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Immigration for Employers

Summer 2015

Obama's Executive Order: Opportunities, Pitfalls, and Challenges for Employers

President Barack Obama's November 20, 2014, Executive Order sought to expand the number of individuals who qualify under the Deferred Action for Childhood Arrivals program ("DACA") and to provide employment authorization to undocumented immigrants who are parents of U.S. citizens or of permanent legal residents under the "Deferred Action for Parents of Americans and [of] Lawful Permanent Residents" ("DAPA").

DACA was created in the spring of 2012 as a measure of relief to "Dreamers" when the DREAM Act failed to pass in Congress — thousands of previously ineligible individuals have obtained employment authorization since.

While these programs are temporarily on hold due to a court injunction, it is anticipated that they will move forward, adding many new lawful workers to the labor pool.

The increased number of "Employment Authorization Documents" or "EADs" from the DACA and DAPA programs in the labor pool, particularly of workers not previously authorized to be employed, may prove a challenge for some employers. First, employers must diligently update their Form I-9 records to ensure that there are no gaps in employment authorization. Second, despite employers' best efforts, there likely will be gaps in employment authorization, which would raise issues regarding how to handle those gaps. Third, and likely the most difficult, employers must determine how to address workers who now disclose that they were not authorized to work when they were hired.

I-9 Reverification

The Immigration Reform and Control Act of 1986 ("IRCA") requires all U.S. employers to verify the identity and employment authorization status of all employees hired after November 6, 1986. This means employers must require all new hires to complete Section 1 of Form I-9 no later than the first date of hire and to present documentation, which the employer must record in Section 2 of Form I-9, confirming their identity and authorization to work no later than three days after the date of hire.

Immigration and Nationality Act ("INA") § 274A(a)(2) makes it unlawful for an employer, after hiring an alien for employment, to continue to employ the alien, knowing the alien is or has become unauthorized to work. Therefore, employers must reverify the employment authorization of an employee whose employment authorization document expires no later than the expiration of the authorization on file.

Gaps in Employment Authorization

Workers' Employment Authorization Document applications frequently take up to 120 days for processing by U.S. Citizenship and Immigration Services. Therefore, failure to make a new application at least 120 days before the expiration of the current EAD likely will lead to gaps in a worker's employment authorization. The Form I-9 receipt rules for EADs also can be confusing for employers, further complicating this issue. For the vast majority of expiring EADs, a receipt for an extension is not acceptable evidence for purposes of Form I-9. The exceptions to this rule are Temporary Protected Status ("TPS") and Science, Technology, Engineering and Mathematics (STEM) on Optional Practical Training (OPT) EADs.

Employers must consider how to handle employees with potential gaps in employment authorization caused by EAD renewals. Essentially, employers have two options: (1) granting a leave of absence and (2) terminating the employee and then rehiring the individual.

IRCA defines "employment" as providing services or labor for an employer for wages or other remuneration. This definition permits an unpaid leave of absence since the employee is not providing services or labor during a gap period in employment authorization. In fact, the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, has held that a leave of absence should be granted for a reasonable period of

Inside:

time for such gaps in employment authorization. *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007). The Court held that a gap in employment authorization did not constitute good cause for termination under California law because a leave of absence was a viable alternative and is consistent with IRCA. While the Ninth Circuit decision is binding only in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, the decision may inform courts in other jurisdictions. A weakness of this option is that the employer could have an employee on leave, waiting indefinitely for the employment authorization issue to be resolved. Another problem is that this option raises issues over medical insurance and COBRA, among other employee benefits.

The termination-and-rehire option, therefore, may be more appropriate as there is a clear separation at the time employment authorization ends. This makes for a cleaner record and puts the burden on the employee to request rehire once the issue is resolved.

Previously Unauthorized Workers

An increasing problem in the current DACA environment is how employers should respond to employees who disclose their unlawful status to the employer, for instance, when the employee provides a new identity or documents to the employer. If an employee admits to providing false identification for the Form I-9, should the employer terminate the employee or merely accept the new documentation? Where an employee has worked for an employer using false documents, as long as the individual is currently work-authorized, the I-9 rules do not require termination. Further, such an employee may be terminated only if doing so is in compliance with an existing written honesty policy implemented indiscriminately and consistently throughout the entire organization, as even perceived disparate treatment of employees can be viewed as national origin discrimination.

In the absence of an honesty policy, the employee should be given an opportunity to present other acceptable I-9 documentation. If the employee provides alternate documentation, the employer may accept it and have the employee complete a new Form I-9. The new Form I-9 should be attached to the old one. If the employee fails to present new documentation, the employer may terminate the employee.

While new regulations and guidelines from the Department of Homeland Security providing EADs to DACA recipients potentially may expand the labor pool, they present challenges for employers. Employers can better avoid the pitfalls and challenges by establishing and maintaining effective policies and procedures and administering them in a uniform manner.

