Immigration Alert:
January 2016

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I. U.S. Supreme Court to Rule on Obama Immigration Plan

On January 19, 2016, the U.S. Supreme Court agreed to hear the Obama administration's appeal from the Fifth Circuit decision that enjoined implementation of its plan to defer deportation of millions of illegal immigrants. The administration announced the plan in November 2014. Essentially, President Obama asserted that he had the executive authority to establish removal priorities that focused on more serious criminals, while allowing illegal alien parents of children to remain here and work. Both the district court and Fifth Circuit disagreed.

The plan represents one of the Obama administration's signature legacy achievements in the immigration area. The Supreme Court is expected to decide the case by the end of its term in June 2016. This would allow the plan to become effective at least until the president leaves office in January 2017. It remains unclear how many illegal aliens will sign up for the plan, even if the Supreme Court reinstates it, because they would have to reveal themselves and the next president may not continue the plan.

II. H-1B Cap Season Is Just Around the Corner

The fiscal year ("FY") 2017 H-1B cap lottery will be arriving in a few months, and employers should start preparing for it now. Continuing the trend of the last few years, employers in 2016 are likely going to face increasingly long odds in getting cases selected in the annual H-1B cap selection process. While it is impossible to predict with precision the chances for success, information from past years does not bode well for the 2016 lottery. For the FY 2014 lottery, the USCIS received approximately 172,500 petitions within its first week of filing. In 2015, that number grew to nearly 233,000 petitions. This represents about a 35 percent increase in petitions received between these two years. The 2016 H-1B lottery will likely involve even more petitions.

Smart employers will start planning now by identifying candidates for whom they want to file H-1B petitions, preparing the necessary documents to file and considering alternative immigration options for important employees who may be cap casualties.

III. The Safe Harbor Period for Compliance with *Matter of Simeio* Ends on January 15, 2016

As our readers may recall, the Administrative Appeals Office of the U.S. Citizenship and Immigration Services ("USCIS") issued the precedential decision of *Matter of Simeio Solutions* on April 9, 2015. This decision overruled previous H-1B guidance issued by the USCIS and required employers to file amended H-1B petitions whenever an H-1B employee's job location moved outside the metropolitan statistical area ("MSA") covered by the previous H-1B petition. Recognizing that this was a radical change, the USCIS issued final guidance in July 2015 and announced that the agency generally would not pursue enforcement actions against employers that did not file amended petitions for location changes that occurred prior to the issuance of *Simeio.* In the final guidance, however, the USCIS warned that location changes occurring between April 9, 2015, and August 19, 2015, required an amendment. The mandatory deadline to file the amendment and comply with *Simeio* is January 15, 2016.

Employers must be aware of their ongoing obligations under *Simeio*. If an H-1B location change outside the underlying petition's MSA occurred between April 9, 2015, and August 19, 2015, and the employer has not filed the necessary amendment petition by January 15, 2016, the USCIS will consider the employer and sponsored employee to be noncompliant. This means that the USCIS may deny future extensions and may consider the employee out-of-status.

The bottom line is that employers are now required to file an amendment for every H-1B employee who has been assigned to work at a new job location outside the relevant MSA on or after August 19, 2015.

IV. DOS Is Going to Review H-1B Visa Applications for Compliance with *Matter of Simeio*

On a related matter, the Department of State ("DOS") has entered the fray as an enforcer of the *Matter of Simeio* decision. On November 30, 2015, the DOS issued a cable that summarizes *Simeio* and advises consular officers when an H-1B amended petition is required. This cable also explains that consular officers should reverify whether employers have satisfied the requirements of *Simeio* if they learn of a change in the H-1B applicant's place of employment. The cable instructs consular officers to deny the visa application if these requirements have not been followed.

Employers should be keenly aware of the requirements imposed by the *Simeio* decision before they advise H-1B employees to carry out the visa process abroad. In the event of noncompliance, the H-1B employees may find that they will not be able to secure the new visa they need in order to return to the United States.

