

## Immigration Legislation and Changes to Watch for in 2015

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President Barack Obama's November 20, 2014, announcement regarding executive actions he will be taking on immigration reform has put into motion a number of changes to U.S. immigration law in 2015 that could be important.

While Congress moves to block the President's actions, as well as to introduce its own reform legislation, and many states challenge the executive action, other major legislative and regulatory developments are taking place that immigration attorneys will be watching.

### Revisions to Adjustment of Status

Adjustment of Status is the process by which individuals who have been sponsored for permanent residence by a family member or employer can apply to become a permanent resident. New adjustment regulations would reflect revisions to how the State Department uses the Visa Bulletin, as well as accelerate the period when the Adjustment of Status applications can be submitted. Currently, an individual cannot file for Adjustment of Status until a visa number is available. The President's executive action would allow an individual with an approved immigrant visa to apply for Adjustment of Status despite the fact that a visa number is not available. Doing so will provide benefits to foreign nationals and their families, including greater flexibility in employment and travel. It also will become easier for foreign workers to switch employers. Presently, a foreign worker being sponsored by an employer cannot switch employers without her new employer sponsoring a new and expensive green card process until the Adjustment of Status has been pending for 180 days, and then only if the position will be in the same or a similar position as the sponsored position. The President's guidance directs the U.S. Citizenship and Immigration Services ("USCIS") to issue better guidance on what constitutes "same or similar" positions.

### Easing of Demand on H-1B Visas

The H-1B visa category is essential to many businesses that wish to employ foreign nationals in professional positions. Each year, the government makes available 65,000 new H-1B visas (this limit is commonly referred to as the "H-1B cap") for individuals who have not recently or ever previously held H-1B status. The actual number of visas available under the cap is lower because of set-asides for certain countries under Free Trade Agreements. Further, under the advanced degree exemption, an additional 20,000 H-1B numbers are available for individuals who have obtained a U.S. Master's degree or higher. For Fiscal Year 2015, which began October 1, 2014, USCIS received more than twice as many H-1B applications as there were visa numbers available, and for Fiscal Year 2016 (USCIS will accept petitions beginning April 1, 2015), the demand is expected to be higher. Both President Obama and Congress have taken steps to ease this demand.

### *STEM Students*

The STEM Program allows foreign graduates in the Sciences, Technology, Engineering or Mathematics to obtain longer periods of post-graduation work authorization if they go to work for employers who participate in the government's E-Verify program. The original STEM program allows for an additional 17 months of employment authorization. The Administration is expected to publish proposed rules in the spring that would: (a) increase the number of years that STEM graduates can remain in the U.S. under post-completion optional practical training (OPT) — this would be for F-1 students earning degrees at U.S. universities in STEM fields; and (b) allow individuals whose first college degree is in STEM, but whose second degree (such as MBAs with undergraduate engineering degrees) is not, also to qualify for STEM OPT.

### *H-4 Dependents*

The Department of Homeland Security expects to publish a final rule in early 2015 regarding work authorization for the spouses of H-1B workers being sponsored for green cards. This would allow certain spouses of persons with H-1B work authorization to obtain work authorization cards that are not restricted (meaning, they can apply for jobs anywhere). As the permanent residence process can take 4 to 10 years for some sponsored foreign workers, this would be a significant benefit for their spouses, who otherwise

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would need to obtain their own H-1B visas or wait until the very end of the process to seek U.S. employment.

### ***Senate Bill Would Raise H-1B Cap***

A new bipartisan Senate Bill, the Immigration Innovation (I-Squared) Act, introduced by Senators Orrin Hatch (R-Utah), Amy Klobuchar (D-Minn.), Marco Rubio (R-Fla.), Chris Coons (D-Del.), Jeff Flake (R-Ariz.), and Richard Blumenthal (D-Conn.), would initially raise the H-1B cap from 65,000 visas per year to 115,000. Thereafter, the cap would be adjusted based on demand, up to a maximum of 195,000 and down to a minimum of 115,000.

### **PERM Regulations to be Revised**

PERM Labor Certification is the way an employer typically will sponsor a foreign worker for permanent residence. It is done through the Department of Labor and has not been updated in approximately 10 years. The President's executive action calls for DOL to streamline the PERM process and, perhaps, allow the DOL to work through its significant backlog of cases and reduce the processing time to less than six months.

### **Clarification of Specialized Knowledge for L-1B Visa Program**

Under the L-1B Visa Program, multi-national employer may transfer workers to the U.S. who possess "specialized knowledge" needed in the U.S. USCIS has long taken a narrow and sometimes inconsistent view of what constitutes "specialized knowledge," making it difficult for employers to use the category. Two developments in 2014, however, could change this. First, a federal appeals court in Washington, D.C., rejected the agency's determination that L-1B "specialized knowledge" cannot be "inherent knowledge a person gains as a result of his or her upbringing, family and community traditions, and overall assimilation to one's native culture necessarily falls into the realm of general knowledge." In its decision, the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court's decision granting summary judgment for the government and remanded the case for further proceedings. *Fogo De Chao (Holdings) Inc. v. U.S. Department of Homeland Security*, No. 13-5301 (D.C. Cir. Oct. 21, 2014). The ruling could broaden the range of professionals eligible for transferee specialized knowledge visas. Second, in response to the President's executive action, USCIS has stated that it will issue clear, consolidated guidance on the meaning of "specialized knowledge."

### **Promoting Research, Development, and Entrepreneurs**

There will be policy guidance issued allowing "researchers, inventors, and founders" to qualify for National Interest Waivers ("NIW") under the Employment-Based Second Preference category. The goal is to expand the use of the category for foreign nationals whose work will benefit the U.S. In addition, USCIS will develop a program to permit such individuals to enter the U.S. temporarily to pursue these activities prior to obtaining the NIW.

### **Interagency Cooperation on Worksite Enforcement**

U.S. Immigration and Customs Enforcement's coordination with the Department of Labor regarding worksite enforcement will be strengthened. Better cooperation among ICE worksite enforcement, Department of Justice (Office of Special Counsel), the National Labor Relations Board, and the Equal Employment Opportunity Commission, also will be addressed. The increased coordination and cooperation is expected to lead to more workplace investigations.

Jackson Lewis attorneys in the [Immigration](#) practice are available to answer inquiries this and other workplace issues.

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