January 2013 Immigration Alert

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I. H-1B Nonimmigrant Season Opens on April 1, 2013, for Fiscal Year 2014

As most H-1B employers know, there is an annual quota on the number of new H-1B petitions that can be approved each federal fiscal year. The quota is 65,000 for regular H-1B petitions, plus another 20,000 for H-1B petitions filed for foreign nationals ("FNs") who have obtained a master's degree or higher from an accredited American university. The federal government's fiscal year runs from October 1 through September 30, so fiscal year 2014 will begin on October 1, 2013. Employers are eligible to start filing H-1B petitions toward the fiscal year 2014 quota on April 1, 2013, but they cannot secure a start date prior to October 1, 2013.

As the U.S. economy improves, the likelihood is that more employers will submit H-1B petitions included in the 2014 H-1B quota. Last year, the quota was reached on June 12, 2012. This year, predictions are that the quota will be reached even earlier. Thus, employers need to assess their workforce requirements, determine what H-1B petitions they plan to file, and attempt to get them submitted on or shortly after April 1, 2013.

II. Report Finds Immigration Laws Frustrate the Admission of Critical Health Care Professionals

The National Foundation for American Policy ("NFAP") has issued a report entitled "U.S. Government, Heal Thyself: Immigration Restrictions and Americas Growing Health Care Needs." The report notes that U.S. immigration laws place significant barriers and other restrictions on the admission of doctors, nurses, physical and occupational therapists, and other health care professionals even though there are apparent shortages in these occupations. Experts predict that these shortages will grow due to the aging population and the increased access that Americans will have to medical services under the Affordable Care Act ("ACA").

The NFAP report reviews the limited immigration options available to foreign doctors, nurses, therapists, and other health care professionals and concludes that they will not be sufficient to meet the growing demands for the delivery of medical services. The report suggests that the physician shortage will approach 63,000 in 2015, and that amount will more than double by 2025. The report also notes that the national deficit of registered nurses will exceed 900,000 by 2030. At the same time, the report observes that the United States will not be able to train anywhere near the number of Americans necessary to fill these positions, placing increasing pressure on the nation's ability to attract qualified FNs. Toward this objective, the NFAP report recommends that comprehensive immigration reform include provisions specifically designed to address the shortage of health care professionals.

III. Senators Offer "Bipartisan" Framework for Comprehensive Immigration Reform

On January 28, 2013, Senators Chuck Schumer, John McCain, Dick Durbin, Lindsey Graham, Robert Menendez, Marco Rubio, Michael Bennet, and Jeff Flake offered what they characterized as a "Bipartisan Framework for Comprehensive Immigration Reform" ("Bipartisan Proposal"). This framework rests on four basic legislative pillars:

1) Creation of a "tough but fair" path to citizenship for unauthorized immigrants that is contingent on securing the borders and tracking the departure of legal immigrants.

2) Reformation of the immigration system to better recognize characteristics that will build the American economy and strengthen American families.

3) Creation of an effective employment verification system that will prevent identity theft and end the hiring of future unauthorized workers.

4) Establishment of an improved process for admitting future workers necessary to serve the country's economy, while protecting all workers.

On January 29, 2013, President Obama gave his long-awaited speech on comprehensive immigration reform, and the White House simultaneously released the administration's "Fact Sheet" on immigration reform. The primary difference between the Bipartisan Proposal and the President's plan concerns the path to citizenship for undocumented immigrants. The Bipartisan Proposal would defer that path until defined border security benchmarks are reached, while the President's plan would create a provisional status that would allow undocumented immigrants to start the path to citizenship immediately. At the same time, Senators Orrin Hatch, Marco Rubio, Christopher Coons, and Amy Klobuchar introduced a related Senate bill to increase the number of H-1B visas and immigrant visa numbers available to skilled workers and foreign students who obtain advanced degrees from American universities.

Both the Bipartisan Proposal and the President's plan address the path to citizenship initiative. However, details about how these proposals stand to benefit the business community are tantalizingly absent, with two exceptions: (i) the President's plan calls for a "start-up visa" for job-creating entrepreneurs, and (ii) the Bipartisan Proposal suggests that green cards be awarded to those FNs who receive either PhD or master's degrees in science, technology, engineering, or mathematics, a concept which has been incorporated into the Senate bill introduced by Senators Hatch, Rubio, Coons, and Klobuchar. Conspicuously absent from all the proposals is any legislative initiative about amending the immigration laws to admit the FN health care professionals who are so desperately needed to support the ACA. While the time is ripe for comprehensive immigration reform, the proposals, so far, fall short. Stay tuned!

IV. HHS Issues Proposed Regulation Implementing ACA

On January 22, 2013, the Department of Health and Human Services ("HHS") released a proposed regulation that would implement key ACA provisions relating to Medicaid and the Health Benefit Exchanges. Essentially, this proposed rule expands the eligibility provisions of ACA relating to Medicaid by, among other things, broadening the definitions of which FNs are "lawfully present" in the United States. Under the HHS proposal, Medicaid eligibility would include the following: lawfully residing non-citizen children and pregnant women, victims of trafficking, noncitizens with a government-issued document reflecting a valid non-immigrant status (thus removing the requirement for a Medicaid agency to check for status violations), and individuals who have been granted an administrative stay of removal.[1]

V. DOJ Settles Worksite Enforcement Claim Against Oregon Homecare Provider

The Office of Special Counsel ("OSC"), within the Civil Rights Division of the U.S. Department of Justice ("DOJ"), has settled claims against an Oregon homecare provider that resulted from its failure to properly use E-Verify, the federal government's electronic