V. DHS Receives Three More Months to Issue Its Notice of Proposed Rulemaking Extending the STEM OPT Program

On January 23, 2016, the district court granted the request by the Department of Homeland Security ("DHS") to extend the deadline for issuing the Notice of Proposed Rulemaking ("NPRM") regarding the F-1 STEM regulations until May, 10, 2016. DHS had made its request because it claimed it was necessary to comply with the August 2015 federal district court decision that invalidated the regulation that established the USCIS's STEM (Science, Technology, Engineering, Mathematics) Optional Practical Training ("OPT") extension process. See *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security,* Civil Action No. 14-529 (D.D.C. Aug. 12, 2015). Under the OPT program, F-1 students are eligible to obtain work authorization for up to 12 months. Pursuant to the STEM OPT extension regulations, students can extend this work authorization by an additional 17 months if they graduate from a U.S. university with a degree in designated STEM fields and work for an employer who uses E-Verify.

Recognizing that many employers and foreign national ("FN") employees would be unfairly impacted by an immediate invalidation of the STEM extension program, the court established a deadline of February 12, 2016, by which the current STEM regulation would be invalidated unless the USCIS properly promulgated a new regulatory scheme. To save the program, the DHS published the NPRM on October 19, 2015. In addition to reauthorizing the basic STEM OPT extension process, the NPRM added new requirements to the current rule. However, the DHS received more than 50,000 comments to this NPRM and has asked the court to extend the February 12, 2016, deadline to May 10, 2016, so that the agency could properly consider these comments. The court granted this request on January 23, 2016, and the new deadline is May 10, 2016.

VI. Employer Payback Agreements with H-1B Employees May Be Unlawful Under Certain Circumstances

On November 30, 2015, the U.S. Court of Appeals for the Ninth Circuit affirmed a jury award of $4.5 million in back wages to a class of approximately 350 Filipino teachers working pursuant to H-1B visas in California. The teachers brought suit against their employer, Universal Placement International Inc. ("UPI"), and their Philippines-based staffing agency, PARS International Placement Agency ("PARS"). The teachers claimed that they were coerced into signing contracts under false pretenses that obligated them to pay back exorbitant fees and legal charges. The Ninth Circuit rejected the employers' arguments that the fees that they charged the teachers were legitimate because the teachers were paid higher than what was stated on their visa applications, and many

times higher than the average salaries for similarly employed U.S. and Filipino teachers. Among the fees charged by the employers to the teachers were a recruitment fee of approximately $5,000 and 30 percent of their ongoing annual income in the United States.

This decision highlights the special concerns that employers face if they entertain the thought of requesting repayment of legal and filing fees from H-1B employees. Remember that H-1B working conditions are subject to Department of Labor ("DOL") wage regulations, and any attempt to change the terms of those wages may face legal obstacles. The DOL has issued a Fact Sheet discussing some of the guidelines for determining lawful and unlawful wage deduction practices for H-1B employers: http://www.dol.gov/whd/regs/compliance/FactShee t62/whdfs62H.htm.

VII. USCIS Job Portability Guidance Is Helpful, but It May Be Too Focused on SOC Codes

On November 20, 2015, the USCIS issued a memorandum addressing its interpretation of the "same or similar" green card portability provisions. These rules allow FN employees to "port" their pending permanent residence petitions to new positions and employers, so long as the new position is the "same or similar" to the position contained within the underlying petition and the green card application has been pending for at least 180 days.

The business immigration community has been requesting that the USCIS define the meaning of "same or similar" for many years. On the positive side, this memorandum confirms how to handle portability cases involving career advancement from non-supervisory to supervisory roles. The memorandum, however, raises significant concerns that the agency is relying too heavily on DOL's Standard Occupational Classification ("SOC") codes to make the determination. The SOC system separates all jobs into 23 major groups and breaks the groups down into more specific classifications, resulting in a total of 840 detailed occupations. Even with this breadth of classification, some argue that the actual amount of jobs for which one can apply for green card portability is substantially larger. Moreover, the DOL does not modify the SOC fast enough to incorporate many of the new job classifications that the economy creates. Therefore, there is a significant chance that many jobs will not fit neatly into one of the predefined SOC codes and, consequently, an SOC-dependent analysis will be inappropriate and inaccurate.

