Immigration Update
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Dear Jeff,

On March 11, 2016, the Department of Homeland Security issued a final rule that will allow certain foreign students with science, technology, math, or engineering (STEM) degrees to extend their optional practical training or "OPT" period by 2 years, on top of the 1 year already allowed for graduates in all fields. The rule is scheduled to go into effect on May 10, 2016. As with the prior STEM OPT rule extensions are permitted only for students employed by employers who participate in the USCIS electronic employment verification program known as E-Verify.

The rule also increases oversight of the STEM OPT program by implementing robust new integrity measures including:
o Requiring individualized training plans developed by the employer and the student;
o Requiring the student to regularly report to the university's designated school official;
o Requiring the employer to attest that the student will not replace a full- or part-time, temporary or permanent U.S. worker;
o Requiring an employer to offer the same terms, conditions, hours, and compensation to the STEM OPT student as similarly situated U.S. workers;
o Allowing extensions only to students with degrees from accredited schools; and
o Authorizing site visits by ICE to verify training plans, compensation, and non-displacement attestations employers are required to sign.

The implementation rules are slightly different for those who have a pending Form I-765 requesting a 17-month STEM OPT extension, and for those who have already received a 17 month STEM OPT extension and now wish to obtain an additional 7 months of OPT.

Please contact our office for more information on these important differences.

Best,

Jeffrey W. Goldman

H-1B Professional Visas - Close to Deadline for April Filings

Once again it is H-1B filing season, and, once again USCIS is likely to receive a record number of petitions and the full allocation of visa petitions in the first week of filing commencing April 1. Once the quota is reached, new H-1B visa requests will not be accepted until April 1, 2017, for work that commences on October 1, 2017.

Visas for professional specialty workers (H-1Bs) are capped at 65,000 per fiscal year. Another 20,000 visas are available to workers with advanced degrees (Master's or higher) obtained at U.S. institutions of higher education. Of the total 85,000 H-1B visas available, some 6,800 visas are set aside for nationals of Chile and Singapore under special rules of H-1B1 visas.

While some H-1B petitions can be filed at any time because they are cap exempt, the vast majority of H-1B petitions for new work must be filed in April. Thus, employers should immediately identify first-time H-1B employees and begin preparing necessary petitions for the early April filing period.

Supreme Court to Review

Administration's Executive Actions on Immigration

President Obama's late 2014 executive order on immigration that would offer protection from deportation (and work permits) to more than four million undocumented immigrants has been tied up in the courts since February 16, 2015. However, the Supreme Court has recently granted certiorari to the case known as Texas v. U.S., and will be reviewing the Fifth Circuit's decision to uphold the court-ordered injunction. The Justice Department's legal brief is due in March, followed by oral argument in late April or early May. The Supreme Court is expected to reach a decision on the case sometime in June.

The Supreme Court has directed the parties to provide a full briefing on the legality of DAPA (Deferred Action for Parents of Americans) under the "Take Care" Clause of the Constitution (Art. II, §3). This is a unique turn of events because the court rarely adds issues to the case that were not heard on appeal below. Consequently, the Supreme Court's holding in Texas v. U.S. may have serious implications concerning the responsibilities and power of the executive branch for this and future administrations.

That said, if the Court were to issue an evenly divided 4-4 decision (now a possibility with the recent passing of Justice Scalia), the opinion would only have the effect of affirming the Fifth Circuit's decision; it would not necessarily preclude other circuits from deciding differently.

Employment-Based Immigrant Visa Categories for India and China

Professionals from India and China face multiple-year visa waits because their employment-based (EB) visa categories are oversubscribed. Recently, however, there has been some significant forward movement, reducing wait times in some categories by as much as six months. Below is a summary of waiting times and the reasons for the movement:

EB-2 India: In the March Visa Bulletin, the EB-2 India final-action date advanced to October 15, 2008, shaving off 8½ months from where the category was just three months ago. The Department of State (DOS) explains that demand was less than anticipated - thus the forward movement - and also reflects a strategy of advancing dates more aggressively earlier in the year in an effort to ensure that cases can be completed and all visa numbers used within the fiscal year. The lower demand may be attributable to fewer EB-3 to EB-2 upgrades than expected, or that the last advancement sufficiently captured the bulk of the demand. Low demand also may be the result of USCIS working through a backlog of EB-2 India cases, which would give the appearance that demand has tapered off. The category, advises DOS, is not expected to move at this pace in the coming months.

EB-2 and EB-3 China: The EB-2 Final Action date for China continues to lag behind the EB-3 China Final Action date in March - August 1, 2012 for EB-2 and June 1, 2013 for EB-3. DOS explains that while demand decreased in November and was relatively low in December, demand for this category was high in October. At the same time, demand for EB-3 China is on the low side. Thus, EB-3 China continues to advance. Because the EB-3 category cut-off date for China continues to be more than 10 months ahead of EB-2 China, foreign nationals and their employers degrade from EB-2 to EB-3, which in turn causes greater than normal fluctuations in both categories.

On a related note, USCIS has determined that for family-sponsored filings, the "Dates for Filing Visa Applications" chart for March 2016 may be used. For employment-based filings, the Application "Final Action Dates" must be used.

