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FBT Immigration Update: November/December 2016

Impact of the 2016 presidential election

As President-elect Trump made immigration a major campaign issue, it is very likely that we will see changes to the current U.S. immigration system. Unfortunately, we can only speculate now on what changes may occur. We will keep employers updated as the situation develops and we gain more clarity.

New Form I-9 must be used starting January 22, 2017

After a long wait, USCIS finally published the new Form I-9, which must be used after January 22, 2017. Until that date, employers have the option of using the March 8, 2013 version. The new form, which incorporates several "smart" features, should appear more user-friendly to employers. The "smart" features include the use of drop-down menus, instantaneous error-checking, and prompts for pop-up instructions for all fields. While the new Form I-9 may be completed on a computer to take advantage of these changes, it is not to be treated as an electronic Form I-9. Therefore, employers that do not utilize electronic Form I-9 and related procedures, must continue to print, sign, and store and retain each Form I-9. Also, the new Form I-9 does not communicate with the E-Verify system, requiring employers registered with E-Verify to retype the information from the form into the system.

In addition to the changes mentioned above, the form does contain several substantive changes:

- Permits multiple preparers and translators to complete attestations.
- Must indicate whether a translator or preparer was used.
- "Other Names Used" field in Section 1 has been replaced with "Other Last Names Used" to minimize the risk of

discrimination as well as to protect the privacy of transgender and other individuals who have changed their first names.

- Certain employees must enter Form I-94 number or foreign passport information but not both in Section 1.
- Employees that provide an Alien Registration Number/USCIS number must also indicate whether the number is an A-number or a USCIS number in Section 1.
- Section 2 contains a new "Citizenship/Immigration Status" field that is linked to the citizenship/immigration status selected by employee in Section 1.
- Section 2 contains a dedicated area for additional information to be included, such as, H-1B portability and OPT STEM extensions.
- A QR code to be used by ICE auditors.

USCIS issues final rule on changes to employment-based immigration system

After first releasing a proposed rule in December 2015, USCIS recently issued a final rule that will make significant changes to the employment-based immigration system, effective January 17, 2017. Over 15 years ago, two major laws were enacted that dramatically changed the employment-based immigration system: the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). However, many of the main features of these laws were defined by policy memoranda and not implemented through the formal rulemaking process. The final rule not only brings the regulations in line with current policy, but also implements new changes affecting both the nonimmigrant (temporary) and immigrant (permanent) visa processes. This update will focus on the latter.

• Immigrant Petition (I-140) Revocations

- Under the final rule, if an I-140 is withdrawn by the petitioner or petitioner's business terminates, USCIS will not revoke the I-140 if it has been approved for at least 180 days or a related

adjustment of status application has been pending at least 180 days. This will allow new employers to secure H-1B extensions on behalf of employees beyond the traditional six-year H-1B limit without fear that the basis for such extensions (the I-140) could unexpectedly vanish. USCIS still retains the authority to revoke I-140 petitions obtained through fraud, material misrepresentation, invalidation or revocation of the underlying labor certification, or USCIS error.

- **H-1B Extensions Beyond Six-Year Limit**

- The final rule limits access to extensions under section 106(a) of AC21. Currently, USCIS permits a foreign national to receive one-year extensions of H-1B status beyond the typical six-year limit until a final decision is made on the foreign national's lawful permanent residence if either a PERM labor certification application or immigrant petition (I-140) has been pending or approved for at least 365 days. The final rule limits the indefinite nature of such extensions by requiring a foreign national to file an application for adjustment of status or an immigrant visa within one year of an immigrant visa becoming immediately available. USCIS will have discretion to excuse failure to file within the one-year window due to circumstances beyond the foreign national's control.
- Depending on how this requirement is applied, it could negatively affect an employer that is extending the H-1B status of an employee beyond the traditional six-year limit based on a prior employer's I-140 and has not yet started or completed its own efforts to secure a new I-140 on behalf of the employee. If the priority date secured by the prior employer's I-140 becomes current, the one-year clock to file an application for adjustment of status (I-485) may start. If it does and the employer does not have a new I-140 in place to allow the employee to apply for permanent residence through its sponsorship, it could limit its ability to further extend the employee's H-1B status.

- **Priority Date Retention**

- A priority date is the date a labor certification application was received by the Department of Labor, or, if no labor

certification application was required, an immigrant petition was received by the USCIS on behalf of a foreign national. The priority date establishes the foreign national's place in line to obtain an immigrant visa number, which is necessary to move to the final step of the green card process. The final rule establishes that a priority date for an EB-1, EB-2, or EB-3 petition may be used for a subsequent EB-1, EB-2, or EB-3 petition upon approval of an I-140, unless it is later revoked due to fraud, willful misrepresentation, erroneous approval, or revocation or invalidation of the underlying PERM labor certification.

- **60-Day Grace Period**

- To provide foreign nationals with more flexibility following termination of employment in the U.S., the final rule gives foreign nationals in E-1, E-2, E-3, H-1B, H-1B1, L-1, and TN status a grace period to find new employment or figure out their next step. The grace period is either 60 days or until the existing validity period ends, whichever is shorter.