It is likely that the USCIS will need to provide further guidance to address the deficiencies and ambiguities within this latest memorandum. In the meantime, employers can look to this memorandum when making a reasoned judgment as to whether employee job changes or new hires will qualify for green card portability relief.

VIII. The Visa Waiver Program Is Now Far More Restrictive

On December 18, 2015, President Obama signed the 2016 Consolidated Appropriations Act ("Act") into law. The Act included significant changes to the Visa Waiver Program ("VWP"). As a result of the Act, FNs who have traveled to Iraq, Syria, Iran, or Sudan (or other nations designated by the DHS as supporting terrorism or "of concern") at any time on or after March 1, 2011, are no longer eligible to participate in the VWP. The Act also excludes from the VWP FNs who are nationals of Iraq, Syria, Iran, or Sudan, and imposes new requirements on FNs choosing to participate in the VWP, including higher passport security requirements, screening protocols, and increased information sharing.

The original intent of the VWP was to allow tourists and business travelers to enter the United States without a visa for 90 days or less, so long as they passed applicable security screenings pursuant to the Electronic System for Travel Authorization ("ESTA") program. In the wake of the recent Paris attacks, both Congress and the White House supported the additional restrictions on the VWP that appear in the Act. As a result, FNs and employers that have previously relied on the VWP to schedule meetings in the United States, or arrange other activities acceptable under the VWP, now

must consider the nationality and the travel history of FNs intending to participate using this program. If the FNs are a national of, or have traveled to, one of the enumerated problem countries within the applicable time period, they will no longer be able to enter the United States without a visa stamp under the VWP. Rather, they will have to qualify for an alternative visa category (such as the B visa), make an appointment at a U.S. consulate abroad, and obtain a visa stamp before entering the United States. Employers should plan for the additional time and expense of the process, or consider sending to the United States only those FN employees who will continue to qualify for the VWP under the newly restrictive measures.

IX. Government Provides Guidance for Employer Self- Correction of I-9s

In December 2015, Immigration Customs and Enforcement ("ICE") and the Department of Justice's ("DOJ's") Civil Rights Division issued "Joint Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits." This guidance is meant to provide clearer instruction on how employers should correct I-9 errors within their employment verification program. In an era of growing awareness regarding potential immigration violations, employers have increased the amount of internal self-audits; ironically, this has led to more mistakes in the I-9 process, as employers have been left without sufficient guidance to conduct such audits. In some instances, the lack of guidance has led to employers asking for document reverification when it is unnecessary or unlawful. ICE and DOJ issued this guidance in response to this disturbing trend.

Overall, the guidance emphasizes clarity of communication between employers and employees about conducting an I-9 audit and employer transparency when correcting I-9 errors. For example, any errors or changes to an existing Form I-9 should not be erased or concealed. Technically, that constitutes an obstruction of justice. Rather, employers should correct Forms I-9 in a more transparent manner, such as drawing a line through the incorrect information, entering the correct data, and initialing and dating the correction. Thus, when conducting an internal I-9 self-audit, employers should consult the latest guidance from the USCIS, keep in mind that they must not discriminate against any employees on the basis of national origin, and not try to cover up any I-9 mistakes that they have made.

X. Selective Use of the E- Verify Program May Lead to Anti-Discrimination Violations

On August 24, 2015, the OSC issued a Technical Assistance Letter ("TAL") in response to a request from a staffing agency seeking guidance on how to respond to a contracting client's request that it use E-Verify to screen the immigration work eligibility of all temporary employees it recommended for work with the client. The staffing agency did not utilize E-Verify as part of its regular screening process; therefore, the General Counsel asked the OSC if it would be violating the anti-discrimination provision of the U.S. Immigration and Nationality Act ("INA") by selectively using the E-Verify program in this instance.

