December 2016 Special Immigration Alert

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I. USCIS Updates Fee Schedule for Immigration and Naturalization Benefit Requests

On October 24, 2016, the U.S. Citizenship and Immigration Services ("USCIS") announced a final rule adjusting the fees required for many immigration and naturalization applications and petitions. These new fees are scheduled to take effect on December 23, 2016. There is nothing that employers must do to prepare for these new fees; employers simply must pay them once they take effect.

II. New Form I-9 Becomes Mandatory on January 22, 2017

On November 14, 2016, USCIS issued a new "smart" version of Form I-9 ("Employment Eligibility Verification"), which can be downloaded from the USCIS website at www.uscis.gov/i-9. Employers may use this form immediately, but they must use it on and after January 22, 2017.

According to USCIS, the new Form I-9 will facilitate compliance by guiding users through a step-by-step process that will help reduce errors in completing the form. The new form (1) includes alerts when required fields are left blank or incorrectly completed, (2) helps employers know when the information provided by employees is not consistent with employment-authorized status as indicated in section 1 of the form, and (3) adds drop-down menus from the List A or List B and List C document fields of section 2 that help employers know which documents to accept.

The new Form I-9 also includes content-based changes. With regard to section 1, USCIS has made the following four changes:

1. USCIS replaced the "Other Names Used" field with "Other Last Names Used"; this change helps avoid discrimination issues and heightens privacy protection for transgender individuals along with others who have changed their first names.

2. Employees must now indicate whether the number indicated on section 1 of the form is an Alien Registration number or a USCIS number.

3. Certain foreign nationals ("FNs") must enter either their foreign passport information or their Form I-94 number information, but not both as in prior versions.

4. The new Form I-9 allows multiple preparers/translators to participate in the completion of the form. Each preparer and translator must complete a separate "Preparer and/or Translator" section. If an employee does not use a preparer or translator, the employee will check a new box labeled "I did not use a preparer or translator."

Section 2 of the new Form I-9 has two additional fields that employers must complete:

1. USCIS added a new field to the top of section 2 labeled "Citizenship/Immigration Status." This new field requires the employer to input the number correlating with the citizenship or immigration status inputted by the employee in section 1.

2. USCIS included a new field that allows employers to input additional information that is currently notated in the margins of the Form I-9.

While the new "smart" Form I-9 may improve proper completion for compliance purposes, it is impossible to predict whether it will be 100 percent foolproof. This may be important as the new presidential administration attempts to follow up on its announced intention to increase worksite enforcement efforts. In addition, employers should know that a completed new "smart" Form I-9 does not satisfy the government's current definition of an "electronic I-9." This means that

employers must still print a copy of the form to proceed with their normal signing, storing, and reverification practices that already should be in place for previous paper Forms I-9.

Employers that have questions about the new Form I-9, or any related aspect of the employment verification process or worksite enforcement, should contact their Epstein Becker Green attorney for help in navigating this increasingly important and complex area of compliance.

III. USCIS Issues Final Rule Modernizing and Improving Selected Immigrant and Nonimmigrant Visa Programs

Last month, USCIS issued its long-awaited final rule regarding certain Employment-Based Immigrant and Nonimmigrant Visa programs. See 81 Fed. Reg. 82398 (November 18, 2016). The rule is extensive and, according to USCIS, largely conforms government regulations to current USCIS practices and policies established in response to various sections of the American Competitiveness and Workforce Improvement Act of 1998 and the American Competitiveness in the Twenty-first Century Act of 2000. These statutes were intended to provide greater flexibility and job portability to certain nonimmigrant workers, particularly those sponsored for U.S. permanent residence. The pertinent provisions are as follows:

- H-1B "Recapture": The final rule incorporates into USCIS regulations the ability of FNs to "recapture" time spent abroad and use it to extend H-1B time beyond the six-year maximum limit.

- H-1B "Portability": The final rule incorporates into USCIS regulations the current administrative rules regarding when H-1B employees may move to a new employer while still maintaining their H-1B status.

- H-1B Cap Exemption: The final rule clarifies two issues regarding when H-1B workers must be counted against the cap. First, it provides that H-1B workers who work for a cap-subject employer, but spend the majority of their time at a cap-exempt location, are not subject to the cap. Second, it allows a cap exemption for H-1B workers employed concurrently by cap-subject and cap-exempt employers.

- H-1B Cap Exemption/Affiliation: In an important development for health care systems, the final rule expands the definition of "affiliation" to an institution of higher education by eliminating the "shared ownership and control" requirement for cap-exempt organizations.

- H-1B Licensure: Under the final rule, qualified H-1B workers now may include unlicensed professionals who are legally permitted to "fully practice" occupations that normally require a license as long as they are under the supervision of a licensed professional.

