June 2015 Newsletter
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Update on President's Executive Action on Immigration

Federal Court Challenge to DAPA and Expansion of DACA

On May 26, the U.S. Court of Appeals for the Fifth Circuit denied the federal government's request for an emergency stay of the preliminary injunction that temporarily halted the implementation of some of President Obama's deferred action initiatives. These initiatives, announced last November, include Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and an expansion of Deferred Action for Childhood Arrivals (DACA). These initiatives could shield as many as 5 million immigrants from deportation. As a result of the court's decision, the preliminary injunction remains in place and, in turn, the DAPA and expanded DACA programs remain on hold. The Fifth Circuit now will consider the appeal of the lower court's ruling, but not on an emergency basis and will hear arguments in early July.

Two judges on the three-judge panel voted to deny the emergency stay. Judge Stephen A. Higginson, the judge who was in favor of granting the emergency stay, stressed the political nature of this case in his dissenting opinion. He stated that it is inappropriate for the courts to intervene in such a political dispute. Considering that over 100 legal scholars agree that President Obama's executive actions on immigration are "within the legal authority of the executive branch," there is no doubt that this battle will continue in the coming months. Unfortunately, until then, millions of immigrants will have to continue to live in uncertainty.

Implementation of Business and Employment-Based Immigration Relief

Meanwhile, the Administration has announced its plans to begin implementing a number of business-related immigration fixes — fixes also contained in the President's executive action — through the formal administrative rulemaking process. The following were included in recent relevant agency regulatory agendas:

Immigration Avenues Promoting Inventions, Research, and Entrepreneurship

In August, DHS plans to issue a proposed rule that would allow "certain inventors, researchers, and entrepreneurs who will establish a U.S. start-up entity, and who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research" to enter the U.S. through its parole authority. Normally used for urgent humanitarian purposes or significant public benefit, parole allows for the admission of certain immigrants through other-than-normal channels. According to DHS, the proposed rule would allow for temporary parole admission, on a case-by-case basis, based on "investment, job-creation, and other factors." There was no mention in the current regulatory agenda, however, of the use of the national interest waiver employment-based visa category for some of these immigrants — an idea that was suggested in the executive action.

Expansion of Foreign Student OPT

Also in August, DHS plans to release a proposed rule that would expand optional practical training (OPT) for foreign student graduates with STEP (science, technology, engineering, and mathematics) degrees. What this expansion would mean exactly was not detailed in the announcement, but previously the agency called for an expansion of the degree programs eligible for OPT as well as the length of time foreign graduates can work in the U.S. in OPT status.

Job Mobility Through General Work Authorization for I-140 Beneficiaries

In October, DHS plans to issue a proposed rule that would allow certain I-140 beneficiaries to obtain work authorization while awaiting their green cards and remove restrictions on the ability to change jobs or progress in careers, while facing lengthy adjustment delays.

PERM Labor Certification

In December, the Department of Labor plans to modernize and overhaul the PERM labor certification program, which has not been modified for 10 years. The program has been criticized for not reflecting changes in the U.S. workforce and common industry recruitment practices. The PERM labor certification process is the most common way employees obtain green cards by having their employer certify that no U.S. workers are willing, able, or available to perform the job. Details on exactly what DOL is thinking in terms of how any new program would operate were not released.

Other Executive Action Initiatives

DHS continues to work on guidance, both internally and with relevant agencies, to implement the other initiatives announced in November by President Obama. No specific timetable has been announced.

Employers Must File Amended H-1B Petition When Employee's Worksite Changes, Effective Immediately

On April 9, the USCIS appellate level administrative office, the Administrative Appeal Office (AAO), issued a precedent decision, *Matter of Simeio Solutions, LLC*, which held that employers are required to file an amended H-1B petition if moving an employee to a worksite location that requires the employer to certify a new Labor Condition Application (LCA). Specifically, an employer must file an amended H-1B petition if the H-1B worker's place of employment has or will change to a worksite outside of the metropolitan statistical area (MSA) or area of intended employment covered by the existing approved H-1B petition — regardless of whether a new LCA is already certified and posted at the new location. Moreover, employers are required to file an amended H-1B petition by August 19, 2015, for all employees who changed worksite locations before the case was decided. After the employer has filed the amended petition, the H-1B employee can immediately begin to work at the new location.

USCIS guidelines state that if the amended H-1B petition is denied, but the original petition is still valid, then the employee may return to the worksite covered by the original petition. The employer may also file another amended petition if a previously filed H-1B petition for the same worker is still pending. In such a case, the H-1B employee may begin work at the new location immediately upon the latest filing.

It should be noted that on June 9, USCIS Director Leon Rodriguez, speaking at the Council for Global Immigration, stated that the agency is considering applying the *Matter of Simeio Solutions, LLC* decision prospectively to provide relief to employers struggling to file all amended petitions by the August 19, 2015, deadline.
Employers, however, do not need to file an amended H-1B petition or LCA for employees whose new worksite is within the same MSA or area of intended employment. Employers are also not required to file an amended petition if the H-1B employee is moving to a non-worksite location — such as a location for employee developmental activity or business travel on a casual, short-term basis. Under some circumstances, an H-1B worker may be moved to a new worksite for up to 30 or 60 days temporarily, without obtaining a new LCA. In these cases, the employer does not need to file an amended H-1B petition.

