Immigration Update
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Dear Jeff,

Foreign Students in STEM Fields Get More Time on Their F-1 OPT

Effective May 10, a new rule published by the Department of Homeland Security (DHS) will make a big difference for foreign students majoring in STEM (science, technology, engineering, mathematics) fields. In an effort to attract and retain more foreign students, DHS is permitting a 24-month extension for foreign students who have U.S. STEM degrees and are doing their Optional Practical Training (OPT) in a STEM field. The current rules allow for a 17-month extension for STEM students after their one year of OPT if their employers participate in E-Verify. While the new rule creates opportunities for foreign students, employers will have additional paperwork requirements in order for their foreign student employees to take advantage of the extension.

In addition to the two additional years of employment authorization post-graduation, STEM students will have additional opportunities to play the H-1B lottery during their 36 months of OPT. With the quota stagnant and the number of petitions rising, this is a huge benefit for foreign students. Summer STEM graduates often take advantage of OPT and are frequently sponsored by their employers for an H-1B visa in April. If they are selected, they transition into H-1B status in October. If not, they can apply for the STEM OPT extension and have two full years to work - and two additional chances to apply for the H-1B visa.

For foreign students to receive a STEM OPT extension, they will need to obtain an updated I-20 form from their Designated School Official (DSO). Students and employers will have to work together to create a formal training plan that identifies learning objectives and a plan to achieve those goals. While mandatory employer enrollment in E-Verify is a holdover from the current OPT STEM extension rule, employers now also must attest to the fact that they possess the resources to implement the training plan, that the work will be an educational benefit to the student, that no U.S. worker will be displaced, and that the student will be paid the wages and benefits comparable to other similarly situated U.S. workers employed at the work site.

The new rule also requires more oversight of the STEM OPT program. DHS will impose a basic validation requirement six months into the STEM OPT extension that will collect biographic and employment information from the foreign national. At the one-year mark, DHS expects a self-evaluation report to be drafted by the student and provided to their DSO. Any material

changes must be reported immediately.
The additional rules and paperwork are a price worth paying for extended employment opportunities that benefit both students and employers. And, the extra chance to play the H-1B visa lottery is a huge collateral benefit for STEM students. It seems that DHS and the Administration are serious in their commitment to attracting and retaining foreign graduates.

Update on FY2017 H-1B Cap-Subject Processing

On April 9, USCIS advised the public that it used a computer-generated random selection process, or lottery, to select petitions to meet the FY2017 cap. USCIS received over 236,000 H-1B petitions during the filing period and will begin premium processing no later than May 16, 2016. About the same number was received last year.Last year, regular processed cases were adjudicated anywhere from two to five months after filing.

USCIS will now begin notifying petitioners of selection in the form of a receipt notice. In the past, petitioners received advanced-degree cap receipts first. Shortly afterwards, regular cap-case receipts were mailed. We can expect USCIS to take about a month to announce that all of the receipts have been mailed. However, petitioners cannot confirm selection or rejection until a receipt is received or the H-1B package is returned.

Updates from the DOL Regarding the PERM Process - Insights for Employers

For many employers who wish to sponsor a foreign national on an employment basis, they must take steps to establish that there are no willing, qualified, and able U.S. workers available for the position, and that the foreign national will be paid the prevailing wage for the job. This portion of employment-based permanent immigration is handled by the Department of Labor (DOL) and is called PERM labor certification. In the last fiscal year, DOL adjudicated 89,151 PERM cases, an increase of 17% in the number of cases filed. In late February, DOL held a stakeholders meeting to discuss the labor certification process. The resulting report contained three issues that employers will want to consider when pursuing a PERM application: potential fees, job titles, and skill experience.

Perhaps most disheartening about the report is the indication that DOL is considering instituting fees for the PERM process. Today, filing a prevailing wage request and a labor certification is free. But, due to a lack of funding to address the growing number of cases and backlogged audits, DOL is looking for filing fees to cover those costs and it is looking to employers. As an example of the need for increased funding, DOL reported that prevailing wage determinations, the first step in the PERM process, now take longer than 60 days to reach a determination due to a lack of staffing and funding. While there was no indication when filing fees would be implemented, they are on the horizon.

Another issue mentioned in the report is the job title of the offered position. Employers often have their own ideas about how they want to title a position, what experience will be required, where and how they want to recruit, and how much the salary will be. These ideas rarely align with DOL's expectations, especially the job title and salary. For example, the DOL report confirmed that positions with words like "Senior," "Chief," or "Journeyman" in the title will merit a higher salary, often $8,000 to $12,000 more than expected, even if the position is entry-level. Employers should be mindful of this before adding

arbitrary titles to entry-level positions because it will make a difference in DOL's salary assignment.

Also, when an employer is recruiting for a position that requires three years of experience and a specific skill (like C++ programming), they need to be sure that their intended foreign worker has both three years of experience and three years of that specific skill. DOL has been issuing denials over imputed quantification of the specific skill. DOL acknowledged this practice in the report and did not express any desire to change. Likewise, DOL has been unkind to employers who describe the salary as "competitive," "negotiable," or "depends on experience," or who fail to include any offered housing in the advertising language.