E-Verify rules allow for the use of E-Verify at a limited number of hiring sites; however, employers must verify all new hires at those sites. An employer also would be guilty of discrimination if it selectively used E-Verify for new hires based on citizenship status or national origin. Therefore, the OSC advised against designating participating hiring sites for E-Verify based on the citizenship status or national origin of employees working at that location. The OSC also advised against selectively using E-Verify based on client demands, as this could lead to the appearance of discrimination.

Employers should be careful whenever they treat employees differently in any way that relates to their citizenship status or national origin. In the context of selective E-Verify use, this means that employers should not selectively implement E-Verify unless they can clearly articulate reasons for doing so that are entirely unrelated to the citizenship status or national origin of the employees working at that location.

XI. Under New Law, Delinquent Taxpayers Could Lose Their Passports

Under the newly enacted FAST (Fixing America's Surface Transportation) Act, the U.S. Secretary of State now possesses the authority to revoke the eligibility of certain tax delinquents from receiving a passport. These include U.S. taxpayers who, as of December 4, 2015, hold Internal Revenue Service debt over $50,000, including tax, interest, and cumulative penalties. Such delinquency can both prevent the person from obtaining a new passport and lead to the revocation of an existing passport.

For any U.S. taxpayer who holds significant tax delinquency, please consider the possible ramifications to your existing passport or to your future passport applications, when planning for your next international trip abroad.

XII. H-2A Visa Holders May Be Eligible to Pursue Federal Wage-and-Hour Claims

On December 14, 2015, the U.S. Court of Appeals for the Tenth Circuit issued its decision in *Saenz Mencia et al. v. Allred*, No. 14-4047 (10th Cir. 2015). This case involved the claim of a Peruvian working in the United States on a valid H-2A Sheepherding visa that he was improperly classified and thus paid inadequate wages under the Fair Labor Standards Act ("FLSA"). Specifically, he argued that he should have been classified as a rancher, not as a sheepherder, and paid the higher wage associated under the FLSA with that position. The FLSA is designed to ensure that covered employees work under fair conditions, and it does so by regulating such matters as minimum wages, overtime, child-labor restrictions, equal pay rules, record- keeping requirements, and enforcement mechanisms. The district court had rejected this plaintiff's claims. The Tenth Circuit reversed and found that the plaintiff was entitled to be paid as a rancher under the FLSA and directed the employer to pay these additional wages.

Employers need to be cognizant of the FLSA's requirements when they employ FNs. Even if the USCIS approves a particular classification for an FN employee (in this case, H-2A status), employers must still comply with classification requirements under the FLSA. If they fail to do so, they are subject to financial penalties.

XIII. Employers May Violate the INA's Anti-Discrimination Provision If They Choose to Terminate U.S. Workers and Replace Them with FN Contract Workers

On December 22, 2015, the OSC responded to questions asked by the Morrison Public Affairs Group ("MPAG") in Bethesda, Maryland, which requested guidance regarding possible citizenship discrimination claims. Specifically, the MPAG asked whether employers may, consistent with the anti-discrimination provision of the INA, terminate U.S. workers and instead hire contract workers with temporary work visas to perform the work previously done by the terminated U.S. workers.

The OSC explained that, while such determinations are fact-sensitive, an employer violates the anti-discrimination provision if it terminates workers or hires their replacements because of citizenship or immigration status, regardless of whether the employment action is exercised through direct hiring or contracts. Primarily, the analysis of whether discrimination has occurred depends on whether there is evidence of intentional discrimination, the circumstances surrounding the selection of the contract replacements, and the extent to which the original employer could be considered a joint employer of the contract workers. The OSC's response also explained that employers must "intend" to discriminate in order to be guilty of it, but intent does not necessarily require animus or hostility toward a protected class member.

This guidance from the OSC highlights the need for employers to understand the anti-discrimination provisions in the immigration laws and take them into account in making employment decisions. Under these provisions, citizenship and national origin cannot be the sole reasons for hiring and

firing decisions; rather, employers must be prepared to defend their decisions on characteristics that are not prohibited by the anti-discrimination provision of the INA.

