. Citizenship and Immigration Services (USCIS) said it will use the fund primarily to administer the EB-5 Regional Center Program. As required under the EB-5 Reform and Integrity Act of 2022, the fee is \$20,000 for regional centers with more than 20 investors and \$10,000 for those with 20 or fewer investors.

The fee payment for fiscal year (FY) 2023 is due by April 1, 2023, and regional centers must pay the fee online directly at [Pay.gov](#), a system managed by the U.S. Department of the Treasury. Starting in FY 2024 (October 2023), the fee will be due at the start of each fiscal year between October 1 and October 31.

In addition, DHS said, the filing fee for [Form I-526E, Immigrant Petition by Regional Center Investor](#), increased by \$1,000 on October 1, 2022, to incorporate the Integrity Fund fees.

USCIS said it will not impose late fees for payments that were due in FY 2023. The agency will start imposing a late fee in October 2023 for any payments made more than 30 days later than the due date. USCIS said it will announce the amount of the late penalty and the process for collecting it "in a future publication before we collect it or it is due."

Per the new EB-5 law, USCIS must terminate the designation of any regional center that does not pay the fee within 90 days of the due date. Termination will not be automatic, and USCIS will provide a notice of intent to terminate and the opportunity to prove that the fee was paid in the proper amount within 90 days of the due date before sending a notice of termination.

#### Details:

- USCIS alert (Mar. 1, 2023).  
<https://www.uscis.gov/newsroom/alerts/uscis-to-start-collecting-fee-for-e-b-5-integrity-fund>
- USCIS notice, 88 Fed. Reg. 13141 (Mar. 2, 2023).  
<https://www.govinfo.gov/content/pkg/FR-2023-03-02/pdf/2023-04295.pdf>

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### **DOS Issues Final Rule Updating Regulation on Signed Photos for Visa Processing**

Effective April 5, 2023, the Department of State (DOS) is updating its regulation regarding visa applicants' furnishing of signed photographs as required under Immigration and Nationality Act § 221(b). DOS said the updates reflect changes in technology, including the ability to upload digital photographs electronically as part of the online visa application process.

The final rule clarifies that immigrant and nonimmigrant visa applicants may upload digital photographs electronically as part of the online visa application

process instead of submitting ink-signed photographs. The electronic signature on the DS-160, Online Nonimmigrant Visa Application, or the biometric signature for the DS-260, Online Application for Immigrant Visa and Alien Registration, will be "considered as signing the digital photograph and any paper photographs that may be otherwise submitted." Additionally, the rule amends language concerning the nonimmigrant photograph to clarify that the submitted photograph must meet the specifications prescribed by DOS and deletes language allowing immigrant visa applicants to submit black-and-white photographs.

#### Details:

- DOS Final Rule, 88 Fed. Reg. 13694 (Mar. 6, 2023) (advance copy).  
<https://www.govinfo.gov/content/pkg/FR-2023-03-06/pdf/2023-04405.pdf>

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### **USCIS Updates Guidance on On-Site Inspections for Religious Worker Petitions**

U.S. Citizenship and Immigration Services (USCIS) is updating guidance in its Policy Manual regarding on-site inspections for special immigrant and nonimmigrant religious worker petitions. To assess the efficacy of on-site inspections for petitioning religious organizations, USCIS conducted a large-scale review of the results of these inspections over the past 12 years. The agency said that although pre-adjudicative religious worker site visits uncovered a significant decline in levels of noncompliance, USCIS has determined that "conducting random on-site inspections to monitor compliance, coupled with the ability of an officer to refer religious worker petitions for a compliance review at any time during the application lifecycle, will add value and program efficiencies to the overall process and help ensure program integrity."

The guidance:

- Clarifies that, as a matter of policy, USCIS no longer conducts mandatory pre-approval compliance review on-site inspections of all petitioners for religious workers.
- Explains that USCIS randomly selects religious worker petitions for compliance review on-site inspections, which normally occur after the approval of the petition, and which include inspections of the work

locations to verify the religious worker's work hours, compensation, and duties.

