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Management Alert

The Top 10 Things U.S. Employers Need to Know about President Obama's Executive Actions on Immigration

By Maura K. Travers, Angelo A. Paparelli, Jason E. Burritt, Michelle Gergerian and Gabriel Mozes

In a live address to the nation on Thursday, November 20, 2014, President Obama laid out his plan to use executive actions to alter the U.S. immigration system. These actions may allow up to five million unauthorized immigrants to stay in the U.S. and obtain work permits. In his address, the President stated that he intends to "make it easier and faster for high-skilled immigrants, graduates, and entrepreneurs to stay and contribute to our economy, as so many business leaders have proposed."

Soon after the President finished speaking, Secretary of the Department of Homeland Security (DHS), Jeh Charles Johnson, published a *memorandum* addressed to U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE) directing the agencies to enact new policies and regulations to support high-skilled businesses and workers by better enabling U.S. businesses to hire and retain highly skilled foreign-born workers, while providing these workers with increased flexibility to make career decisions. This Management Alert is intended to inform employers of *possible* changes to the U.S. immigration system that will impact the hiring and retention of high-skilled foreign born workers.

1.) Clarification of the Meaning of "Specialized Knowledge" in the L-1B Visa Context:

To date, the L-1B visa program has suffered from unclear guidance and erratic interpretation of the term "specialized knowledge by USCIS adjudicators and U.S. consular officers". A lack of clear guidance has created uncertainty for companies seeking to temporarily transfer essential personnel from foreign operations to the U.S. USCIS is expected to issue a long-awaited policy memorandum by January 2015 to provide guidance on the meaning of "specialized knowledge" and clarify L-1B eligibility standards for adjudicating officers. Secretary Johnson's memorandum suggests that this L-1B policy guidance "will bring greater coherence and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program."

2.) Accelerated Filing of Adjustment of Status Applications:

Currently, many individuals with approved employment-based immigrant petitions (I-140) are unable to file Adjustment of Status (I-485) applications for green card status due to immigrant visa quota backlogs. Changes in the content and format of the Department of State's Visa Bulletin and changes to the USCIS regulations may permit tens of thousands of individuals to file their Adjustment of Status applications earlier and obtain the benefits of a pending green card application. These benefits

will enable affected employees to obtain employment authorization and advance parole, and to take advantage of green card portability. Because this new approach will require formal rulemaking, the change will not likely take effect until 2016.

3.) Increased Worker Portability:

Current law allows employees whose Adjustment of Status have been pending with USCIS for 180 days to change jobs or employers without jeopardizing their application if the new job is in the "same or a similar" occupational classification as their old job. To help eliminate uncertainty in applying these terms, and offer clear guidelines for career promotion and worker mobility, USCIS will issue a policy memorandum to clarify what constitutes a "same or similar" job under current law.

4.) Visa Modernization:

In prior fiscal years, administrative delays caused the loss of many employment-based immigrant visa quota numbers and thus delayed the grant of green card status to eligible individuals. USCIS will work with the Department of State (DOS) to ensure that all immigrant visas authorized by Congress are issued to qualified beneficiaries. DOS has agreed to modify its visa bulletin to more simply and reliably determine when immigrant visas are available to applicants during the fiscal year.

5.) H-4 Spousal Work Authorization:

Current law does not allow spouses of H-1B visa holders (H-4 dependent spouses) to apply for work authorization. On May 12, 2014, DHS proposed a *rule* to extend work authorization to certain H-4 dependent spouses of H-1B visa holders who are in the green card process. The proposed rule reportedly will be finalized by January 2015.

6.) Extension of Optional Practical Training (OPT) for Certain Foreign Students:

Through a rulemaking process, the OPT period for Science, Technology, Engineering and Mathematics (*STEM*) graduates will be expanded and the relationship between the student and the school will be strengthened during the OPT period. Other changes also under consideration include allowing STEM OPT after the attainment of a master's degree where only the first degree is in a STEM field. ICE and USCIS will clarify and implement these changes through regulations. In addition, through the promulgation of regulations, ICE and USCIS will take steps to ensure that OPT employment is consistent with U.S. labor market protections to safeguard the interests of U.S. workers in related fields. This may include a prevailing wage requirement for OPT employment. Because these changes will require formal rulemaking, the change will not likely take effect until late 2015 at the earliest.