Employers who have moved or are contemplating to move an employee to another worksite since the filing of the original H-1B are urged to contact their immigration lawyer to determine if an amended petition is required.

Push to End Family Detention

The push to end the detention of mothers and their children from Central America continues from members of Congress to advocacy groups. Here's what's happened recently.

On May 27, 136 House members joined together to call for an end to family detention. In their letter to the White House and the Department of Homeland Security (DHS), the House members called DHS's decision to increase family detention rather than use alternatives "morally reprehensible. . . .immoral and inhuman," especially when considering the particularly vulnerable refugees fleeing violence and persecution in Central America. Shortly thereafter, 33 Senators directly condemned family detention, asserting in a letter that "the prolonged detention of asylum-seeking mothers and children who pose no flight risk or danger to the community is unacceptable and goes against our most fundamental values." These letters represent significant congressional support to end the President's family detention practices. Nearly three-quarters of the members of Congress from the President's own party have now called on the Administration to end this shameful practice.

Homeland Security Secretary Jeh Johnson said during a late May Senate hearing that he's evaluating whether family detention is an appropriate policy, but no announcement of a changed policy has yet to be made.

Could an end to the Administration's questionable family detention policy be in sight? We sure hope so.

More New Versions of Common Immigration Forms: I-539 and I-907; Other New Forms Also Released

USCIS has released new forms that are commonly used in the filing of immigration cases. These include an updated Form I-539, Application to Extend/Change Nonimmigrant Status, required as of 7/6/15, and Form I-907, Request for Premium Processing Service, required as of 6/1/15. Other forms also have undergone revision, including Forms I-508 and I-508F (required as of 7/20/15), Form I-690 (required as of 8/5/15), Form I-601 (required as of 8/5/15), and Form I-693 (required as of 7/27/15).

Applicants for Green Card Renewals are Reminded of Attestation Regarding Veracity of Information Contained in I-90 Application

DHS has advised applicants who file an application to replace their green cards, Form I-90, that within the next several weeks they will see new language in their biometric appointment notices reminding them that they have already certified, under penalty of perjury, that the content of their Form I-90 is complete, true, and correct. Also, by appearing at an ASC, applicants are re-affirming that the content of their Form I-90 remains complete, true, and correct.

Class Action Filed Against USCIS and DHS for Unlawful Delays in Adjudicating Applications for Employment Authorization

In May, a nationwide, class action lawsuit was filed against USCIS and DHS for delaying the adjudication of applications for employment authorization documents (EADs). The complaint alleges that the EAD adjudication delays and failure to issue interim EADs are unlawful; specifically, that they violate the Administrative Procedure Act that governs federal agencies' actions.

Regulations require USCIS to either adjudicate an EAD application within a fixed period of time — normally 90 days — or issue interim employment authorization if this time period has expired. When USCIS fails to do either, foreign nationals are left in a precarious position: they risk losing their jobs, any work related benefits, and in some states, their driver's licenses, although they have valid immigration status.

Is Your Birth Certificate Really Unavailable? How to Find Out and What to Do If it Is

As applicants for permanent residency learn, a birth certificate with their date and place of birth and parents names reflected on the document is required for adjustment of status or immigrant visa processing at a consular post. While a copy of the birth certificate is sufficient for adjustment of his or her, originals are required for consular processing. Often a foreign national believes that his or her birth certificate is not available or that an original cannot be procured from the embassy or home country. How can you find out if your birth certificate really is unavailable and what can you do.

First, the State Department maintains a list of countries and the availability of documents in a particular country. Its Visa Reciprocity and Country Documents Finder can be found at http://travel.state.gov/content/visas/english/fees/reciprocity-by-country.html Both the National Visa Center (for consular processed green cards) and USCIS (for adjustment of status) use this reciprocity table to determine whether an applicant has gathered the minimum documents required for an adjudication. If the table says a document is unavailable in the country, then the foreign national does not need to obtain it. However, a copy of the reciprocity table should be included with the filing and its unavailability should be so noted in the cover letter.

If, however, the reciprocity table says that birth certificates are available or possibly available, the applicant must try to get it and such efforts should be documented in an affidavit for inclusion in the filing as well as the actual paper trail of such efforts. The applicant, for example, should explore whether the document can be obtained through friends, relatives, at an embassy, or even online or mail.

