



# **Our Perspective: 2023 Immigration Outlook for H-1B, Green Card Processing, and More**

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As we enter 2023, we can expect some changes to the immigration landscape. On January 3, a new split Congress began, making meaningful immigration reform unlikely. Newly elected U.S. House Speaker Kevin McCarthy pledged to tackle immigration, taking a hardline stance on DACA and the southern border, among other issues.

Our outlook for H-1B, Green Card Processing, DACA, the Border and Asylum, and Immigration Backlogs are provided here. Contact ILBSG with any questions or to find out more.

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## About Us

ILBSG is a law firm focusing on U.S. Immigration and Global Mobility Services.

Our business is to understand yours - and your challenges. We are trusted for our successful representations, primarily in immigration, international arbitration, and contracts. Our clients consistently rate us highly, noting our strategic insights, attention to detail, and personal attentiveness.

With proprietary technology central to our processes, we deliver an efficient and personalized legal solution, enabling clients to access our services anytime, anywhere. Clients also see the status of each case anytime, in real-time.

Our organization is MSDC-certified minority-owned, ISO-9001 Quality Management System certified, and our attorneys are licensed to practice in the states of NY, CA, and IL. We are also licensed in the U.S. District Court for the Northern District of Illinois, U.S. District Court for the Southern District of California, U.S. Court of International Trade, U.S. Tax Court, and multiple foreign jurisdictions.

Our team speaks 12 languages and employs high levels of cultural sensitivity, always focused on the experience of the individual.

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With a divided Congress, it is unlikely any kind of immigration legislation will pass. This will impact Dreamers, who are at risk to lose much needed protection this year as the courts once again take up the legality of DACA. Other much needed reform, such as increased or eliminated per country caps for green cards (as we saw proposed in the EAGLE Act), will also be unlikely.

While comprehensive immigration legislation is unlikely to make any headway, we will see administrative rulemaking and policy shifts this year. The Department of Homeland Security (which includes USCIS), the Department of Labor, and the Department of State have all issued their new regulatory agendas, providing crucial insight into the agencies' priorities for the next year, including proposed rulemaking and timelines.

In light of the newly released regulatory agendas and the recent shifts in Congress, this article breaks down what we expect to see in immigration in 2023.

## **H-1B Program**

For H-1B, some changes are already in process. On January 4, USCIS submitted a proposed rule to increase certain immigration fees. The proposed rule includes an increase to the base fee for an H-1B petition (from \$460 to \$780), a substantial increase to the H-1B cap registration fee (from \$10 to \$215), as well as an additional "Asylum Program Fee" of \$600 to be paid by all petitioners filing an I-129 petition (for any classification). The Asylum Program Fee funds the cost of administering the asylum program, while avoiding increasing fees for individual applicants (since I-129 petitions are filed by U.S. companies).

The fee increase proposal also seeks to extend the premium processing adjudication timeline from 15 calendar days to 15 business days, which effectively extends premium processing adjudication by an additional week. This means that while the cost of premium processing will not increase, you'll get less bang for your buck.

The proposed rule is currently in a 60-day public comment period which will end on March 6, 2023, meaning some adjustments or changes are possible before the final rule is published. ILBSG will update its clients on any new updates in this area.

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## H-1B Program Continued

In addition to USCIS fee increases, we can also expect an increase in prevailing wage requirements. In its regulatory agenda, the Department of Labor has reconfirmed its plan to propose increases to the prevailing wage requirements for the H-1B and PERM programs. Previously, a final prevailing wage rule was scheduled to take effect in November 2022, but it was vacated by a federal court in 2021 with the agency's consent. The DOL is currently working on a new prevailing wage regulation, which will take into consideration feedback received during the previous public comment period in 2021. The new proposal is slated for September 2023, but this timeline could change.

DHS will also prioritize H-1B modernization, with a proposed rule to amend certain aspects of the H-1B program. We expect the rule to redefine the “employer-employee” relationship. This could mean clarification on what is required of employers who place employees at third-party client sites, as this is a common scenario in H-1B employment. The proposed rule states it will provide flexibility for start-up companies, which would certainly be welcomed. The summary of the rule explains it also seeks to implement new requirements and guidelines for site visits, address cap-gap issues, strengthen the H-1B registrations system to eliminate fraud and misuse, and clarify the requirements for H-1B amendments (such as what constitutes a material change).

