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# **Immigration Law in 2022: Updates and the Road Ahead-Hedging Your Bets in a Post-Pandemic World**

Sarah J. Hawk  
Partner, Global Mobility & Immigration  
404-264-4030  
Sarah.Hawk@btlaw.com

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**Sarah Hawk's strategic mind and extensive understanding of current and emerging immigration legislation and trends have earned her national and international recognition. Sarah provides crucial immigration counsel to domestic and multinational companies in various industries such as healthcare, financial services, hospitality, higher education, and technology, among others.**

Sarah brings nearly 20 years of experience helping companies develop and implement immigration policies to secure visas and permanent residence status for executives, managers and critical employees. She also assists physicians, professors, and scientists at universities and research institutions, along with artists, athletes, entrepreneurs, and investors.

Her comprehensive knowledge includes advising on a broad range of immigration petitions, nonimmigrant and immigrant visa applications, consular processing, waiver cases and outbound placement, helping clients manage their global workforce. Sarah provides guidance for even the most complex I-9 and E-verify compliance, audits, investigations, training, and policies for various entities.

Sarah oversees the preparation of employment-based immigration petitions (B, H, L, O, P, TN, E-2), PERM labor certification applications, EB-1 Extraordinary Ability, EB-1 Outstanding Researcher/Professor, EB-2 National Interest Waiver, and immigrant petitions in virtually all preference categories, adjustment of status and consular processing cases and naturalization cases.

With a knack for building and enhancing client relationships, Sarah once served as business immigration legal counsel delegate on a trip to China, providing counsel to Atlanta Mayor Kasim Reed and the Metro Atlanta Chamber.

Sarah is a frequent speaker nationally and regionally on business immigration issues.

## Sarah J. Hawk

### Partner

3475 Piedmont Road N.E.  
Suite 1700  
Atlanta, GA 30305-3327

P 404-264-4030  
F 404-264-4033  
Sarah.Hawk@btlaw.com

### EDUCATION

Georgia State University College of Law,  
(J.D.), 2000

Agnes Scott College, (M.A.T.), 1993

Agnes Scott College, (B.A.), magna cum  
laude, 1992

### BAR ADMISSIONS

Georgia

### COURT ADMISSIONS

U.S. District Court for the Northern  
District of Georgia

### LANGUAGES

English

### PRACTICES

Chinese Services

Immigration and Global Mobility Services

Immigration Pathfinder Program

Japanese Services

### INDUSTRIES

Healthcare

## Professional and Community Involvement

Board member, Asian Pacific Institute on Gender-Based Violence

Member, Georgia Asylum and Immigration Network (GAIN) Advisory Board

Former co-chair, GAIN Executive Board

Former president, Georgia Asian Pacific American Bar Association

Former vice president of professional development, National Association of Asian American Professionals

## Honors

The Best Lawyers in America, 2017-2023

Nation's Best, Lawyers of Color, 2020

Chambers USA, 2018-2022

GAIN's William E. Hoffmann, Jr. Service Award, 2017

Who's Who Legal Corporate Immigration, 2014-2016

International Who's Who of Corporate Immigration Lawyers, 2013

Leadership Atlanta Class, 2013

Named to Georgia Trend Magazine's Legal Elite, 2012, 2021

Most Powerful & Influential Women Award, National Diversity Council, 2012

Who's Who Legal, 2010

Georgia Super Lawyers, Rising Stars, 2010

Who's Who Among Business and Professional Achievers, 2009

Who's Who in Asian-American Communities, 2007



## Immigration Law in 2022: Updates & the Road Ahead – Hedging Your Bets in a Post-Pandemic World

What U.S. employers need to know about immigration and compliance, including a top-level view of hiring foreign national talent during the pandemic and I-9 compliance

- Trends & Governmental Updates
- I-9 Flexibility Rules extended, Post-Pandemic Best Practices:
  - Remote review of documents for I-9 employment verification: extension of flexibility rule, I-9 & E-Verify best practices post-Pandemic
- Mobility & Remote Worker issues
  - Hiring strategies for foreign national talent for the best and brightest
  - How to manage an international workforce
- Other regulatory and governmental updates

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## Trends & Governmental Updates

