



2023 IN PERSPECTIVE FROM THE INSIGHTFUL IMMIGRATION BLOG

Posted on December 29, 2023 by Cyrus Mehta

By Cyrus D. Mehta & Jessica Paszko*

Thank you for reading and supporting The Insightful Immigration Blog in 2023 as we covered several major themes.

Though we finally said goodbye to the COVID-19 public health emergency in the spring, Title 42, which was instituted due to the pandemic, still hung around for part of the year and effectively prevented migrants from applying for asylum at the border. With Title 42 still in place during the first four months of the year, we argued that President Biden's expansion of the [humanitarian parole program at the border can serve as a template for further relief under the broken immigration system](#). The parole program was only in effect for a couple of weeks before [Texas's legal challenge](#), but it still remains in place. In July, we considered how [DHS's family reunification parole initiative can serve as a template for other bold executive actions to reform the immigration system without fear of being sued by a state](#).

We have long implored USCIS to use the Dates for Filing chart in the Visa Bulletin to protect a child's age under the Child Status Protection Act (CSPA), and at long last, our wishes were answered. On Valentine's Day, in lieu of chocolates and flowers, USCIS gave us the best gift of all and issued updated guidance implementing this long-awaited change. Rather than sharing in this exciting development with our own valentines, who likely wouldn't fully grasp its significance anyway, we took to the blog where we discussed how [the Dates for Filing chart in the Visa Bulletin not only protects children from aging out but can be dramatically advanced to allow many more backlogged immigrants to file adjustment of status applications](#). We wrote a companion blog a few months later as a result of a [USCIS update to the policy guidance on the CSPA](#)

[‘sought to acquire’ requirement after using the filing date to protect the age of the child.](#)

Business immigration lawyers were kept on their toes throughout 2023. As more wage transparency laws went into effect this year, we covered [the tension between state wage transparency laws and labor certification recruitment](#). The Department of Labor also had a busy year issuing [section H.10-B labor certification denials](#) and updating its forms which had us thinking about [answering tricky questions on the revised labor certification form on dual representation and familial relationships questions](#). When *Kellogg* reared its ugly head in the new labor certification form, we considered [how to deal with alternate requirements](#) and when Section H.10-B disappeared from the new ETA 9089, we considered whether its [ghost would continue to haunt us](#). As the pandemic, although it had receded, changed work as we know it for many, we considered the impact of [changes in work from home policies after a labor certification has been filed](#).

Given that many industries were still reeling from the disparate effects of the pandemic on the job market and economy, and employers were faced with the difficult task of laying off employees in 2023, we offered [pathways for terminated H-1B workers who want to become entrepreneurs](#). Another option for terminated workers became available when [USCIS broadened compelling circumstances parameters for skilled immigrants in the green card backlogs so that they can continue to work in the U.S. even after job loss](#). When [Canada announced a new program for holders of U.S. H-1B visas](#) in June, we considered whether Canada meant H-1B visas or H-1B nonimmigrant status, and later clarified that it really did mean [H-1B visas, not H-1B status, although family members need not have any kind of H-4](#). We also considered the options available to workers who were subjected to employment [termination in the twilight zone when the I-485 application has been pending for less than 180 days](#). Keeping in mind that some unlucky ones may be terminated before their I-140 is approved, we highlighted that the decision of [Khedkar v. USCIS affirms that an employee also has an interest in an I-140 petition filed by an employer](#).

While some desperately sought to cling onto their H-1B status amid lay-offs, a record number of new

H-1B hopefuls were registered in this year’s H-1B cap lottery. Although USCIS conducted a second-round lottery in July which provided a glimmer of hope to registrants who were not selected in the first round, we shared our frustrations

on the H-1B lottery system in general and illustrated why Congress should [eliminate the H-1B and green card caps](#). Following DHS's announcement in October that it plans to amend the regulations governing H-1B specialty occupation workers, we suggested that [while the proposed H-1B rules have many positive features, they may also result in requests for evidence and denials](#). In our final blog of the year, we shared our [comment to the proposed H-1B rule expressing concern over the new definition of specialty occupation](#).