H-1B Visa Numbers Up More Than 35%

U.S. Citizenship and Immigration Services announced on April 13 that it had completed the annual H-1B non-immigration visa lottery selection, having received approximately 233,000 petitions for fiscal year 2016 (beginning in October 2015), an increase of more than 35 percent from last year (172,500 petitions). USCIS randomly selected petitions to meet the general category cap of 65,000 and the advance degree exemption of 20,000. Based on this year's numbers, it appears that barely more than one petition in three was selected.

Alternatives to H-1B

Since the majority of employers who filed under the H-1B cap had their cases rejected, employers must consider alternatives for sponsored employees. For instance, employees just graduating or with additional Science, Technology, Engineering and Mathematics (STEM) on Optional Practical Training (OPT) time can try again for next year's H-1B cap and work this year on their OPT work authorizations. For F-1 students who will run out of OPT time this summer and new employees who are not working in another renewable status, other creative solutions may be available.

Employers with related foreign entities can assign the employee to work at the foreign entity for one year, and then sponsor the employee back to the U.S. as an L-1 intracompany transferee. This process is easier if the employee is a manager because the L-1B or specialized knowledge category, another possibility, is highly scrutinized and suffers from a disproportionately high denial rate. The L-1B guidance is under agency review and will be revised to make this a more attractive option than the H-1B for employers with related foreign entities.

If the employee has an extremely well-regarded skill set, an O-1 visa may be the right choice. O-1 is the category for workers of "extraordinary ability" and is reserved for those who have shown extraordinary ability in the fields of science, education, business, athletics, or the arts. To qualify, petitioners must show that they can meet at least three of the following criteria:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
- Membership in associations in the field for which classification is sought which require outstanding achievements, as judged by recognized national or international experts in the field.

- Published material in professional or major trade publications, newspapers, or other major media about the beneficiary and the beneficiary's work in the field for which classification is sought.
- Original scientific, scholarly, or business-related contributions of major significance in the field.
- Authorship of scholarly articles in professional journals or other major media in the field for which classification is sought.
- A high salary or other remuneration for services as evidenced by contracts or other reliable evidence.
- Participation on a panel, or individually, as a judge of the work of others in the same or in a field of specialization allied to that field for which classification is sought.
- Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.

Finally, employers can join ongoing lobbying efforts to change the H-1B cap and process. For example, high profile technology figures, including Facebook cofounder Mark Zuckerberg, have founded FWD.us, a nonprofit organization that supports comprehensive immigration reform and, specifically, more investment in scientific innovation.

Please contact a Jackson Lewis immigration attorney if you have any questions about the H-1B or other visas.

Lucrecia Davis and Matthew Martinez Join Jackson Lewis

We are pleased to welcome **Lucrecia M. Davis** to our Houston office. With more than 15 years of corporate immigration experience, Ms. Davis has represented a variety of multinational clients throughout a broad range of industries including energy/oil and gas, financial services, pharmaceutical and software consulting. She partners with clients to provide strategic counsel on all matters involving U.S. immigration and nationality law, as well as policy and compliance. She advises on all major employment-based temporary and permanent visa categories, family-based permanent residence matters, and naturalization.

Ms. Davis has in-depth experience working within the international energy sector and has assisted prominent professionals, including senior executives, scientists, researchers, and engineers with obtaining permanent residence based on demonstrated international expertise and prominence in their fields. Ms. Davis may be reached at Lucrecia.Davis@jacksonlewis.com.

We also welcome **Matthew Martinez** to our Phoenix office. Mr. Martinez practices immigration and nationality law, providing immigration-related counsel for multinational corporations, academic institutions, information technology providers and users, foreign investors, performers, professional athletes, manufacturers and individuals from numerous countries.

He works with companies to conduct internal I-9 audits in an effort to assess compliance with immigration, employment and discrimination laws, and works with clients to develop hiring policies and procedures. He also assists employers in responding to agency-initiated workplace investigations and in defending against immigration-related discrimination complaints.

Mr. Martinez works closely with companies from diverse industries, including the golf, resort, equine, and lumber, to develop guest worker programs that provide temporary and seasonal workers. In addition, he represents employers and athletes in the equine industry, including companies and individuals involved in thoroughbred horse racing, equestrian competition, and equine transport.

He also assists companies in sending employees abroad, working with HR professionals and individual employees to obtain appropriate outbound visas. Mr. Martinez is an active member of the American Immigration Lawyers Association and frequent lecturer on domestic and global immigration law issues. He is fluent in Spanish.

Mr. Martinez may be reached at Matthew.Martinez@jacksonlewis.com.

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 more than 300 years of combined 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.

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