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Immigration Law Update

Current Developments in Immigration

Greetings!

This is the latest installment in our efforts to keep you apprised of the rapidly changing U.S. immigration environment. Some of the most recent changes could have a serious impact on you or your employees, and we urge you to communicate these changes to interested parties.

H-1B Quota Reached

Today United States Citizenship & Immigration Services ("USCIS") announced that the H-1B quota was reached for FY 2017. As many of our readers are aware, only 65,000 H-1B visas can be issued each fiscal year, with an additional 20,000 available to beneficiaries who hold a U.S. Master's degree. This number falls well short of the demonstrated need of U.S. employers. As we previously reported, last year nearly 233,000 petitions were submitted during the first week of the filing period. We anticipate equal or greater numbers this year.

The next step is for USCIS to conduct the H-1B lottery to determine which filings will be randomly selected. A date for this has not yet been set, but we expect it to happen in the coming weeks. USCIS initially sorts H-1B filings between the U.S. Master's Cap and the standard non-U.S. Master's cap. USCIS then uses a computer-generated random selection process to select 20,000 U.S. Master's Cap petitions to process under this year's quota. Any U.S. Master's

cap petitions that are not selected in the U.S. Master's lottery will be entered into the Bachelor's cap lottery. USCIS will then reject any petitions not selected under the lottery, and return the petitions to the attorney or employer (along with the filing fees).

Last year USCIS completed the H-1B lottery process on April 13, and began issuing receipt notices on May 3, 2015. As such, employers should expect to know if their petition was chosen under the H-1B lottery by the beginning to middle of May.

USCIS Provides Guidance on Job Changes During the Permanent Residency Process

USCIS recently released long-awaited policy guidance to assist its officers determine when an applicant with a pending I-485 Adjustment Application can move to a new job without hindering the permanent residence process.
In order to make use of this provision, an applicant must meet three requirements: 1) the applicant must have an approved Form I-140 visa petition; 2) the applicant must have filed a Form I-485, Application to Adjust Status on the basis of the approved I-140, and the application must remain pending for at least 180 days; and 3) the new job must be in the "same or similar" occupational classification as the job for which the I-140 petition was filed.

The new memo, which can be found here, provides greater clarity on how to determine whether the two jobs are in a "same or similar" occupation. The memo instructs adjudicators to consider the totality of the circumstances, including:

1. The job duties of both positions;
2. The skills, experience, education, training, licenses, or certifications required to perform each position;
3. The wages offered for each position; and
4. Any other material and credible evidence relevant the determination of whether the positions are the same or similar.

The memo also advises adjudicators that, in the case of career progressions, if applicants have advanced to a new job classification that encompasses managers, the new position could be considered to be the same or similar occupation if the applicant is managing the same or similar functions of the previous position.

While the memo does provide a significant amount of guidance, determining whether the new position satisfies this criteria requires detailed analysis, especially with the stakes so high. We recommend contacting our offices if you have any questions as to whether you or your employee could benefit from the job portability provisions in the permanent residence process.

All Visa Waiver Program Travelers Must Now Use Electronic Passports

Following the events in Paris and San Bernardino late last year, a law was passed revising the Visa Waiver Program to address certain national security risks. The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 requires nationals of Visa Waiver countries to use an electronic passport for travel to the United States as of April 1, 2016.

Electronic passports contain additional security features, including an electronic, which retains biographical information on travelers. This feature protects the passport holder's privacy, prevents identity theft, and aids in effectively identifying travelers. As of April 1, 2016, travelers from Visa Waiver countries who do not hold electronic passports must apply for a visa before traveling to the United States.

USCIS Experiencing Significant Processing Delays

For many months now, USCIS has experienced significant backlogs in processing numerous petitions, particularly H-1B extensions and I-765 applications for Employment Authorization Documents. As of this writing, the current processing times for H-1B extensions filed with the California Service Center is five months, while H-1B

extension petitions filed at the Vermont Service Center are taking seven months to adjudicate. While H-1B nonimmigrants can continue living and working in the U.S. while their H-1B extension petitions are pending, these lengthy delays often have a negative impact on foreign national's day-to-day life. For instance, many states will not issue driver's license renewals without an approval from USCIS.

In addition, while USCIS has indicated that the processing time for I-765 EAD applications is 90 days, there have been numerous accounts of applications processed beyond the 90 day period. Delays in the adjudication of I-765 EAD applications are more problematic as they can result in disruption of employment authorization.

The American Immigration Lawyers Association is urging USCIS to address this problem, requesting a meeting with Director Rodriguez and his senior leadership to address the backlog issues. We are hopeful that USCIS will take action to correct these delays.

If you believe that you may be negatively impacted by these delays, we recommend contacting our offices to see if you are able to upgrade your petition to premium processing in the H-1B context.

DHS Launches New Website on New STEM Optional Practical Training (OPT) Program

As we reported in our March newsletter, the Department of Homeland Security (DHS) published the final version of the revised OPT rule for international students with degrees in science, technology, engineering, and mathematics (STEM) fields on Friday, March 11, 2016. The new rule, which will go into effect on May 10, 2016, includes several changes to the STEM OPT program, and requires employers of STEM OPT employees to incorporate a formal training program that identifies specific learning objectives for the employee.

In conjunction with the newly published rule, DHS has launched a new web portal, Study in the States STEM OPT Portal. The website provides detailed information on the new training plan requirements to Students, Employers, and University representatives. DHS hopes that this website will help assist with the transition to the new requirements.

If you have any questions on how these changes will impact your or your employee's eligibility for a STEM OPT extension, we encourage you to contact us.

DHS Creates New Known Employer Pilot Program

This past month the U.S. Department of Homeland Security created the Known Employer Pilot Program to streamline processes for employers seeking to hiring foreign nationals under certain immigrant and nonimmigrant classifications. The Known Employer Pilot Program includes employment-based immigrant petitions for outstanding professors or researchers, and multinational executives or managers. The program also includes H-1B, L-1A, L-1B, and TN nonimmigrant classifications.

Under the program, employers will file an application to request USCIS to predetermine certain requirements of the above mentioned classifications that only relate to the employer. These requirements generally relate to the employer's corporate structure, operations, and its financial health. After USCIS approves an employer's predetermination request, the employer can then file petitions or applications for individual employees without resubmitting the evidence initially provided to USCIS. Unless there has been a change in circumstances or a material error in the predetermination approval, USCIS officers will not review the employer's previously established eligibility requirements and will only evaluate the qualifications of the individual petition or application, such as the nature of the job offered and the employee's qualifications. In some respects, this is similar to the Blanket L program.

Currently there are five employers participating in the pilot program, all of which were preselected for participation by USCIS. At this time USCIS is not accepting applications for participation in the Known Employer Pilot Program; however, if the pilot program is successful it is likely that USCIS will utilize this program for additional employers in the future.

The pilot program is expected to last for one year; however, USCIS may extend or terminate the program in its discretion. To read more about the program, please visit the Known Employer Pilot Program's website.

For additional information about any of the topics presented here, please contact us. If you would prefer not to receive future e-mails of this nature, please unsubscribe on the link below.

Sincerely,

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