Democrats Introduce Bill that Would Mandate Legal Representation for Unaccompanied Children and Vulnerable Immigrants

On February 11, several Democratic senators introduced the "Fair Day in Court for Kids Act of 2016," which mandates that unaccompanied children and vulnerable immigrants receive legal representation. The bill requires the government to appoint and pay for counsel for unaccompanied children and particularly vulnerable individuals, such as persons with a disability; victims of abuse, torture, or violence; or individuals whose circumstances are such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings. The bill also clarifies and expands access to counsel for other immigrants in removal proceedings, whether or not they are detained, and requires DHS to provide such immigrants with all relevant charging documents before their removal proceedings can move forward. Moreover, information about legal services at detention facilities would be provided through formal procedures that ensure that legal orientation programs are available for all detainees. Also, a two-year pilot program to provide legal orientation programs to nondetained asylum seekers would be created in at least two immigration courts.
Our nation has one of the most complicated immigration systems in the world, and one of its huge flaws is that it does not guarantee legal representation to individuals facing deportation. This bill represents a huge step toward ensuring fairness in these complex proceedings

New Rules Tweak Certain Nonimmigrant (E-3, H1-B1, CW-1) and Immigrant (Professor/Researcher) Visa Classifications

The Department of Homeland Security (DHS) has published new rules, effective February 16, 2016, that tweak the eligibility requirements or the work authorization process for four visa classifications. Below is a summary of what has changed:

Outstanding professors and researchers are eligible for priority worker immigrant visa classification if they can demonstrate international recognition in their academic field, three years of experience in teaching or research, and an offer of employment at an institution of higher learning or research facility. USCIS regulations provide six categories of acceptable evidence to demonstrate international recognition; however, those categories are limiting and do not specifically allow for other kinds of evidence that could equally establish eligibility. The new rule provides for greater flexibility by adding a catch-all category of acceptable evidence - "comparable evidence to establish . . . eligibility"- that would permit other significant accomplishments and achievements, such as important patents and peer-reviewed

funding grants, for consideration. This additional language aligns with comparable evidence that can be presented in the extraordinary ability category.

E-3, H-1B1, and CW-1 are nonimmigrant work visa categories that have been treated as the other nonimmigrant work-visas classifications with respect to work authorization "incident to status," even though the regulations did not specifically provide for such. Visa holders in other nonimmigrant work-visa classifications are permitted to work for 240 days during the pendency of a timely filed extension application, but these nonimmigrants were not expressly permitted to do so even though in practice they were. The new rule remedies these anomalies and makes the categories consistent.

What are these visas? Available only to nationals from Australia, the E-3 visa is similar to the H-1B professional specialty worker visa. The H-1B1 visa is a result of free trade agreements with Chile and Singapore and is also similar to the H-1B. The CW-1 visa allows certain workers in the Commonwealth of the Northern Mariana Islands (CNMI), a small group of islands within the Mariana archipelago that has been under U.S. control since the end of World War II, to work there. The CNMI has its own immigration laws but is slowly transitioning to U.S. federal immigration compliance.

One-to-One Facial Image Comparison Project at JFK Airport

Last spring, travelers passing through customs at Dulles International Airport noticed new equipment being tested there. That equipment was the one-to-one facial image comparisons assisting U.S. Customs and Border Protection (CBP) in identifying possible fraudulent usage of valid passports. After a successful testing period at Dulles, DHS has installed the new technology in three terminals at John F. Kennedy International Airport in New York City.

The system was developed by Unisys as part of its Land Border Integration contract with CBP. The facial-comparison technology relies on the personal image on a passport's biometric page (which is electronically stored on the small chip in the ePassport and compares it to a live facial image taken at the CBP booth. The system then generates a match confidence score indicating the likelihood of a match between the two photographs. If there is a successful match, the live facial image is not retained.

Facial image comparisons will be used for returning U.S. citizens with ePassports and first-time Visa Waiver Program travelers. The latter have been included because Homeland Security has identified an appreciable risk of passport and identity fraud among this population of travelers, exacerbated by recent terrorist attacks. Since travel on the Visa Waiver Program accounts for about two-thirds of all business and leisure travel to the U.S., the new technology will be heavily used.

Given its success as a test program, Dulles Airport is expected to adopt the new facial-comparison program in February 2016. CBP has not stated whether additional airports will use the one-to-one program, but the agency will be conducting additional tests to evaluate new biometric technologies in different environments in 2016.

What to Do When the Examiner at Your Adjustment Interview Requests Your EAD

Local field offices can ask for EAD (Employment Authorization Document) cards from applicants at the conclusion of successful adjustment of status interviews. This is because once the application has been approved, the foreign national is no longer an applicant for adjustment of status, but a permanent or conditional resident. As a result, the authority under which the EAD was granted no longer applies, and the card is no longer valid. Unfortunately, the EAD is often the only document a foreign national has to demonstrate lawful status in the U.S. Many field offices do not issue an I-485 approval notice at the conclusion of the interview, nor routinely place "I-551" lawful permanent resident stamps in passports immediately after a successful interview. By confiscating the EAD at the interview, the foreign national is left without any documentation regarding his or her status in the United States. Should an officer request an applicants EAD card at the conclusion of a successful adjustment interview, request an approval letter or an I-551 stamp. While most green cards are being produced and mailed within two to three weeks of the approval, an approval letter or stamp can serve as proof in the interim and in the event that the green card is not delivered as planned.

Copy of Approval Notice Sufficient for O and P Canadian Travelers

Some Canadian O and P travelers recently have been told by CBP officers that their admission may be denied for not having the original I-797 approval notices when they seek to enter the United States. In a recent meeting, CBP confirmed that presentation of a photocopy of an approval notice is sufficient for CBP to verify the petition validity and grant admission. The issue arises because Canadian nationals are exempt from the visa requirement for O and P visas and often are approved with multiple beneficiaries but only receive one original approval notice. Because the beneficiaries frequently do not travel together, only one person will have the original and all others only copies.

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