USCIS ISSUES MAJOR NEW IMMIGRATION REGULATIONS FOR HIGHLY SKILLED WORKERS

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Immigration Alert

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On November 18, 2016, USCIS issued an extensive set of revisions to immigration regulations affecting highly skilled workers. The new rules, which go into effect on January 17, 2017, clarify longstanding agency practices and create several process improvements that impact highly skilled immigrant and nonimmigrant workers. Among the most significant changes are new 60-day grace periods for certain nonimmigrants following cessation of employment, automatic 180-day extension of work eligibility for those who timely file extensions of their work authorization cards, a uniform process for applying the "portability rule" for green card applicants who change employers and/or jobs, and a new discretionary work authorization category for green card applicants adversely impacted by immigrant visa backlogs. These new rules impact employers of nonimmigrants in the H-1B, H-1B1, E-1, E-2, E-3, L-1, O-1, P, and TN categories and EB-1, EB-2 and EB-3 immigrants (including PERM labor certification beneficiaries) as well as their dependents.

The new regulations make the following changes:

CLARIFICATION OF CAP EXEMPT EMPLOYMENT

The regulation clarifies existing USCIS policy and practice regarding "cap exempt" H-1B employment. Generally, first-time H-1B applications are subject to the numerical cap, with an exemption for certain institutions of higher education and their affiliated non-profits, as well as other government research organizations.

8 CFR § 214.2(h)(8)(ii)(F), which controls H-1B employment by an institution of higher education, an affiliated non-profit entity, and a non-profit or government research organization (cap exempt entity) is amended to provide as follows:

> (a) The definitions of cap exempt entities are clarified. (b) An alien not directly employed by a cap exempt entity may take advantage of the exemption if the alien will spend a majority of the time working in a job closely related to a cap exempt entity. (c) If cap exempt employment ceases, further H-1B employment will be subject to the cap. (d) A cap exempt H-1B employee may have concurrent employment in cap subject employment, but the cap subject employment cannot extend beyond the authorized cap exempt employment, and the cap subject employment automatically terminates if the cap exempt employment terminates.

CALCULATING THE MAXIMUM H-1B ADMISSION PERIOD AND THE "RECAPTURE RULE"

This change is also a clarification of long-standing agency practice with respect to the H-1B recapture rule. The most important clarification may be that the time outside the US must be in excess of 24 hours, meaning that that H-1B recapture rules do not apply to absences of less than a day. For example, if the H-1B holder departs the US on Monday morning and returns Wednesday evening, only Tuesday would count towards the recapture rule.

8 CFR § 214.2(h)(13)(iii)(C) is added to provide as follows:

> (a) Any amount of time exceeding 24 hours spent outside the U.S. during an approved H-1B period does not count toward the maximum 6 year allowed H-1B period. (b) This period outside the U.S. may be recaptured in a new petition upon approved proof of absence. (c) An alien previously counted against the H-1B numerical cap who has not been within the U.S. for the maximum allowed 6 year admission period may apply for a new admission for the remaining portion of his maximum period without being outside the U.S. for 1 year.

H-1B EXTENSION OF STAY UNDER AC 21

Existing policies and practices implementing the provisions of AC 21 allow H-1B holders who are reaching the expiration of their maximum 6 year period of stay to extend H-1B status while permanent residence processing continues. Many of these are now formalized in new regulations.

8 CFR § 214.2(h)(13)(D) is added to provide that an alien who is in H-1B status, or who previously held H-1B status, even if the alien is not in the U.S., may extend H-1B status if at least 365 days have passed since the non frivolous filing of either (i) a labor certification application with the Department of Labor or (ii) an immigrant visa petition with USCIS. The extensions are granted under the following conditions:

> (a) In 1 year increments until the underlying application or petition is finally denied, revoked, permanent residence is obtained, or permanent residence is denied. (b) Following denial of an application or petition, extensions may be continued through any appeal period. (c) Unless a beneficiary was substituted for another alien prior to July 16, 2007, the alien must be the beneficiary named in the pending or approved labor certification. (d) An H-1B extension petition may be filed within six months of the requested start date. (e) The extension petition may be filed before the 365 days has passed as long as the 365 days will have elapsed before the requested petition effective date. (f) The petition may request any remaining 6 year time and/or recaptured time under H-1B or L status. (g) The H-1B petitioner need not be the employer which filed for the labor certification or immigrant visa. (h) Extensions past the 7th year extension need not be based upon the same labor certification or immigrant petition used for the 7th year extension. (i) Pending time under separate labor certification or permanent resident petitions may not be aggregated to reach 365 days. (j) Extension petitions may not be filed if the alien has not sought permanent residence within 1 year of the approval of an immigrant petition unless a period of non-

> availability for permanent residence has occurred within the 1 year.

This regulation expresses current USCIS policy which had previously been expressed through agency memoranda.

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