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COUNSEL FOR IMMIGRATION

June 8, 2015

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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.

Update on Fiscal Year 2016 H-1B Cap

On April 7, 2015, U.S. Citizenship and Immigration Services (USCIS) announced that it had reached the H-1B Cap for fiscal year 2016. During the H-1B filing period, USCIS received approximately 233,000 petitions-a 36% increase from last year's total. As it has done in the past, the agency used a computer-generated random selection process, known as the "lottery," to select 65,000 petitions under the general H-1B Cap, and 20,000 under the advanced-degree or Master's Cap. USCIS completed the selection process on April 13, and finalized all data entry for the petitions selected in the lottery on May 4.

We have received receipt notices for many of the petitions that were selected. We have yet to receive any rejected petitions, but we expect to receive these imminently. Any petitions that were not selected in the lottery will be returned by mail to the petitioner or the attorney-of-record along with the filing fee checks.

If you missed the H-1B Cap this year, please contact us to discuss possible alternative forms of work authorization you may be eligible to receive.

Employment Authorization for Certain H-4 Spouses of H-1B Nonimmigrants Available

As we previously reported in our March newsletter, on May 26, 2015, USCIS began accepting applications for Employment Authorization Documents (EADs) for certain H-4 spouses of H-1B Nonimmigrants. Under the new rule, H-4 spouses of H-1B nonimmigrants who are already in the "Green Card" pipeline will be eligible to receive work authorization. Unlike H-1B employment which is reserved for specialty occupations, H-4 spouses who qualify for EAD cards can seek employment in any sector. The employment authorization will be valid for the period of H-4 status remaining on the H-4 spouse's I-94 card.

The new rule limits employment authorization to H-4 spouses who are married to an H-1B nonimmigrant who:

1) Is the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker; or

2) Has received a grant of H-1B status beyond the 6-year statutory limit under section 106(a) or (b) of the American Competitiveness in the Twenty-first Century Act.

H-4 dependents whose spouses do not meet the requirements outlined above remain ineligible for employment authorization.

To apply for employment authorization, applicants must submit Form I-765 along with the $380 filing fee and supporting documentation. USCIS estimates that approximately 179,000 H-4 spouses will be eligible for employment authorization under this rule in the first year alone, but has not commented on processing times for these applications. Generally, however, USCIS adjudicates EAD applications within 90 days. If you believe that you or your spouse qualifies for employment authorization under this new rule, please contact us so that we can assist you with your filing.

Responding to Criticism from the Business Community, USCIS Publishes New Guidance on L-1B Petitions, Clarifying the Specialized Knowledge Requirement

Following years of requests for clarification and inconsistent adjudication, U.S. Citizenship and Immigration Services (USCIS) has published a new memorandum providing guidance on the requirements of L-1B petitions and the meaning of specialized knowledge. The draft memorandum, which is set to go into effect on August 31, 2015, comes after an independent report that showed that the denial rate for L-1B petitions for Fiscal Year 2014 was at an historic high of 35%.

The L-1B Visa is utilized by multinational companies to transfer employees with "specialized knowledge" to work temporarily in the United States. Under the L-1B regulations, a foreign employee is deemed to have "specialized knowledge" if that employee has "special knowledge" of a company's products or an "advanced level of knowledge" in the company's processes and procedures. The new memorandum does not change these requirements, but instead offers guidance to USCIS adjudicators on how USCIS defines these terms.

The new memorandum defines "special knowledge" as ""knowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably distinct or uncommon in comparison to that generally found in the particular industry or within the petitioning employer."

Likewise, the new memorandum defines "advanced knowledge" as "knowledge or expertise in the organization's specific processes and procedures that is not commonly found in the relevant industry and is greatly developed or further along in progress, complexity and understanding than that generally found within the petitioning employer."

In order to establish whether a foreign national employee meets this definition, the new memorandum instructs USCIS adjudicators to consider the following factors:

1) Whether the employee's knowledge is not generally known in the U.S.;

2) Whether the employee possesses knowledge that is particularly beneficiary to the employer's competitiveness in the U.S. marketplace;

3) Whether the employee's employment abroad involved projects or assignments that significantly enhanced the company's productivity, competitiveness, image, or financial position;

4) Whether the employee's knowledge can normally only be obtained through prior experience with that company; and

5) Whether the employee's knowledge of a product or process cannot be easily transferred or taught to another individual without a substantial amount of time and a significant economic cost and inconvenience to the company.

While not every L-1B employee must satisfy the above factors, it is useful for employers to keep these in mind when planning to transfer employees to the U.S. The memorandum also instructs employers to submit a substantial amount of documentary evidence to demonstrate the employee's specialized knowledge, and requests an explanation from employers on precisely how an employee's specialized knowledge qualifies him or her to perform the duties of the U.S. position.

Among a growing trend of offsite L-1B employment, the new memorandum provides additional guidance on off-site employment of L-1B employees. The memorandum explains that while this is allowed under the regulations, the Petitioning entity must retain complete control over the L-1B employee's work, and the L-1B employee's work off-site must be providing a product or service that requires specialized knowledge specific to the employer.

Immigration professionals and multinational companies are hopeful that the new memorandum will lead to more consistent, less onerous decisions by USCIS adjudicators. If you would like further assistance in determining whether an employee of your organization qualifies for an L-1B Visa, we encourage you to contact us. Rosner, Ortman & Moss Partners, LLC has extensive experience with successfully obtaining L-1B status for employees of multinational companies.

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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