- **10-Day Grace Periods**

- The final rule extends the 10-day admission period currently granted at the beginning and end of H-1B visa holders' period of authorized stay to foreign nationals in E-1, E-2, E-3, L-1, and TN status. While the foreign nationals may only work during the validity period of the petition, it would permit them to enter the U.S. before their start date to settle down or, at the end of their stay, to settle their affairs prior to departure or find new employment.

- **I-140 Job Portability**

- In addition to codifying DHS' current practice concerning I-140 portability, the final rule provides for the creation of a Supplement J Form to formalize the process. Under the final rule, it appears that foreign nationals are still not under an obligation to inform USCIS that they are "porting" their pending I-485 to a new employer; however, they may file Supplement J affirmatively or upon request by USCIS.

- **Adjudication of employment authorization documents (EADs)**

- If an EAD extension is timely filed before the current EAD expires, the final rule would permit USCIS to automatically extend the validity of the expiring EAD by 180 days. This change benefits foreign nationals that are no longer maintaining nonimmigrant status and, instead, working pursuant to an EAD connected to a pending I-485. As extensions currently take up to 90 days, the final rule reduces the risk of a gap in employment authorization. It is important to note that the final rule does not extend the benefit of automatic EAD extensions to H-4 dependents.
- However, at the same time the final rule adds the benefit of automatic EAD extensions, it takes away the 90-day processing timeframe and the availability of interim EADs for applications not processed within this timeframe.
- **Issuance of EADs Due to “Compelling Circumstances”**
- If a foreign national is (1) in E-3, H-1B, H-1B1, O-1, or L-1 status, (2) the beneficiary of an approved I-140, (3) unable to submit an I-485 due to the visa backlogs, (4) and facing “compelling circumstances,” he/she may apply for an EAD valid for one year. USCIS provided a non-exhaustive list of situations that may involve “compelling circumstances” in the final rule.

While the final rule is set to take effect on January 17, 2017, there has been some speculation that even final rules implemented before President-elect Trump takes office could be undone through the Congressional Review Act (CRA). The Congressional Research Service recently published a memorandum on November 17, 2016, outlining why the CRA may gain more prominence in the next Congress and administration. We will monitor the situation closely and keep employers updated if we sense that the CRA could be utilized to alter the final rule discussed above.

USCIS filing fees will increase on December 23, 2016

Employers should be aware that USCIS filing fees will increase on December 23, 2016, by a weighted average of 21 percent. As USCIS made clear in the recently finalized rule, the last time the fees were

adjusted was November 23, 2010, and the current fees do not cover the full cost of services provided.

Employers may review the [final rule](#) to see all the fee increases, but below are the increases for the more popular forms/processes:

- Form I-129, [Petition for a Nonimmigrant Worker](#), from \$325 to \$460 (42%)
- Form I-140, [Immigrant Petition for Alien Worker](#), from \$580 to \$700 (21%)
- Form I-485, [Application to Register Permanent Residence or Adjust Status](#), from \$985 to \$1,140 (16%)
- Form I-765, [Application for Employment Authorization](#), from \$380 to \$410 (8%)
- Form I-526, [Immigrant Petition by Alien Entrepreneur](#), from \$1,500 to \$3,675 (145%)

If employers are in the process of preparing petitions or applications, they may want to try to file affected petitions or applications before December 23, 2016, to avoid the fee increases.

FY2018 H-1B cap opens April 1, 2018

On April 1, 2017, USCIS will begin to accept FY2018 H-1B petitions. While that is several months from now, employers should begin to evaluate whether it should sponsor current employees or potential new hires, specifically those in F-1 status, L-1 status that are approaching the maximum time allowed, or TN status that intend to obtain permanent residence.

The H-1B cap remains at 65,000, and the first 20,000 petitions filed by foreign nationals with at least a U.S. master's degree will continue to be exempt from the cap. As has been the case since 2013, it is extremely likely the H-1B cap will be exceeded during the first five business days starting April 1, requiring USCIS to resort to a lottery. Under last year's FY2017 cap, USCIS received approximately 236,000 cap-subject petitions during the first five business days beginning April 1, 2016. When a lottery is triggered, USCIS will include all petitions received during the first five business days.

In the coming months, USCIS should update its annual H-1B cap page for the current cap season (FY 2018), which employers should review for guidance and tips. For now, employers should identify employees or potential new hires that will require sponsorship and begin to take steps so that an H-1B petition can be filed April 1 or no later than the first five business days starting April 1.

New app created to help workers fight violations of wage and hour laws

Several union groups have developed and launched a new app, *Jornaler@App*, aimed at helping day laborers properly track time in an effort to step up enforcement of wage and hour laws and ensure that day laborers, a group believed to include some undocumented immigrants, as well as permanent residents and citizens, are properly paid for the work they perform. According to statements from the AFL-CIO, the app not only allows individuals to track their time worked (similar to an app created and distributed by the U.S. Department of Labor), but also collects data on specific employers and allows individuals to share that data amongst each other. Federal wage and hour laws apply equally to undocumented workers as well as permanent residents and citizens.

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