It's worth noting that the 2010 and 2018 policy memos, both invalidated through the ITServe lawsuit, were previously used to determine the existence of an employer-employee relationship. In particular, the 2018 policy memo heightened the burden for employers placing employees at third party client sites. Following the 2018 policy memo, H-1B denials increased dramatically. Armed with the policy memo, USCIS began requiring letters, contracts, and work orders from end clients to approve the petition. Since many end clients do not share their contractual documents, denials skyrocketed. In the ITServe lawsuit, the court held that this dramatic increase in denials supported a finding that the policy memo amounted to unlawful rulemaking as these new requirements had not undergone a public comment period. Since the ITServe holding, USCIS has not issued a new policy memo, likely due to concerns about subsequent legal challenges.

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## H-1B Program Continued

If USCIS requires end client letters, contracts, etc., it would need to do so through formal rulemaking, with a notice and comment period. This means we could see this issue included in the H-1B modernization rule.

We know that the relevant immigration agencies still want to see this kind of documentation. While USCIS has not been able to require these documents since the policy memos were struck down, the Department of State is requiring them at the consular stage. We have seen a notable increase in 221(g) notices asking for end client documentation over the last two years, which may be a good indicator that these kinds of requirements will appear in the modernization rule. Only time will tell.

Finally, we expect to again see a high number of H-1B cap registrations. While there has recently been a significant number of tech layoffs from some of the major players, this is not a reliable indication that demand will be lower in March. Many of those laid off have quickly found new positions. In general, demand has remained steady in the industry. On that basis, we recommend planning early for the [FY 2024 H-1B cap](#). Because only about 20% of the FY 2023 registrations were ultimately selected, we recommend registering enough candidates that you can meet your staffing needs if only 20% are selected. If you only register the exact number of candidates you need, you'll be left short.

USCIS has yet to announce the registration period, but we expect an announcement soon. Last year, registration began on March 1, but in previous years it was a week or so later. We don't expect the new fee rule to be in effect for the FY 2024 cap season, as the comment period ends on March 6 and the final rule would not be published until at least 30 days later, unless the agency could demonstrate good cause for an earlier effective date. This means we do not anticipate the increased registration fee of \$215 will apply this year, even if included in the final rule. If that changes, we will update our clients immediately.



## Green Card Processing

There will also likely be some changes to the green card process this year. First, the fee increase proposal seeks to require separate fees for adjustment of status applications, which are currently bundled when the I-485, I-765, and I-131 are filed together. Requiring separate fees for each form will dramatically increase the cost of filing a green card adjustment package. If filed on paper, the fees for filing an I-485, I-765, and I-131 together will increase from \$1225 to \$2820 for each applicant (meaning applicants with dependents will see this cost multiplied). This is a 130% increase. USCIS plans to incentivize electronic filing with lower fees, but an I-485, I-765, and I-131 filed together online will still see a 77% increase, from \$1225 to \$2170. Notably, under the new rule, the I-485 filing fee will be the same regardless of the applicant's age. Again, this is just a proposed rule, so we could see some changes based on public comment before the final rule is published.

DHS also continues to pursue a proposed rule amending the process of adjustment of status. The proposed rule, titled "Improving the Regulations Governing the Adjustment of Status to Lawful Permanent Residence and Related Immigration Benefits" is currently scheduled for publish in July 2023. On DHS' latest agenda, new details have been provided about this proposed rule. Some of the proposed changes include permitting the transfer of the underlying basis of a pending adjustment of status application, changing the age calculation under the Child Status Protection Act (which comes into play when a child "ages out"), as well as employment authorization for certain derivative beneficiaries who are awaiting immigrant visa availability and can demonstrate compelling circumstances. As more information about this rule and its implications emerges, ILBSG will post updates.

