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June 2018 Special Immigration Alert

U.S. Supreme Court Upholds Travel Ban

New Rules Are Issued for F, J, and M Visa Holders Regarding "Unlawful Presence"

Sorting Out USCIS's Guidance That Restricts the Third-Party Placement of STEM OPT Students

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I. U.S. Supreme Court Upholds Travel Ban

After many lawsuits and appeals, on June 27, 2018, the Supreme Court of the United States upheld the Trump administration's September 24, 2017, travel ban of nationals from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen ("Travel Ban 3.0"). Travel Ban 3.0 was upheld by a vote of 5-4, with Chief Justice Roberts writing that the ban "is squarely within the scope of Presidential authority under the INA (Immigration and Nationality Act)." The Court ruled that the ban did not violate the First Amendment's Establishment Clause because the purpose of the ban was to strengthen national security under the rational basis test, not to discriminate against Muslims.

The Supreme Court's decision will mainly impact employers with employees from the seven countries mentioned in Travel Ban 3.0. If international travel is sought by those employees, whether for business or pleasure, then legal counsel should be consulted before the employees take their trips. Without knowing the full ramifications of Travel Ban 3.0, employees from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen may not be allowed back into the United States. This is true even if those employees possess a valid and unexpired U.S. entry visa, such as an H-1B.

II. New Rules Are Issued for F, J, and M Visa Holders Regarding "Unlawful Presence"

In accordance with a new policy memorandum issued by U.S. Citizenship and Immigration Services ("USCIS"), starting on August 9, 2018, foreign national students or cultural exchange visitors holding F, J, or M status will begin to accumulate "unlawful presence" in the United States if they (1) are no longer pursuing their course of study (i.e., they are not attending the educational institution that granted them F or M student status); (2) are no longer engaging in their authorized activity (i.e., J visitors are not maintaining

their cultural program or F students are not maintaining the purported practical training during school attendance or after graduating); or (3) engage in unauthorized activity (such as working without authorization or no longer attending their required educational or cultural exchange program).

Before August 9, 2018, any F, J, or M visa status violation based on (1) no longer pursuing the course of study, (2) no longer engaging in the authorized activity, or (3) engaging in unauthorized activity did not accrue unlawful presence. Once unlawful presence begins to accumulate, then F, J, and M students are subject to the three- and 10-year bars, as follows:

- When more than 180 days of unlawful presence accumulates, then the F, J, or M student is barred from returning to the United States for three years.

- When more than one year of unlawful presence accumulates, then the bar becomes 10 years.

Due to these draconian bars, it is paramount that F, J, and M students maintain their status. This policy change will most likely affect U.S. employers that hire F-1 graduates under optional practical training ("OPT") and STEM (science, technology, engineering, and mathematics) OPT. To prevent these employees from violating their status, employers should make sure that these F-1 students are placed in roles that are consistent with their OPT or STEM OPT employment.

III. Sorting Out USCIS's Guidance That Restricts the Third-Party Placement of STEM OPT Students

In April 2018, USCIS posted guidance on its website that restricts assigning STEM OPT employees to off-site third-party locations. When first posted, the USCIS guidance caused confusion and concern—confusion because the jurisdiction of policing the STEM OPT program is not with USCIS but with Immigration and Customs Enforcement ("ICE"), and concern by many companies that hire STEM OPT graduates to be assigned to third-party client sites. The USCIS guidance prevents or limits these companies from placing their STEM OPT employees at client sites, even though both the employer and employee intend to follow the requirements of the I-983 training program—a prerequisite for STEM OPT employment.

The USCIS guidance contradicts both the preamble to the STEM OPT regulation (8 CFR 214.16 and 81 FR 13040, 3/11/16) and ICE's "Frequently Asked Questions and Answers" document, which specifically states the following:

> STEM OPT students are permitted to use staffing/placement agencies to find a training opportunity. However: ... [a]ll STEM OPT regulatory requirements must be maintained, and … [t]he staffing/placement agency cannot complete and sign the Form I-983 as an employer, unless … [t]he

> staffing/placement agency is an E-verified employer of the student, and ... [t]he staffing/placement agency provides and oversees the training.

With a couple of months passing and the dust settling, the guidance seems to have been an overreaching statement that was beyond USCIS's jurisdiction. It is our opinion that, as long as the STEM OPT program is followed, staffing agencies should be allowed to hire STEM OPT employees and place them at client sites. Further, where USCIS has issued a request for evidence (or "RFE") questioning the bona fide employer/employee relationship of off-site employment of STEM OPT applicants or for current STEM OPT workers applying for H-1B change of statuses within the annual H-1B cap, USCIS has approved those petitions when the employment relationship remains consistent with the I-983 training program.

Therefore, notwithstanding the USCIS guidance, so long as (1) the employer is an E-Verify registered company, (2) the employer directly employs the STEM OPT employee, and (3) both the employer and STEM OPT employee strictly follow the I-983 training program, then such employment, including staffing agency employment, should be allowed for STEM OPT employees.

Epstein Becker Green's Immigration Law Group will be closely monitoring all developments in this area and will report on any policy changes by ICE or USCIS.

If you have any questions regarding this Alert or any other U.S. immigration issues, please contact Epstein Becker Green's Immigration Law Group:

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