In addition to the positive policy changes mentioned above, we also saw USCIS extend premium processing to National Interest Waivers and we discussed [how National Interest Waiver changes for STEM graduates and entrepreneurs along with premium processing will benefit H-4 spouses seeking work authorization](#). When USCIS made an interesting and confusing post on Twitter on April 11th, which has since been rebranded to X, we tried [making sense of USCIS's Twitter posts on applying for jobs or attending interviews while in visitor visa status](#). Following USCIS's September 27th announcement that it will increase the maximum EAD validity period for certain noncitizens to five years, we delved into the Administration's ability to [shape immigration policy through EADs](#). In October, we were happy to report that [ICE imposed guardrails on the use of Red Notices against noncitizens in removal proceedings](#) and encouraged USCIS to follow suit. When President Biden issued an executive order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI) in October, we considered [whether the immigration provisions in the AI executive order will bring meaningful change or be mere window dressing](#). Although we hope for positive changes with respect to the Visa Bulletin at the start of each new year and that Final Action Dates will move forward, rather than backward, each year we end up being disappointed. This year was no different and following the release of the August 2023 Visa Bulletin, we shared our frustrations and proposed that [advancing the dates for filing in the State Department Visa Bulletin will restore balance and sanity to the legal immigration system](#). When the Visa Bulletin did not fare any better in later months, we opined in October that the [Administration still has the option to advance the Dates for Filing in the next Visa Bulletin](#).

This year, we continued to provide analyses on a number of freshly adjudicated cases, and some from prior years. When the Second Circuit upheld the Trump Era interpretation on administrative closure in *Garcia v. Garland*, even though Biden changed it, we addressed whether this [leaves open the possibility that](#)

[the Biden Era interpretation may also be upheld if future administrations change it](#). In June, when the Supreme Court held that states have no standing to challenge federal immigration enforcement priorities in *United States v. Texas*, we considered how this ruling would [bode for DACA and other immigration policies](#). Following the August 1st indictment charging former President Trump with conspiring to defraud the U.S., conspiring to disenfranchise voters, and conspiring and attempting to obstruct an official proceeding, we considered [whether *United States v. Hansen* would come back to bite Trump](#), given the case's holding that speech constituting fraud is not protected under the First Amendment. In September 2023, we saw the DOJ bring suit against SpaceX for discriminating against refugees and asylees in its hiring and recruitment practices. A district court in Texas ruled in favor of SpaceX, which had countersued on the basis of the Appointments Clause, and granted it a preliminary injunction. We then considered how [SpaceX's constitutional challenge may nix the DOJ's ability to bring discrimination claims against employers under Section 247B of the Immigration and Nationality Act, including in the labor certification context](#). Lastly, in December, we were happy to see a positive rung being added to the growing ladder of final-merits-EB-1-cases and examined how [Scripps v. Jaddou offers a nuanced interpretation of "final merits determination" in reversal of EB-1B denial for an outstanding researcher](#).

A variety of new trends and developments gave rise to our blogs centered on ethics. In response to this year's trend by immigration courts to dismiss cases of noncitizens with great zeal, we considered [ethical considerations when the removal case is dismissed](#). As a follow-up to last year's blog on *United States v. Hansen*, we addressed the issue of [providing competent representation to undocumented noncitizens despite the criminal encouragement provision](#). Though it was launched late last year, ChatGPT made its mark in 2023 and quickly became a go-to source for many. Despite the AI system's incredible ability to expedite tedious workstreams, many still rely on it sparingly and with an air of caution, making sure to cross-check the AI's assertions with other more trustworthy sources. Some, however, were more optimistic about the AI's propensity for accuracy and blindly trusted its ability to draft a legal brief that cited fake cases generated by ChatGPT, as was the case in *Mata v. Avianca* which led us to consider [to what extent can immigration practitioners ethically rely on ChatGPT to aid their practice](#). With the Russia-Ukraine war still raging on, we saw another devastating war break out this year after Hamas' unspeakable

atrocities on Israel on October 7th, leading us to consider the [emerging immigration issues arising from violence in the Middle East](#) and [personal conflicts of interest arising out of the Israel-Hamas war](#).

We also offered commentary on miscellaneous current events. In the spring, we dedicated a blog [remembering Mark Von Sternberg through *Matter of Recinas*](#) after he sadly passed away on May 16th. Mark's refreshing interpretation of *Matter of Recinas* has, among other things he accomplished, left a lasting legacy in the field of immigration. 2023 also saw record numbers of migrants arriving at the southern border but despite New York City's status as a sanctuary city, Mayor Adams' push for more federal funding to aid in the influx of migrants to the city moved us to opine why [NYC should welcome migrants rather than have a mayor who disparages them](#). Though every victory is celebrated in our practice, no matter how minor or routine, some victories are just a little bit sweeter than the rest. This year, just in time for Thanksgiving, we were pleased to close the chapter on an adjustment case that was a long time coming for our client who had been in immigration proceedings for nearly 29, out of the 31, years of her life. As we recalled all the trials and tribulations of her complicated case that led to that victorious moment in immigration court one Friday afternoon, we were reminded of [how prosecutorial discretion saved our client](#).

Each blog is a labor of love and remains an important reference and resource to practitioners, journalists, policy wonks, and laypersons. We will ensure that our blogs continue to remain insightful in the immigration law field as we enter 2024. Thank you for your support.

*Jessica Paszko is an associate at Cyrus D. Mehta & Partners PLLC.