XIV. Second Circuit Concludes That Employees and New Employers Must Be Notified About Revocations of Existing I-140s Filed by Previous Employers

On December 30, 2015, the U.S. Court of Appeals for the Second Circuit decided *Mantena v. Johnson,* No. 14-2476-cv (2d Cir. 2015). In that case, the Second Circuit held that the USCIS must provide notice to an immigrant worker and his or her new employer when revoking an I-140 petition approved for work at a different employer. Although similar decisions have been issued in other circuits, the Second Circuit took the ruling further than those other courts by concluding that the current employer, not just the employee, has a stake in the viability of the existing approved I-140.

This ruling may be very helpful for employers within the Second Circuit (New York, Connecticut, and Vermont). New employers and employees often rely on approved I-140s from previous employers (1) to ensure the employee's continued work authorization, and (2) for employees to obtain green cards more quickly through priority date retention and green card portability. If an underlying I-140 is revoked, however, the FN employee may no longer be eligible for these benefits, and the new employer may lose that employee. Under the new ruling, when employers receive notice of an I-140 revocation, they will be better prepared to address the impact of that revocation on the FN's work status.

XV. DHS Proposes New Rules with Potentially Mixed Impact on High-Skilled FN Workers

On December 30, 2015, the DHS released an NPRM that would make significant changes to nonimmigrant and immigrant visa programs. The NPRM primarily addresses changes to three particular groups of provisions: (1) the 21st Century DOJ Appropriations Authorization Act ("AC21") and the American Competitiveness and Worksite Improvement Act ("ACWIA") provisions, (2) provisions related to stability and job flexibility for certain FN workers, and (3) regulations governing employment authorization document ("EAD") applications.

The NPRM is currently undergoing notice-and-comment review, but the immigration community has already provided substantial, ongoing feedback on the proposals. Some of the highlights of the rule include the following:

- **Limitations on the grounds for revocation of underlying I-140 petitions:** Current regulations allow FNs with approved I-140 immigrant petitions to change jobs and keep their oldest priority date, as long as the prior immigrant visa petition is not revoked. The proposed regulation addresses a significant problem in the current regulations, which allow the revocation of the petition in a variety of situations beyond the employee's control. Under the NPRM, an I-140 petition that has been approved for at least 180 days may no longer be revoked based simply on a withdrawal by the petitioning employer or termination of the employer's business. This distinction between "withdrawal" and "revocation" provides long-awaited clarification. The DHS would, however, retain its long-standing authority to revoke a petition in the event of fraud or willful misrepresentation, invalidation, or revocation of the underlying labor certification, or cases involving government error. While properly holding that a petition revoked for fraud or misrepresentation does not confer a priority date on the immigrant, the proposed regulation also contains a broad provision allowing a subsequent adjudicator to decide that the prior approval was an "error."
- **Clarification on when individuals may keep their priority dates:** The NPRM clarifies that an FN worker is able to retain the priority date from a prior I-140 petition, regardless of a subsequent withdrawal by the petitioning employer or termination of the employer's business, within 180 days after the approval. In other words, the priority date attaches to the worker

immediately upon approval. This provision does not apply to cases involving fraud or willful misrepresentation, invalidation, or revocation of the underlying labor certification, or government error. The NPRM also adopts the contents of the November 20, 2015, USCIS draft policy memorandum addressing adjustment of status ("AOS") portability, defining the terms "same" or "similar" for purposes of FN employees to obtain new jobs while maintaining their pending green card applications.

- **Additional eligibility for employment authorization in very specific circumstances:** The NPRM allows certain high-skilled individuals in the United States, in E-3, H-1B, H-1B1, L-1, or O-1 nonimmigrant status, to apply for one year of unrestricted employment authorization if they (1) are the beneficiaries of an approved I-140 petition, (2) remain unable to adjust status due to visa unavailability, and (3) can demonstrate "compelling circumstances" that justify issuing an EAD. The "compelling circumstances" may include the need to relocate because of a disability or illness, employer retaliation for a working conditions complaint, or a compelling need of the employer to have the employee continue employment. The proposal makes clear that a determination of compelling circumstances will be made only in limited situations. The NPRM also clarifies that "compelling circumstances" cannot be demonstrated simply by reaching the maximum period of stay in a given nonimmigrant classification.