- Immigration reform – “top national policy concern” of business advocates at state level.
  - According to Aug. 31, 2022 State Chambers of Commerce report
  - Report called for sufficient supply of H-1B workers
    - 41% of US employers voiced need for more H-1B work visas.
    - 36% said not enough green cards available.
  - Guest workers- need for a more reliable verification system
  - Protections for DACA, Improvements for Employment Policies for Refugees
  - U.S. Chamber of Commerce: Need to modernize immigration system to address employers’ talent needs.
    - Due to COVID and policy changes, 1 million fewer college educated immigrants in US.
    - Without policy changes, employers must watch immigration’s role in talent strategies/plan for visa processing delays.

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## Updates in Immigration and Compliance

- Pandemic impact on Immigration/Compliance
  - I-9 Employment Verification Form: “Flexibility during COVID-19”
    - Employment eligibility form that is required for all newly-hired employees. Immigration Reform and Control Act (IRCA) in 1986.
  - Documents for Identification and Work Authorization
    - Normally an employer is required to meet the new hire in person, to review original documents for completion of Section 2 of the I-9.
  - Flexibility for Remote Review of new hires’ I-9 documentation:
    - For companies with no employees at the worksite, DHS temporarily allows employer to remotely review the identity & work authorization documents via email, fax, skype, video conference etc. Sec. 1 must still be completed by the new employee by the start date. Sec. 2 must still be completed within 3 business days of the start date.

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## Form I-9 Compliance – Flexibility during Covid-19

- On April 25, 2022- USCIS announced remote review of new hires’ I-9 documentation for remote workers extended through **October 31, 2022**.
  - **Temporary measure.** Need to physically review the documents at a later time.
  - **Eventual In-Person Review:**
    - Insert date of physical inspection and notate as “documents physically examined.”
    - The employer will also be required to add a Memo or Notate Section 2 “Additional Information” section on the Form I-9 with the language “COVID-19” to explain the reason for the physical delay

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## Form I-9 Post-Pandemic Planning

- Employers must return to **physical inspection** of original identity and work authorization documents, once normal operations have resumed.
- Employers should now address **return-to-work I-9 policies**.
- Plan now to update Form I-9s in-person, when possible, while being aware of CDC safety precautions.

## I-9 Compliance: Where are your I-9 forms stored?

- Paper or Electronic?
- Stored at Headquarters or each company location?
  - Securely stored in locked cabinet?
  - Separate or together with personnel files?
- Self-Audit: Do you have an I-9 form for every employee? Check payroll records.
- Who is in charge of I-9s: HR or In-house Employment attorney
- I-9 Training? Yearly or frequently with HR turnover
- If ICE knocks at the Door, who answers? What is your policy?

## DHS Ended COVID-19 Temporary Policy for Expired List B Identity Documents -July 2022

- DHS adopted the temporary policy in response to the difficulties many individuals experienced with renewing documents during the COVID-19 pandemic.
- Now that document-issuing authorities have reopened and/or provided alternatives to in-person renewals, DHS ended this flexibility on May 1, 2022 and employers must only accept **unexpired List B documents**.
- If an employee presented an **expired List B document** between May 1, 2020, and April 30, 2022, employers are required to update their Forms I-9 by **July 31, 2022**.
  - Have the employee provide an unexpired document that establishes identity. Employees may present the renewed List B document, a different List B document or a document from List A.
    - In the “Additional Information” field of Section 2, the employer enters the document:
    - Title;
    - Issuing authority;
    - Number; and
    - Expiration date.
    - The employer initials and dates the change.

**Note:** If the List B document was by the issuing authority, it was unexpired when presented. No action is required because the **auto extended** document was unexpired when presented.

## E-Verify for Employers: After July 15, 2022, no extensions on timeframes to resolve Tentative Nonconfirmations (TNC Mismatches)

For E-Verify cases referred on or after July 15, 2022, E-Verify will **no longer provide extended timeframes** for employees to visit SSA to resolve these Tentative Nonconfirmation (mismatches) case results.

