SQUIRE PATTON BOGGS

US Immigration Law Update for 2016

As 2015 came to a close we saw several significant developments to US immigration law and procedure from the Congress and the Executive Branch. Below is a brief review of some significant updates to immigration law and US visa programs, as well as changes you should be aware of as a result of the *Consolidated Appropriations Act*, 2016.

Remember! H-1B Visa Application Season Begins April 1, 2016

The US Citizenship and Immigration Services (USCIS) will begin accepting applications for H-1B applications on Friday, April 1, 2016 for employment in the fiscal year 2017. However, strong demand for H-1B visas is expected, and it is strongly encouraged that you start preparing H-1B petitions well before the April 1 filing date.

DHS Proposed Rulemaking for STEM OPT Expansion

In August 2015, a federal court in Texas struck down certain longstanding extension-related provisions of the Optional Practical Training (OPT) program for F-1 students, including the available 17-month extension for graduates with science, technology, engineering, and mathematics (STEM) degrees from US institutions of higher education. The court ruled that the Department of Homeland Security (DHS) failed to follow necessary notice and comment procedures before implementing the OPT provisions, but stayed enforcement of its order until February 12, 2016, to allow DHS to properly run any new OPT provisions through necessary administrative procedures.

In October 2015, after substantial delays, DHS opened its proposed replacement OPT rules for public notice and comment. The proposed changes include expanding the prior 17-month OPT STEM extension to a 24-month extension and formalizing the cap-gap rule, among other provisions. The comment period closed on November 18, 2015, but the high number of public comments left DHS with insufficient time to respond prior to the February 2016 deadline. In response, DHS requested an additional extension of the court's stay, this time until May 10, 2016. We await the court's response to the extension request, which will be crucial for H-1B applicants looking to take advantage of the existing OPT cap-gap provisions to allow them to continue working between their OPT expiration and the start of their H-1B classification. We will continue to provide updates as events progress.

USCIS Simeio Policy Statement

On April 9, 2015, the USCIS Administrative Appeals Office (AAO) issued its decision in *Matter of Simeio Solutions, LLC (Simeio)*. Simeio held that an H-1B employer must file an amended or new H-1B petition when a new Labor Condition Application for Nonimmigrant Workers (LCA) is required as a result of a change in the H-1B worker's place of employment.

On July 21, 2015, the USCIS issued a policy memorandum offering final guidance on the AAO's decision, clarifying that the H-1B petition is not required when the employee's work site location remains in the same Metropolitan Statistical Area as their current work site location. The AAO also provided a "safe harbor" for employers who file amended or new H-1B petitions **on or before January 15, 2016**.

DHS Proposed Rulemaking for Employment-Based Immigrant and Nonimmigrant Visa Programs

On December 31, 2015, the DHS laid out a comprehensive proposed rulemaking affecting numerous employment-based visa programs. The changes are designed to streamline employer sponsorship of nonimmigrant workers; increase job portability, stability, and flexibility for such workers; and provide additional transparency and consistency in the application of agency policies and procedures.

The proposal largely conforms DHS regulations to longstanding policies and procedures established in response to certain sections of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), as amended in 2002. This proposed rule would significantly expand immigration benefits for employment-based nonimmigrants and those seeking immigrant status in the following areas by: codifying job portability procedures for employment-based adjustment of status applicants; providing employment authorization for certain approved I-140 beneficiaries; limiting automatic revocation of certain approved I-140 petitions; expanding priority date retention for approved I-140 beneficiaries; expanding the definition of "related or affiliated nonprofit entity" to extend the H-1B cap exemption for certain nonprofits employers; codifying the agency's longstanding policies on post-sixth year H-1B extensions and provide additional clarifications; providing grace periods for certain nonimmigrants including a 60-day grace period that would preserve the status of E-1, E-2, E-3, H-1B, H-1B1, L-1 and TN nonimmigrants after employment termination and providing a 10-day grace period before and after petition validity for E-1, E-2, E-3, L-1 and TN nonimmigrants; and granting an automatic 180-day work authorization extension for certain foreign nationals who timely file EAD renewal applications.

This rulemaking is broad and extensive. We will follow up with an in-depth publication, and further notices as information and updates become available.

Consolidated Appropriations Act, 2016

On December 18, 2015, the Consolidated Appropriations Act, 2016 (CAA) was passed into law. Instead of passing along all 887 pages of the CAA (full text is available on the US Congress website), we have compiled a brief summary of immigration-related issues you need to be aware of heading into 2016:

- The EB-5, Conrad 30, Special Immigrant Religious Workers, and E-Verify programs are extended through FY 2016.
- Supplemental L-1 and H-1B fees **are doubled** for companies that employ 50 or more employees in the US and have more than 50 percent of their US workforce in H-1B, L-1A or L-1B nonimmigrant status (L-1 fees increase from US$2,250 to US$4,500, and H-1B fees from US$2,000 to US$4,000); fees must be paid on **both initial petitions and extension petitions**.
- Numerous changes were made to the H-2B program, including: (1) flexibility for a start-date for workers in the seafood industry; (2) defining "seasonal" as 10 months; (3) exempting H-2B returning workers from the 66,000 annual cap for FY 2016; (4) use of private wage surveys; and (5) limitations on the Department of Labor's ability to implement some aspects of the interim final rule.
- The US refugee program's resettlement of Syrian and Iraqi refugees remains largely untouched, but the Visa Waiver Program (VWP) was reformed to categorically exclude nationals of Syria, Iraq, Iran and Sudan, as well as people who have traveled to those countries on or after March 1, 2011.
- The Obama Administration's original DACA program may continue and its proposed DAPA and DACA expansions may proceed through the courts without attempts to block their operation.
- The VWP was reformed to exclude nationals of Syria, Iraq, Iran, and Sudan as well as most individuals who have traveled to those countries since March 1, 2011. Such VWP-restricted individuals are still eligible to apply for a visitor visa. For more details see our Employment Law Worldview Blog.

If you have any questions, or for more information, please contact your designated Squire Patton Boggs lawyer or office.

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