[1] *See* "Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing," Proposed Rule, 78 Fed. Reg.14, (Jan. 22, 2013), pp. 4594-4724.

employment eligibility verification system. According to the OSC, ComForcare In-Home Care & Senior Services ("ComForcare") received an initial tentative nonconfirmation ("TNC") regarding an employee's right to work. ComForcare not only never notified the employee of the TNC, but also refused to permit him to continue working while the TNC issues were resolved as federal law requires. In addition, OSC noted during its investigation that ComForcare violated federal law by requiring non-citizens, and those who appeared to be non-citizens, to produce specific documentation establishing employment authorization, instead of giving them the option of which documents to produce to satisfy their Form I-9 and E-Verify requirements. In the settlement, ComForcare agreed to back pay and a small civil fine. ComForcare also agreed to train its human resources about the requirements of federal law and to submit reporting and compliance monitoring for 18 months.

The small monetary penalties and fines that ComForcare agreed to pay do not reflect the actual costs of this enforcement proceeding. The legal and internal costs, coupled with the adverse publicity that resulted from this proceeding, combine to make compliance in this area a risk management priority. Moreover, the OSC's focus on this aspect of the delivery of health care services is likely to increase. Employers in this industry that hire significant numbers of employees are those that the OSC likely will investigate. For this reason, it is prudent for health care employers to review the E-Verify compliance aspect of their operations and make sure that it is a significant component of their risk management activities.

VI. Immigration Legislation Expands in Georgia and Tennessee in 2013

While the E-Verify electronic employment eligibility verification system remains largely voluntary under federal law, an expanding number of states have enacted legislation making the system mandatory in varying circumstances. At the present time, there are nine states that require most employers to utilize E-Verify, eight states that require public contractors to use E-Verify, and five states that require local and municipal employers to use E-Verify.

New laws passed in Georgia and Tennessee relating to E-Verify usage will become fully effective this summer. In Georgia, starting on July 1, 2013, all private employers with more than 10 employees must enroll in E-Verify and use it to verify the employment eligibility of all new employees. In addition, every employer subject to these E-Verify requirements must submit a compliance affidavit to its local government before it can obtain or renew its business license. In Tennessee, all employers with six or more employees are required to enroll in and use E-Verify by July 1, 2013. Violators in Tennessee are subject to civil fines based on the number of violations and number of employees who were not verified.

VII. OSC Settles Discrimination Claims Against Holliswood Hospital

On December 11, 2012, the OSC announced that it has reached a settlement of its discrimination claims against Holliswood Hospital, located in Queens, New York. According to the OSC, the hospital asked lawful permanent residents to provide more documentation than the law allowed. Specifically, the hospital subjected its lawful permanent residents to re-

verification even though this is not required by federal law. Under the settlement, the hospital paid $1,182 in back pay and a $5,000 civil penalty.

VIII. OSC Settles Discrimination Charge Against Centerplate Inc.

On January 7, 2013, the OSC announced that it had settled charges that food service vendor Centerplate Inc. had discriminated against non-U.S. citizens during the employment eligibility verification process for the past three years. Centerplate has more than 10,000 employees nationwide and provides food services to more than 250 sports stadiums, convention centers, and entertainment facilities in this country. The OSC alleged that Centerplate engaged in a pattern and practice of discrimination by requiring employees who were not American citizens to provide specific documents that American citizens were not required to produce. To settle the allegations, Centerplate agreed to pay a civil penalty of $250,000—the third highest civil penalty that the OSC has secured through settlement.

IX. OSC Advises Employers on Employees Presenting Fraudulent Documents

In November 2012, the OSC issued technical guidance on how employers should respond to employees who present fraudulent documents as part of the Form I-9 employment eligibility requirements. An employer asked the OSC if it was permitted to reject a document that appeared to be fraudulent. The OSC responded that the employer not only was permitted to reject the document, but also had a legal obligation to do so. Under Form I-9 requirements, an employer must reject any document that does not "*reasonably appear to be genuine* or to relate to the person presenting it." Thus, an employer will violate the law if it accepts a document knowing that it is fraudulent.

On a related note, the OSC also advised on the employer's obligations with respect to hiring or re-hiring the employee who submitted the fraudulent documentation. In this regard, the OSC approved the employer's policy of making such employees ineligible for employment as long as the policy is consistently enforced. According to the OSC, "consistent application of a dishonesty policy would not constitute a per se violation of the anti-discrimination provisions [of the immigration laws]."

X. Labor Department Settles Claim Against Employer of J-1 Foreign Interns

In November 2012, the U.S. Department of Labor settled claims that three firms employing foreign J-1 student interns violated minimum wage and overtime laws by deducting excessive housing costs and thus reducing their compensation below what they promised in the J-1 program and what federal law requires. The California-based CETUSA acted as the students' sponsor for the J-1 program, a summer work-travel program designed to promote educational and cultural exchanges. The SHS Group, LP, a staffing company, placed the interns at a facility in Palmyra, Pennsylvania, which was owned by the Hershey Company and operated by Excel, Inc.

XI. DOS Issues February 2013 Visa Bulletin

The U.S. Department of State ("DOS") has issued its Visa Bulletin for February 2013. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. On the employment-based side, the February 2013 Visa Bulletin showed that the Second Preference ("EB-2") for China advanced to January 15, 2008, but India remained at September 1, 2004. The EB-2 cutoff date for the rest of the world remained current. In the February 2013 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: March 15, 2007, for all chargeability, including Mexico; November 15, 2006, for China; November 15, 2002, for India; and August 22, 2006, for the Philippines. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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