- Starting **July 15, 2022**, employees whose E-Verify cases are referred to SSA on or after July 15, 2022, will have the **normal 8 federal working days** to contact their local SSA office to begin resolving the mismatch.
- At the onset of the COVID-19 Pandemic in March 2020, E-Verify extended the timeframe for an employee to take action to resolve a Social Security (SSA) Tentative Nonconfirmation (mismatch).
- However, E-Verify cases referred between **March 2, 2020, to July 14, 2022**, with a SSA mismatch will still have an extended timeframe to be resolved.



## Social Security Administration Resumes E-Verify Operations

- Cases must be referred in E-Verify within 10 federal government working days after the issuance of the mismatch. Employees with any mismatch referred on or after July 15, 2022 must take action to resolve it within 8 federal working days after the case is referred. Federal business days are Monday through Friday and do not include federal holidays.
- You may not take any adverse action against an employee because the mismatch is in an interim case status.
- Employees with an SSA mismatch referred between March 2, 2020 to July 14, 2022, have until September 29, 2023 to resolve it.

Review the date on your employee's original Referral Date Confirmation (RDC). See the RDC samples below for reference.  
After you find the date on the original RDC, see the chart below for preferred dates your employee should visit SSA to resolve their mismatch.

If the date on the employee's Referral Date Confirmation is:

- March 2 to December 31, 2020
- January 1 to December 31, 2021
- January 1 to July 14, 2022

Then you should contact SSA between:

- October 1 to December 31, 2022
- January 1 to March 31, 2023
- April 1 to June 30, 2023

\*Note: Although the timeframes are preferred, all employees must visit SSA to resolve their mismatch by the final deadline of September 29, 2023, or their case will automatically get a Final Nonconfirmation (FNC).

- Update the RDC with the final date by printing a new 'Referral Date Confirmation' notice. This will have the final deadline for employees to contact SSA to begin resolving their TNC. To reprint a copy of your employee's "Referral Date Confirmation" log-in to E-Verify, select your employee's case and select the "Print Confirmation" button. You may also choose to update the existing RDC by which your employee must visit SSA by crossing out each date and inserting "Final: 09/29/2023."
- <https://www.e-verify.gov/social-security-administration-resumes-e-verify-operations>

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## Employer required to communicate Referral Date Confirmation Notices

- Communicate to your employee the preferred dates to visit SSA to **resolve their mismatch**.
  - You may also make a note of the preferred dates on the RDC.
- Provide a **copy of the updated RDC** to your employee via email or hard copy.
  - If you need to reprint a copy of your employee's RDC, login to E-Verify, select your employee's case, and select the "**Print Confirmation**" button.
- **To complete** the E-Verify process, employers must close every case, including cases that were recently updated with final responses.
  - However, E-Verify will **automatically** close cases that receive a result of Employment Authorized.

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## Sample Referral Date Confirmation



### Referral Date Confirmation Tentative Nonconfirmation (TNC) (Social Security Administration (SSA))

E-Verify Case Verification Number: 123456789

Employee Name: Jane Doe

Your employer referred your E-Verify case to SSA after you decided to take action to resolve an SSA Tentative Nonconfirmation (SSA TNC). This document confirms that your case was referred to SSA.

#### What you should do

Visit an SSA field office within 8 Federal Government working days by 09/29/2023 (MM/DD/YYYY), to begin to resolve the SSA TNC. If you have not received the SSA TNC Further Action Notice from your employer, contact your employer immediately to obtain this notice.

The SSA TNC Further Action Notice includes information about your E-Verify case and which documents you need when you visit SSA. Have the SSA TNC Further Action Notice when you visit SSA.

If you do not take action within 8 Federal Government working days by 09/29/2023 (MM/DD/YYYY), a Final Nonconfirmation will be issued and your employer may terminate your employment. Employers must allow you to contest an SSA TNC and may not take adverse action against you because of the SSA TNC while you are contesting the SSA TNC and your E-Verify case is pending.