If a good-faith attempt to comply with the instructions was made and the birth certificate is still unavailable, then try to retrieve "secondary" evidence of the birth. This includes third-party, neutral records of the information required on the birth certificate often contained in government records, school records, baptismal certificates, medical records, hospital certificates, or entries in the family Bible or Koran. Again, document and describe in an affidavit all attempts to find these sources, successful or not. If the applicant cannot document "secondary" evidence, then prepare affidavits from people with direct knowledge of the birth. USCIS regulations require two affidavits. The very best person, if still alive, is the mother; next best is the father. Next is someone attending the birth. Then, relatives or friends alive at the time of the birth with general knowledge of the accepted details of the birth but who were not physically present at the birth. Least persuasive is a younger relative or family friend who only has word of mouth knowledge of the details of the birth, obtained long after the event.

While USCIS will often issue a request for additional evidence if sufficient birth documentation is not provided in the context of adjustment of status, for consular processed cases, the NVC will send a checklist letter to the petitioner or agent indicating what document is lacking or what changes are needed. If an applicant is unable to provide a required document listed on the reciprocity table, the applicant should provide a statement to that effect for inclusion in the case file in lieu of the document, as detailed above. The NVC will then send the case file to the post for the adjudication process. At that point, the consular officer will determine if a document is considered unobtainable and whether to permit the applicant to submit other satisfactory evidence in lieu of such document or record.

Visa Bulletin Update

While most visa categories in the *Visa Bulletin* have moved forward about a month, significantly, the Philippines Employment Third and Third Other Worker visa categories are now "unavailable" for the month of July. That category retrogressed in May and June. The

Visa Office advises that while it is possible that some unused numbers from the Second Preference category may become available for September use, these numbers for the Philippines will once again be available beginning October 1, 2015.

Technical Problems Continue at NVC with Immigrant Visa Processing; Overseas Passport and Visa System Also Experiencing Technical Difficulties

On June 4, the National Visa Center (NVC) confirmed that developers are working on solutions to three areas experiencing high incidence of error messages: submission of the DS-260 Immigrant Visa Application, DS-261 Choice of Address and Agent forms, and online payment of Immigrant Visa Application Processing Fees. The NVC stated that as it works to find a technical solution, individuals should follow the instructions posted on the DOS website, "Assistance for Applicants Experiencing Technical Difficulties." The NVC also advised that is it opening new phone lines as a work-around for customers who have been unable to complete Form DS-261 and pay their online fees. Similar problems were reported last year.

In addition, the DOS reported in early June that its Bureau of Consular Affairs is experiencing technical problems with overseas passport and visa systems. This issue is not specific to any particular country, citizenship document, or visa category.

Immigration Relief Measures for Yemini and Nepalese Nationals; TPS for Nepalese Nationals Now on DHS/USCIS Regulatory Review

USCIS advised recently on the availability of immigration relief measures that may assist eligible Yemini and Nepalese nationals in light of the current unstable security situation in Yemen and the April earthquake that struck Nepal. These include: change or extension of nonimmigrant status for an individual currently in the United States, even if the request is filed after the authorized period of admission has expired; extension of certain grants of parole made by USCIS; expedited adjudication and approval, where possible, of requests for off-campus employment authorization for F-1 students experiencing severe economic hardship; expedited adjudication of employment authorization applications, where appropriate; consideration for waiver of fees associated with USCIS benefit applications, based on an inability to pay; and assistance replacing lost or damaged immigration or travel documents issued by USCIS, such as green cards.

DHS/USCIS just added temporary protected status (TPS) designation for Nepalese nationals in the U.S. who were affected by the earthquake on its regulatory review but it is not clear when that program would go into effect.

News in Brief

The following additional items may be of interest to our readers:

Premium Processing Suspended Until 7/27/2015 for H-1B Extensions: On May 26, USCIS temporarily suspended premium processing for all H-1B Extension of Stay petitions

until 7/27/15. USCIS advised that the suspension would allow USCIS to implement the H-4 work authorization (EAD) final rule in a timely manner.

DACA Immigrant May Practice Law in New York State: An appellate panel of the New York Supreme Court held that an undocumented immigrant who is authorized to be present in the U.S. under DACA meets all other eligibility requirements governing admission to practice law in New York, including the requisite good character standard. The individual becomes the third undocumented immigrant lawyer to become eligible to practice law after court decisions in California and Florida in 2014. In those states, the legislatures also have enacted laws paving the way for the licensing of undocumented immigrants. In New York, however, such a bill died last year. The decision could be a test case affecting hundreds of would-be lawyers and empowering immigrants who arrived as children to the United States and who have been granted a reprieve from deportation.

OSC Settlement is Largest Civil Penalty in Discrimination Suit Under INA; ICE Settles I-9 Case with Washington Orchard: A Department of Justice Office of Special Counsel settlement with Luis Esparza Services, Inc., resolving claims that the company discriminated against individuals because of citizenship status, is the largest civil penalty ever secured to resolve a discrimination claim under the INA. The agreement includes $320,000 in civil penalties. Meanwhile, ICE reached a $2.25 million settlement with Prescott-based Broetje Orchards, LLC, for civil violations relating to Form I-9 issues uncovered during an audit, revealing that nearly 950 employees were suspected of not being authorized to work in the United States.