- Provides that USCIS may also conduct "for cause" inspections at any time in cases where there is suspected noncompliance with the terms of the religious worker petition or for fraud.
- Clarifies that, if applicable, USCIS may issue a request for evidence or notice of intent to deny based on the findings of a pre-adjudication inspection, or a notice of intent to revoke based on the findings of a post-adjudication inspection. The petitioner will have an opportunity to respond.

#### Details:

- USCIS Policy Alert (PA-2023-04) (Mar. 2, 2023). <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230302-ReligiousWorkers.pdf>
- USCIS Policy Manual. <https://www.uscis.gov/policy-manual>

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### **DOL Final Rule Revises AEW Methodology for H-2A Non-Range Occupations**

The Department of Labor (DOL) issued a final rule effective March 30, 2023, revising the methodology by which it determines the hourly Adverse Effect Wage Rates (AEWRs) for non-range occupations (i.e., all occupations other than herding and production of livestock on the range). DOL said it believes the new methodology "strikes a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions" of similarly situated U.S. workers.

For the vast majority of H-2A job opportunities represented by the six Standard Occupational Classification (SOC) codes comprising the field and livestock worker (combined) wages reported by the U.S. Department of Agriculture, DOL will continue to rely on the Farm Labor Survey (FLS) to establish the AEWRs where a wage is reported by the FLS. For all other SOC codes, DOL will use the Occupational Employment and Wage Statistics (OEWS) survey to establish the AEWRs for each SOC code. Additionally, in circumstances in which the FLS does not report a wage for the field and livestock workers (combined) occupational

group in a particular state or region, DOL will use the OEWS survey to determine the AEW for that occupational group.

#### Details:

- DOL Final Rule, 88 Fed. Reg. 12760 (Feb. 28, 2023).  
<https://www.govinfo.gov/content/pkg/FR-2023-02-28/pdf/2023-03756.pdf>

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### **USCIS Issues Guidance on Eligibility for O-1B Visa Classification**

U.S. Citizenship and Immigration Services (USCIS) issued policy guidance on March 3, 2023, effective immediately, clarifying how it evaluates evidence to determine eligibility for O-1B nonimmigrants of extraordinary ability in the arts and nonimmigrants of extraordinary achievement in the motion picture or television industry.

The policy updates include a new chart in the USCIS Policy Manual's appendix describing examples of evidence that may satisfy the O-1B evidentiary criteria, as well as considerations relevant to evaluating such evidence. The chart is also intended to assist petitioners in submitting appropriate evidence that may establish a beneficiary's eligibility.

USCIS said the guidance also improves readability "to help adjudicators with predictable and transparent application of the O-1B evidentiary requirements, in support of consistent decisions and improvements in efficiency."

The guidance in the Policy Manual "is controlling and supersedes any related prior guidance on the topic," USCIS said.

#### Details:

- USCIS alert (Mar. 3, 2023).  
<https://www.uscis.gov/newsroom/alerts/uscis-issues-clarifying-guidance-on-eligibility-for-the-o-1b-visa-classification>
- USCIS Policy Alert (PA-2023-05) (Mar. 3, 2023).  
<https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230303-ExtraordinaryAbility.pdf>
- USCIS Policy Manual. <https://www.uscis.gov/policy-manual>

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## ABIL Global: Australia

*Australia grants thousands of refugees permanent visas after a decade of uncertainty.*

On February 12, 2023, the Australian government announced that refugees who arrived in Australia before 2013 can now transition to a permanent Resolution of Status (RoS) visa. Approximately 19,000 refugees who have essentially lived in indefinite limbo over the past decade will now be able to build their lives in Australia with certainty.

The RoS visa allows for immediate Social Security payments, and access to the national disability insurance scheme and higher education loans. Once the residence requirements have been met, these refugees also can apply for Australian citizenship. Being granted a permanent visa also means that applications can be submitted for separated family members to come to Australia.

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### Firm in the News

**Cyrus Mehta** was an invited speaker at the AILA 2023 Midwest Regional Conference in Chicago on March 3, 2023 where he was on a panel entitled Managing Client Expectations.

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