The PERM process is unforgiving, but if employers have a better idea of what to expect, and how to align their business needs with DOL regulations, chances of a successful PERM filing increase dramatically. This is best accomplished when employers are educated about the basics of PERM applications and work with their attorneys.

USCIS Processing Times - What to Expect

Immigration cases often move at a snail's pace and require much patience. Processing times often change and often do so without notice. Nevertheless, posted processing times by USCIS have, in the past, served to reasonably estimate when a case should be decided and help all concerned manage their expectations. Now not so. USCIS-posted processing times uniformly appear to be out of synch with reality. Not only are posted processing times not updated regularly, but when inquiries are made with the National Customer Service Center, USCIS representatives frequently advise that the posted processing times are not the real processing times. In response to this lack of transparency as well as a growing backlog in processing, the immigration bar has requested a meeting with USCIS Director León Rodrìguez to discuss the processing times problem. Stay tuned.

Supreme Court to Hear Oral Argument on President's Executive Actions on Immigration

On April 18, the U.S. Supreme Court will consider United States v. Texas, a politically charged lawsuit about the legality of some of President Barack Obama's executive actions on immigration. The initiatives in dispute - expanded Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) - have been on hold since a district court in Texas issued a preliminary injunction in the case in February 2015. A Supreme Court decision in favor of the United States could clear the way for the initiatives to go forward as early as June 2016 and provide temporary relief from deportation to as many as 3.7 million people.

The case now before the Supreme Court involves a lawsuit filed in federal district court in the Southern District of Texas by 26 states seeking to block implementation of the President's plan to expand DACA and implement DAPA. The states claim that expanded DACA and DAPA violate federal laws and the Constitution. Specifically, they make the following claims:

- Expanded DACA and DAPA violate the "Take Care Clause" of the Constitution, which states that the President must "take Care that the laws be faithfully executed."
- Expanded DACA and DAPA violate the Administrative Procedure Act (APA) because these initiatives are arbitrary and capricious or otherwise not in accordance with the immigration laws.
- The federal government did not comply with certain technical procedural requirements under the APA, including notice-and-comment rulemaking, before it announced the expanded DACA and DAPA initiatives.

The Supreme Court first will consider whether the states have standing, or legal capacity, to bring the lawsuit. In addition, the Court may consider whether expanded DACA and DAPA are lawful or whether they violate the Constitution or the APA.

Should the Justices reach a 4-4 decision, rather than a majority, the Fifth Circuit's decision would remain intact. As a result, the injunction preventing implementation of DAPA and expanded DACA would remain in place, and the district court would proceed to the merits of the case.

USCIS Proposing to Cancel Interim Employment Authorization (EAD) Cards

Under current regulations, if an initial applicant for work authorization does not receive a decision within 90 days of filing, USCIS must issue an interim work card. However, USCIS recently proposed a rule that will eliminate that obligation. If accepted, the result of this new rule would affect employment-based visas dependent on the EAD card, family-based green card applicants, foreign students, U visa recipients, asylum applicants, and individuals in removal proceedings. In the context of adjustment of status, work authorization and advance parole travel authorization are adjudicated together, thus the new rule could have a negative effect on the issuance of combo cards. The proposal does provide for automatic extensions for applicants who apply to renew their previously granted EADs. Comments to the proposed regulation were due in late February. It is unclear when final rules will be promulgated.

E Visa Holders Can Obtain New Two-Year Admission Period At Land Border But Need to Request It

The immigration rules permit an individual with an expired visa who travels solely to a contiguous territory for up to 30 days to be readmitted to the United States, effectively revalidating that visa. The foreign national is neither issued a new I-94 nor receives an extended admission period, but instead uses the unexpired I-94 period of admission. E visa holders who have unexpired visas and who travel to Canada or Mexico for 30 or fewer days should be issued a new two-year period of

admission. However, they are routinely being readmitted to the U.S. on their unexpired I-94s for the sake of expedience. While at an airport, where I-94s are automated, a fresh two-year admission period will be given. But this is not necessarily the case at land borders. To resolve this issue, CBP has advised that such applicants seeking a two-year I-94 at a land border crossing should request one and be able to articulate why it is necessary.

Chinese Nationals Visiting the U.S. Expected to Enroll in Online EVUS System by November

Beginning in November 2016, nationals of China using a 10-year business or tourist visitor visa (B-1/B-2) to enter the United States will be required, before being admitted, to also enroll in the Electronic Visa Update System (EVUS). The requirement is the result of a reciprocal agreement between China and the U.S. to issue visitor visas with a 10-year validity period. Currently, visitor visas are only issued for one year at a time for travelers between the two countries.

The EVUS is the online system that is used to periodically update biographic information in order to facilitate travel to the United States. All visitors from China, including current visa holders, will be required to enroll in EVUS before November. Enrollment consists of completing a form and paying a nominal fee. Enrollment in the system will only stay valid for two years at most, when Chinese nationals will have to re-enroll to continue traveling to the U.S. on a B-1/B-2 visa.