- **Clarification of various policies and procedures related to the adjudication of H-1B petitions:** The NPRM codifies various rules relating to H-1B extensions of status, the determination of cap exemptions, enumerating workers under the H-1B visa cap, H-1B portability, licensure requirements, and protections for whistleblowers. For example, "whistleblower" protection may be granted to employees who report wage and working condition violations, allowing them to change to a new employer, or even another status, if their employer terminated their employment. The NPRM also codifies current administrative practice in a number of areas, including the definition of employers exempt from the annual cap on H- 1B visas (universities, nonprofit research organizations, government research organizations, and related or affiliated nonprofit organizations), the eligibility of H-1B employees to work for a new sponsoring employer upon filing of a new H-1B petition, and the ability of H-1B nonimmigrants to have that status extended beyond the general six-year limitation during the long green card sponsorship process.

- **Establishment of a 60-day grace period upon expiration of employment authorization:** The NPRM proposes a one-time grace period of up to 60 days for certain high- skilled nonimmigrant workers whenever their employment ends, so that they may look for other employment, change to a different type of temporary visa, or wrap up their affairs in the United States. Under current administrative interpretation, the employee's status ends immediately upon termination of employment, which provides a worker facing a layoff or termination with no time to switch to another employer or to meaningfully put his or her affairs in order before leaving the United States. It is most noteworthy that H-1B nonimmigrants would be eligible for portability during this grace period, thereby providing individuals with work authorization, upon the filing of a non-frivolous H-1B petition by a new employer. This provision would provide additional flexibility in cases of sudden termination of employment.

- **Automatic extension of EAD upon filing of a timely renewal:** The NPRM proposes lifting the time mandate on the USCIS to adjudicate EAD petitions within 90 days of filing; in return, however, the agency would grant (in certain circumstances) an automatic extension of an EAD for up to 180 days, provided the renewal application was filed prior to the expiration date of the existing EAD. This provision would include individuals with pending adjustment of status applications, but exclude nonimmigrants seeking renewals of EADs based on H-4 status.

- **Clarification of exemptions from the annual cap on H-1B visa petitions:** The NPRM proposes "additional means by which nonprofit entities may establish a sufficient relation or affiliation with an institution of higher education" in order to qualify for an exemption from the

annual H-1B quota. Specifically, the proposed rule considers certain situations in which a written affiliation agreement, along with certain other criteria, may satisfy the exemption threshold, thereby providing additional flexibility to accommodate the wide range of arrangements that may exist between educational institutions and nonprofit entities.

The NPRM has the potential for positive and negative impact upon employment-based immigration. Thus, employers should follow the progress of this NPRM closely to assess how it affects their operations and their employees.

XVI. DOS Issues February 2016 Visa Bulletin

The U.S. Department of State ("DOS") has issued its Visa Bulletin for February 2016. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. On the employment-based side, the February 2016 Visa Bulletin shows that the employment-based second ("EB-2") preference Final Action Dates for China advanced to March 1, 2012, and India advanced to August 1, 2008. The rest of the world remained current in this category. The EB-2 Filing Dates remained the same for China (January 1, 2013) and for India (July 1, 2009). The EB-2 Filing Dates for the rest of the world remained current. Also in the February 2016 Visa Bulletin, the Final Action dates for the employment-based third ("EB-3") preference category are as follows: October 1, 2015, for all chargeability, including Mexico; October 1, 2012, for China; June 15, 2004, for India; and January 8, 2008, for the Philippines. The EB-3 Filing Dates are the following: January 1, 2016, for all chargeability, including Mexico; October 1, 2013, for China; July 1, 2005, for India; and January 1, 2010, for the Philippines. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-february-2016.html.

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