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WINTER 2015

Immigration for Employers

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Immigration Reform Version 2015

Despite the near universal recognition that the U.S. immigration system is "broken," and the best efforts of certain congressional representatives over the past several years to advance comprehensive immigration reform, reform continues to be elusive, with legislative proposals being repeatedly advanced and then gutted. As employers and affected foreign nationals grow frustrated, individual states and municipalities have taken to passing their own immigration laws. Such legislation, for example, mandates the use of E-Verify or cooperation between law enforcement and Department of Homeland Security. Ultimately, though, this legal patchwork yields inconsistent treatment and piecemeal solutions.

While calling on Congress to develop a workable bill, President Barack Obama has addressed the issue with executive orders and policy revision mechanisms. Some of these have been successful, but others have been stalled by legal challenges. An expansion of the 2012 Deferred Action to Childhood Arrivals program (DACA), the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), and an extension of work authorization eligibility to H-4 nonimmigrants all have been implemented and then challenged in federal courts around the country. In addition, enforcement policy revisions and announced changes to the monthly visa bulletin will significantly affect foreign national employees with minor criminal infractions or who are subject to visa backlogs.

In force since June 15, 2012, DACA allows certain individuals who came to the United States unlawfully while under the age of 16, and who have remained here since June 15, 2007, to apply for deferred action for two years (renewable) as long as they were under the age of 31 at the time of the order's implementation. To date, approximately 700,000 individuals have been granted deferred action under DACA, which allows the individuals to work legally in the United States. DACA is not a "path to citizenship" in its current form.

On November 20, 2014, the President issued a new executive action designed to expand DACA. This measure removed the age cap and extended the date by which individuals eligible for this program must have been living in the United States. In addition, the order extended the work authorization benefit under DACA from two years to three years. Along with DACA, a second program, DAPA, similarly would allow the parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, provided they have lived in the United States continuously since January 1, 2010, and passed required background checks.

Following the announcement of the 2014 executive actions, 26 states filed a lawsuit in the U.S. District Court for the Southern District of Texas to block implementation of these programs. On February 17, 2015, the court issued a preliminary injunction blocking the federal government from accepting applicants under the extended DACA and DAPA programs while the lawsuit is pending. This injunction was upheld by the Fifth Circuit Court of Appeals. The new programs were supposed to be implemented by June 2015, but due to the litigation, whether or when the November 20, 2014, order will go into effect remains uncertain. For now, DACA remains in effect under the original 2012 executive order, and applicants are receiving extensions of their two-year work authorization. The lawsuit in Texas continues. A resolution is anticipated sometime this year. For more information, please visit http://www.uscis.gov/immigrationaction.

In addition to the extended DACA and DAPA programs, in May 2015, work authorization also was extended to certain dependent spouses of H-1B nonimmigrant visa holders. As a result of this change, certain H-4 dependent spouses may file for work authorization if their H-1B spouse:

- Is the beneficiary of an approved I-140; or

- Has been granted an extension of H-1B status beyond the six-year limit based on the American Competitiveness in the Twenty-First Century Act of 2000. (These are individuals whose H-1B status has been extended based upon a PERM Labor Certification application or an I-140 immigrant petition taking more than 365 days.)

In the days preceding the implementation of this program, a lawsuit was filed in federal District Court in Washington, D.C., by Save Jobs USA, seeking to enjoin the Department of Homeland Security from accepting work authorization applications from H-4 dependents and declaring unlawful DHS's permission for H-4 nonimmigrants to apply for this benefit as exceeding DHS's statutory authority However, the court denied a preliminary injunction. Accordingly, although the suit goes on, H-4 dependent spouses who meet the criteria may apply for work authorization by filing an I-765 Application for Employment Authorization with U.S. Citizenship and Immigration Services. For more information, please see http://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses.

Further, U.S. Citizenship and Immigration Services and the Department of State announced on September 9, 2015, new, relaxed procedures for determining application timing for applicants waiting to file adjustment of status applications. Previously, DOS had published a single chart in its visa bulletin each month indicating "Final Action Dates For Employment-Based Preference Cases," which shows when a visa was available to different classes of foreign national. Commencing with the October 1, 2015, Visa Bulletin, a second chart will be published monthly, identifying those cases that are eligible to file for adjustment of status in the United States. This is a significant change, because even though an individual may be required to wait for the availability of a permanent resident visa, he or she may file an adjustment of status application and thereby obtain employment authorization and travel documents much sooner than under the old system, and continue to receive these benefits throughout the waiting period. For more information, please see http://www.globalimmigrationblog.com/2015/09/uscis-and-dos-announce-revised-procedures-for-determining-visa-availability-for-applicants-waiting-to-file-for-adjustment-of-status/. (Unfortunately, on September 29, DOS published a revised chart rolling back the eligible filing dates by several years, mooting the effort and expense incurred by many applicants initially eligible under the September 9 announcement. This reversal has been challenged by a class action complaint filed on behalf of the thousands of affected individuals.)

In addition, USCIS has announced that, beginning with the November 2015 DOS Visa Bulletin, it will issue a determination within approximately one week following the publication of the Visa Bulletin whether individuals may use the Dates for Filing Visa Applications chart. If USCIS does not post such a determination, individuals should continue to refer exclusively to the Application Final Action Date chart on the USCIS website. This monthly announcement from USCIS can be found at www.uscis.gov/visabulletininfo.