Final:  
09/29/2023

## Workplace Strategies for Hiring & Retaining International Talent

### F-1 students:

- Work authorization for a year after graduation (OPT- Optional Practical Training)
- STEM OPT – An additional 2 years of STEM OPT work authorization Students with a STEM degree from US institution:
  - Science, Technology, Engineering, Math with a Training Plan. Company must use E-verify. Training must be directly related to the Field of Study.
  - 22 additional STEM fields added for eligible STEM OPT extensions in Jan 2022.
    - Bioenergy, Forestry, General, Forest Resources Production and Management, Human-Centered Technology Design, Cloud Computing, Anthrozoology, Climate Science, Earth Systems Science, Economics and Computer Science, Environmental Geosciences, Geobiology, Geography and Environmental Studies, Mathematical Economics, Mathematics and Atmospheric/Oceanic Science, Data Science, General, Data Analytics, General, Business Analytics, Data Visualization, Financial Analytics, Data Analytics, Other, Industrial and Organizational Psychology and Social Sciences, Research Methodology and Quantitative Methods.

## Common Work Visas

Visa Type	Maximum Stay
H-1B Specialty Occupation	6 years Exceptions with Green Card in process
L-1A Intracompany Transferee Manager/Executive	7 years
L-1B Intracompany Transferee Specialized Knowledge Employee	5 years
TN - NAFTA/USMCA- Canada/Mexico Almost always requires Bachelor's degree in related field	No time limit but implies nonimmigrant intent
E-1/E-2 Treaty Trader & Treaty Investor	5 year duration, with 2-year admission

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## Cap-Gap work authorization

- F-1 students in OPT status must provide documents for review.
  - Pre-registration March 9- March 25
  - Lottery selections by April 1
- If OPT ends after April 1, H-1B case must be filed to ensure cap-gap work authorization before EAD expires.
  - If OPT expires after H-1B filed, cap-gap until Sept. 30
  - Filing window may be an issue depending on expiration date of EAD.
  - STEM/OPT extensions should be filed 180 day in advance regardless of registration and/or selection

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## H-1B Workers: Impact of Hybrid and Remote Work for Compliance

- Where are your H-1B workers?
  - Relocations by Employer or Employee impact H-1B Labor Condition Application (LCA) filed with DOL, subject to On-Site Audits by USCIS officers.
    - Increasingly competitive job market – highly-talented employees seek relocations to allow working remotely.
    - H-1B Visa Holders relocated during Pandemic, without first informing Employer.
    - Prevailing Wage for position is based on geographic area:
      - » A move that is outside the Metropolitan Statistical Area- Example: Georgia to NYC.
      - » Material change requiring an amended H-1B petition

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## H-1B Alternatives

- TN- Canadian or Mexican under USMCA former NAFTA
- H-1B1 Chile and Singapore Trade Agt for specialty occupations
- E-3- Australian Treaty Visa for specialty occupations
- E-1/E-2 Treaty Trader/Investor – self or work for a company with same nationality.
- O-1
  - Still seeing an uptick of RFEs
  - Only a better case if well-documented with solid evidence
- Green Card
  - Labor Certification cases (1<sup>st</sup> step of 3 step gc process)
  - Good option for those who are not visa backlogged

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## General Guidance in Current Climate

- Set expectations, especially for entry-level positions
- If STEM OPT eligible, timely file before current EAD expires.
- Review hiring practices and similarly situated employees for degree backgrounds
- Consider beginning green card processes sooner to avoid extensions

## International Remote Workers

- **Increase in requests from employees to work remotely:**
  - From another U.S. state or another country
  - Legal and Tax Implications
- **Foreign Law – application of local law is a significant risk.**
  - Employee-friendly laws limit employer's freedom to terminate employee relationship.
    - Lengthy notice requirements
    - Severance payments
- **Immigration and Work Authorization Issues:**
  - Tourist or short-term business visas do not allow visa holders to perform productive work for foreign employer.
  - Must obtain appropriate visa and work authorization

## Regulatory and Procedural Updates



- COVID-related delays at USCIS, DOL
- Possible Increase in USCIS filing fees in next few months
- Visa Appointments – limited, must plan ahead.
  - Discretionary waiver of in-person interview requirement if previously held a valid visa in last 2 years, depending on consulate
- Visa appointment delays for travel to India, China (July 2023 visa appointment slots)
- USCIS processing times: service center redistribution
- In-person green card or naturalization interviews at local USCIS office
- Beware of immigration scams

<http://www.uscis.gov/avoid-scams/common-scams>

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