## DACA

On the DACA front, we are unlikely to see any major positive developments. The new House Speaker, Kevin McCarthy, has taken a hardline stance on immigration. He is opposed to trading a pathway to citizenship for those with DACA in exchange for increased border security. This is the traditional trade we've seen discussed by both parties for years, so his opposition to this type of compromise means legislation is even more unlikely than in the past.

Unfortunately, there's a realistic possibility that DACA will be invalidated by the courts once again, as a challenge to the program is currently pending in the Fifth Circuit. While there is a strong argument that DHS has the statutory authority required to establish the DACA program, the Fifth Circuit previously held that the Department lacked the authority to set up the DAPA (Deferred Action for Parents of Americans) program. Based on this precedent, there is a high likelihood that the Fifth Circuit will determine that its prior DAPA ruling requires them to similarly invalidate DACA. If that happens, the federal government would likely seek swift review in the Supreme Court, who would determine the future of the program.

Due to the uncertainty in the courts, if Congress doesn't pass legislation to protect Dreamers, it is very possible they could lose access to the much-needed protections and benefits they've had under DACA. Over 600,000 people would lose the ability to work and face the possibility of eventual removal.

For those who may have a pathway, such as those who are married to a U.S. citizen, it's worth consulting with an experienced immigration attorney to see if a waiver or other relief (such as humanitarian parole and reentry) might be possible. Since a pathway through Congress seems unlikely in 2023, if you can adjust status through some other means, you should explore that option.





## The Border & Asylum

We expect the border to be the major focus in 2023, with a Republican majority in the House calling for investigations. As the border becomes the focus, we will undoubtedly see an impact for asylum seekers.

Perhaps anticipating increased scrutiny on border control, last week President Biden announced an expansion of Title 42. Title 42 is a decades old public health law first utilized under the Trump Administration to turn away foreign nationals at the border based on health-related concerns. Title 42 has been heavily utilized since the Covid-19 pandemic began. Many were surprised by the announcement, as President Biden has reiterated since April 2022 that he intends to end Title 42. Currently, the U.S. Supreme Court is scheduled to hear arguments on the legality of the policy next month. Now, President Biden has expanded Title 42 to Haitians, Nicaraguans, and Cubans, who were not previously subject to summary expulsion at the border.

In addition to expanding Title 42, the Biden Administration also plans to implement another Trump-era policy, known as the “transit ban.” This policy requires migrants to first apply for and be denied asylum in the countries they travel through before they can seek asylum in the U.S.

On a more positive note, the Biden Administration announced it will create a special “parole” program for Nicaraguans, Haitians, and Cubans, similar to the one that exists for Venezuelans. Under this program, the U.S. will allow 30,000 individuals from each of the four countries to enter the U.S. each month, as long as they have a sponsor in the U.S. Those paroled through this program will be permitted to stay in the U.S. for 2 years with work authorization. You can read more about this new program [here](#).





## **Immigration Backlogs**

While the pandemic greatly impacted processing times, we do expect to see improvements in 2023. USCIS announced in its 2022 progress report that it plans to improve its operations in 2023 by implementing premium processing for more petition types, eliminating the biometrics requirements for some categories, and simplifying some common forms.

While consular delays have plagued visa applicants for the last two years, the State Department has rolled out plans to reassign and redistribute cases across consular posts. By redistributing the workload, we should see the backlogs cleared sooner. The State Department also plans to waive in-person interviews for certain visa types, which would help with the availability of interview slots.

For FY 2022, USCIS completed approximately 8.7 million petitions and applications, announcing it completed the largest number of cases since the start of the pandemic. Hopefully, this trend will continue in 2023 and we'll see major strides in processing times.

## **Conclusion**

While Congress is now divided and comprehensive reform remains unlikely, immigration will certainly be a focus in 2023. The Biden Administration will seek to use the next two years to improve immigration policies and strengthen the U.S. economy, but he will face challenges for any legislative measure. The federal agencies will move forward with proposed rulemaking, amending aspects of immigration law and policy through the administrative process.

ILBSG continues to report on new updates or developments in this area. We are committed to helping our clients get the best advice in an ever-changing immigration landscape. If you have questions, reach out to an ILBSG attorney today.





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