These changes and others are likely to have a significant impact on employment eligibility for individuals and businesses.

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Proposed New OPT Rules: Up to 3 Years OPT for STEM + Cap-Gap Relief

The U.S. Department of Homeland Security has proposed amending its regulations on the optional practical training ("OPT") program to allow international F-1 students with U.S. degrees in the sciences, technology, engineering, or mathematics ("STEM") – attained from accredited institutions – to extend by 24 months the standard 12-month OPT period available to them to remain in the U.S. to pursue degree-related work experience. This proposal would supersede the 17-month extension currently available to STEM degree holders. In addition, F-1 students may qualify for the extension based on a previously attained U.S. STEM degree from an accredited institution of higher education.

The new proposal responds to a court decision vacating a similar 2008 DHS regulation based on procedural grounds.

The extension comes with some conditions, including increased oversight over the employment of STEM OPT beneficiaries. Employers must be enrolled in the E-Verify employment eligibility verification program. Employers also must implement formal mentoring and training plans, and make certain attestations, similar to those required of other employment-eligible visa categories. An employer must attest that:

(1) the duties, hours, and compensation are commensurate with those applicable to similarly situated U.S. workers;

(2) there are sufficient resources and equipped personnel available to provide appropriate mentoring and training;

(3) there will be no lay-offs or furloughs of any U.S. workers arising from the STEM student's training;

(4) the opportunity advances the student in attaining his or her training objectives; and

(5) ongoing reporting requirements will be observed.

Additionally, the proposal provides continued Cap-Gap relief. Where an F-1 student is named the beneficiary in a timely filed H-1B cap petition, his or her duration of status ("D/S") and any current employment authorization/OPT would be extended until October 1st of the fiscal year for which the H-1B visa is being requested.

DHS's proposed regulations improve the integrity of the STEM OPT program by encouraging students to gain valuable, practical STEM experience, while preventing adverse effects to U.S. workers. By enhancing their functional understanding of how to apply academic knowledge in a work setting, students will be better qualified to embark on careers in their respective fields of study. These on-the-job experiences would be obtainable only with employers committed to developing students' knowledge and skills through practical application. Moreover, the proposed rules aim to maintain our competitive edge in attracting international STEM students to study and lawfully remain in the United States.

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Gary Pappas and Meredith Stewart Join Jackson Lewis

We are pleased to announce **Gary A. Pappas** and **Meredith K. Stewart** have joined the firm's Boston office. They were previously the two principals in the boutique Boston immigration firm of Pappas, Lenzo & Stewart LLP.

"Jackson Lewis' Immigration Practice Group is on the move, as evidenced by our recent growth in Phoenix and Houston," said Sean G. Hanagan, Leader of the Group. "We are pleased to continue to attract top immigration talent and excited to welcome esteemed practitioners Gary and Meredith to our expanding team. Their many years of varied immigration law experience will quickly prove to be a valuable asset to our client base in New England and throughout the county."

Mr. Pappas has been practicing immigration law since 1972 and has been an active member of the American Immigration Lawyers Association since 1974. He served two terms as chairman of the Massachusetts Bar Association Committee on Immigration Law and Practice and served as a panel lecturer for various seminars on business immigration law presented by the Massachusetts Continuing Legal Education and American Immigration Lawyers Association. Mr. Pappas is a retired Brigadier General and former commander of the Massachusetts Army National Guard. Mr. Pappas may be reached at Gary.Pappas@jacksonlewis.com.

Ms. Stewart focuses her practice on employment-based non-immigrant and U.S. lawful permanent residence petitions, including H-1B visas, L-1A and L-1B visas and O-1 visas, as well as Applications for Permanent Employment Certification before the U.S. Department of Labor and first preference petitions based on extraordinary ability, outstanding research, and multinational executive/managerial role. Furthermore, Ms. Stewart has significant experience in the preparation of E-2 investor visa submissions to U.S. Consulates worldwide in a variety of industries, and in addition, advises on I-9 and compliance issues for established corporate clients. Ms. Stewart, who is fluent in Italian and has a strong working knowledge of French, is an active member of the American Immigration Lawyers Association. Ms. Stewart may be reached at Meredith.Stewart@jacksonlewis.com.

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About the Jackson Lewis Immigration Practice Area

The Jackson Lewis Immigration practice is a multi-cultural team of professionals with a command of 15 languages, working to provide a broad range of immigration law services. Our attorney paralegal team model leverages significant corporate immigration experience held by group attorneys with the efficiency and cost-effectiveness of a highly trained paralegal pool. We:

- Train and advise employers on I-9 employment eligibility verification, Social Security "no match," and E-Verify practice and requirements.
- Help establish in-house visa programs and policies to streamline international transfers and visa sponsorship considerations.
- Represent companies in government audits.
- Assist companies in obtaining temporary and permanent employment visas for foreign employees in the United States.
- Counsel recruiting staff and management about the visa system to facilitate strategic planning for key employees.
- For outbound visa assistance, working in concert with a network of leading foreign law firms, offer seamless global coverage for the movement of critical staff.

See our Immigration Blog

http://www.globalimmigrationblog.com/
for regular updates on immigration matters.

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