August 1, 2018

August 2018 Special Immigration Alert

I. USCIS Delays Implementation of New "Notice to Appear" Policy Memo

On June 28, 2018, U.S. Citizenship and Immigration Services ("USCIS") published a policy memo updating the guidelines to allow USCIS officers to issue a Notice to Appear ("NTA") for a wider range of cases where an individual is removable. Specifically, USCIS would issue an NTA when there is a denial of an immigration benefit that leaves the foreign national without lawful immigration status in the United States, or where there is evidence of fraud or criminal activity. However, on July 30, 2018, USCIS announced that implementation of this new NTA policy memo was temporarily put on hold until further operational guidance is issued.

Historically, it has not been standard practice for USCIS to issue NTAs to foreign nationals whose denied cases left them without valid immigration status. As of the date of a denial notice on a petition, a foreign national's immigration benefit is revoked, leaving the person without immigration status and accruing unauthorized period stay. If the foreign national continues to remain in the United States after receipt of a denial notice and the person accrues an unauthorized period of stay exceeding 180 days, the foreign national will be subject to the "3/10-year bar" under Section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act. The 3/10-year bar prohibits the foreign national from reentering the United States for three to 10 years, depending on the length of the unauthorized period of stay. Therefore, when receiving a denial notice, foreign nationals are advised to make arrangements to leave the United States as quickly as possible to prevent being subject to the 3/10-year bar.

If the USCIS implements the new NTA policy memo, the agency's authority to issue NTAs would be expanded and that would create practical challenges. For example, if the foreign national leaves the United States after a petition is denied and an NTA is issued during this time, then the foreign national would not be able to return to the United States to attend his or her NTA hearing in front of an immigration court. Non-attendance of an NTA hearing in an immigration court would subject the foreign national to an *in abstentia* order, which would prevent the foreign national from reentering the United States for up to five years. It also would result in the foreign national being denied other immigration benefits, including adjustment/change of status, voluntary departure, and cancellation of removal, for up to 10 years from the *in abstentia* order.

Based on the above, employers sponsoring non-immigrant petitions (such as H-1B, TN, L-1, and O-1) should file extensions, changes, or amendment of status petitions/applications as soon as the petitions/applications are eligible for filing (i.e., within six months before the current status expires). Further, such petitions/applications should be filed under premium processing once operational guidance is issued to clarify the new NTA policy memo. Epstein Becker Green will keep abreast of developments in this area and provide clarification of the operation guidance, when it is implemented.

II. USCIS May Deny Applications/Petitions Without Requiring RFEs

Beginning September 11, 2018, USCIS will have the discretion to deny any petition or application that it views as incomplete, having errors, or without proper documentation to warrant approval. Previously, petitioners or applicants who submitted erroneous or incomplete documentation or information were given the opportunity to correct those errors through USCIS's issuance of a Request for Evidence ("RFE") or Notice of Intent to Deny ("NOID"). (RFEs usually allowed up to 87 days to respond, while the NOID shortened the response time to 30 days.) With this new policy change, effective September 11, USCIS may issue denials without allowing applicants and petitioners the opportunity to correct errors made inadvertently or to supplement incomplete petitions/applications through an RFE or NOID.

This policy change was announced on July 13, 2018. In light of this policy change and the above-mentioned new NTA policy memo (which is temporarily on hold pending issuance of operational guidance), it is imperative that nonimmigrant petitions and applications be filed at the earliest possible time. In addition, petitions and applications should be filed under premium processing (if allowed) so that a denied petition or application has to opportunity to be corrected and refiled while the affected foreign national maintains valid immigration status.

III. ICE Audits More Than 5,200 Employers' Forms I-9 During the First Half of 2018

In a press release dated July 24, 2018, U.S. Immigration and Customs Enforcement ("ICE") announced that it has served more than 5,200 Notice of Inspections ("NOIs") to employers to check the validity of their Forms I-9 during the first half of 2018. The ICE audits were initiated in two stages. During the first stage, which ran from January 29 to March 30, ICE issued 2,540 NOIs. During the second stage, which ran from July 16 to 20, ICE issued 2,738 NOIs.

For California employers, these ICE audits are additionally burdensome because such employers must also comply with AB 450. (AB 450 is a California law that includes additional 72-hour notice requirements when an ICE I-9 NOI is requested.) Failure to follow California AB 450's notice requirements may subject a California employer to fines of $2,000 to $10,000 per violation.

As for the ICE Form I-9 audits, if a company's Forms I-9 are found to be in noncompliance, substantive penalties of $220 to $2,191 per violation could be imposed. With ICE's recent mandate to issue NOIs, it is imperative that companies be diligent in managing their internal Form I-9 verification and record-keeping processes. For example, companies should perform periodic internal self-audits to correct errors and ensure that proper staff training is in place to prevent the occurrence of future errors when completing and verifying Forms I-9.

IV. Unselected H-1B Cap-Subject Petitions for Fiscal Year 2019 Are Being Returned

On July 30, 2018, USCIS reported that all fiscal year 2019 H-1B cap-subject petitions not selected in the agency's computer-generated random selection lottery have been returned to their original sender. USCIS previously announced on May 15, 2018, that it had completed data entry of all selected cap-subject petitions. Therefore, any employer that did not receive a returned cap-subject petition by August 13, 2018, should contact USCIS.

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