7.) Enhancement of Opportunities for Foreign Inventors, Researchers, and Entrepreneurs:

To date, the "national interest waiver" for non-citizens with advanced degrees or exceptional ability has been underutilized and guidance is limited. USCIS will issue guidance or regulations to clarify the standard to make it clear that this waiver is not only for self-employed entrepreneurs. These new agency interpretations will help employers engaged in research and development to bypass the PERM Labor Certification process by filing national interest waivers for certain employees if the employer can demonstrate that the U.S. economy will benefit and jobs will be created through the permanent presence of an immigrant with exceptional ability.

8.) Department of Labor Review of PERM Program:

Before employers may petition for immigrant visas on behalf of most foreign-born workers, the Department of Labor (DOL) must certify that the employer conducted a test of the U.S. labor market and that, based on the results of a prescribed recruitment effort, no U.S. workers are qualified and/or available to perform the proffered job at the requisite wage. DOL will initiate a review of the PERM program and relevant regulations in an effort to speed up processing. Revised PERM rules are set to be finalized by spring 2016. Meantime, the DOL will seek input on the following:

- Options for identifying labor force occupational shortages and surpluses and methods for aligning domestic worker recruitment requirements with demonstrated shortages and surpluses;
- Methods and practices designed to modernize U.S. worker recruitment requirements;
- Processes to clarify employer obligations to insure PERM positions are fully open to U.S. workers;
- Ranges of case processing timeframes and possibilities for premium processing, and;
- Application submission and review process and feasibility for efficiently addressing nonmaterial errors.

9.) New Interagency Worksite Enforcement Group:

As the DOL explains in a web-posted posted *Fact Sheet*, in order to promote effective enforcement of federal labor, employment, and immigration laws, the Administration has announced the creation of an interagency working group to identify policies and procedures that promote the consistent enforcement of those laws and protect all workers in the U.S. This group will consist of members of the DOL, DHS, the Department of Justice, the Equal Employment Opportunity Commission, and the National Labor Relations Board. Employers should therefore arrange to review its immigration and employment law compliance practices with legal counsel. (Please consult your Seyfarth attorney if you have questions.)

10.) New Work Permits and I-9 Issues:

Through the implementation of Deferred Action for Childhood Arrivals (DACA), USCIS issued *guidance* to employers on the treatment of Employment Authorization Documents (EADs) issued by USCIS to deferred action recipients and how employers should process Form I-9, Employment Eligibility Verification, in these cases. USCIS will issue further I-9 guidance to employers as the volume of these documents will now increase due to the expansion of DACA and the new Deferred Action for Parents (DAP) program. Unfortunately, USCIS has announced that it will not be able to act on all requests of DACA and DAP applicants for immigration benefits (including employment authorization) until the end of 2016. Meanwhile, employers have been given no deferral of enforcement if employers become aware that a worker has applied for DACA/DAP benefits, and thus, by definition, is not authorized to work and thus must face employment termination.

We will monitor these proposed changes closely and provide additional details on implementation procedures and timelines as the information becomes available.

Maura K. Travers is an attorney in Seyfarth's Boston office, *Angelo A. Paparelli* is a partner in Seyfarth's Los Angeles office, *Jason E. Burritt* is a partner in Seyfarth's New York office, *Michelle Gergerian* is an associate in the firm's Boston office and *Gabriel Mozes* is an associate in the firm's Boston office. For more information, please contact the Seyfarth attorney with whom you work, any *Business Immigration attorney* on our website, Maura K. Travers at *mtravers@seyfarth.com*, Angelo A. Paparelli at *apaparelli@seyfarth.com*, Jason E. Burritt at *jburritt@seyfarth.com*, Michelle Gergerian at *mgergerian@seyfarth.com* or Gabriel Mozes at *gmozes@seyfarth.com*.