- H-1B Extensions Beyond Six Years: The final rule incorporates provisions of AC21 that (i) permit H-1B employees to extend their status beyond the six-year maximum when at least one year has elapsed since the filing of a labor certification application or I-140

petition, (ii) allow H-1B employees to continue to secure these H-1B extensions during the administrative appeal process for applications or petitions that have been denied, and (iii) permit H-1B employers to extend the status of these employees even though they were not the original approved labor certification application or I-140 petition sponsor.

- Limits on H-1B Extensions During Lengthy Green Card Adjudications: The final rule limits extensions of H-1B status beyond six years whenever the FN has an approved I-140 petition and is eligible to file for permanent residence under the Visa Bulletin issued by the U.S. Department of State ("DOS") but fails to do so within one year.

- Green Card "Portability": The final rule confirms when FNs sponsored by one employer may move to another employer but still preserve their pending green card application.

- Continuing I-140 Petition Validity: The final rule confirms that an approved I-140 petition remains valid and will support green card or subsequent H-1B extension applications even when the sponsoring employer seeks to withdraw or revoke the I-140 petition so long as at least 180 days have passed after the I-140 petition approval or the filing of an accompanying green card application.

- Priority Dates: The final rule clarifies when priority dates in employer-sponsored cases are established and retained when the employee moves to a new employer.

- Employment Authorization: The final rule allows USCIS to issue employment authorization to certain nonimmigrants in E-3, H-1B, H-1B1, L-1, and O-1 nonimmigrant classifications when (i) "compelling" circumstances exist and (ii) their priority date is backlogged. The final rule also removes the 90-day period during which USCIS must adjudicate applications for employment authorization but provides for an automatic 180-day extension of employment authorization in certain situations where a FN files to renew an employment authorization document extension.

- Grace Periods: The final rule provides (i) two 10-day grace periods—one before admission and one at the expiration of an FN's E-1, E-2, E-3, L-1, or TN status—and (ii) one grace period of up to 60 consecutive days of allowed unemployment for FNs in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, or TN nonimmigrant status.

IV. CBP Requires EVUS Enrollment for All Chinese Nationals Holding 10-Year Visas to Visit the United States

On November 29, 2016, U.S. Customs and Border Protection ("CBP") announced that it is requiring all individuals holding passports issued by the People's Republic of China that contain a visitor's visa (B-1/B-2) valid for 10 years to enroll in the Electronic Visa Update System ("EVUS") before traveling to the United States. EVUS is the online system used by Chinese citizens to update basic biographic information to facilitate U.S. travel. As a general rule, EVUS enrollment is valid for up to two years or until the traveler obtains a new passport or visa, whichever occurs first. Starting November 29, 2016, nationals of the People's Republic of China

will not be able to travel to the United States without a valid EVUS enrollment. To enroll, visit www.EVUS.gov. For the latest EVUS information, visit www.CBP.gov/EVUS.

V. Fifth Circuit Finds That Employer May Sign Section 2 of Form I-9 Based on Corporate Knowledge, in Limited Circumstances

The U.S. Court of Appeals for the Fifth Circuit recently issued its opinion in *Employer Solutions Staffing Group II, L.L.C. v. OCAHO,* No. 15-60173 (5th Cir. August 11, 2016). The Fifth Circuit found that it was permissible for an employer to sign section 2 of Form I-9 based only on corporate "knowledge."

The employer ("ESSG") is a staffing company headquartered in Minnesota. ESSG contracted with a recruiter in Texas to hire workers for a client there. The recruiter reviewed the original documentation that the new hires presented in Texas and scanned those documents to ESSG, where a representative at ESSG's Minnesota headquarters completed section 2 of Form I-9, including signing and dating the certification. The Fifth Circuit upheld this practice. However, it is important to understand the limited nature of this court's holding.

Current USCIS instructions require the individual who personally reviews the original employment verification documents to sign section 2 of Form I-9. At the time of the ESSG's alleged violation, however, this guidance was not clear. Prior versions of Form I-9, including those effective at the time of the ESSG case, did not include this guidance, so the Fifth Circuit held that the employer did not have "fair notice" of the agency's interpretation of the regulation. The Fifth Circuit was careful to add, however, that "[o]ur holding does not address whether [the Department of Homeland Security] can lawfully prohibit [this type of] corporate attestation."

VI. DOL Administrative Law Judge Permits Employer to Deduct H-1B Costs from Final Paycheck per Repayment Agreement

On October 26, 2016, an administrative law judge ("ALJ") for the U.S. Department of Labor ("DOL") found that an H-1B employer, located in Massachusetts, properly enforced a repayment agreement by deducting all expenses related to the H-1B process from an H-1B employee's final paycheck. See *Administrator v. Woodmen of the World Life Insurance Society*, Case No. 2016-LCA-00018 (2016). The H-1B employee in this case entered into an employee repayment agreement ("ERA") for all expenses related to the employer's H-1B submission. The DOL's regulations preclude employers from deducting these expenses from an employee's wages and argued that this ERA was unenforceable.

The ALJ disagreed. The ALJ noted that the entire sum due for H-1B expenses under the ERA was paid out of the employee's unused vacation pay and thus did not adversely affect his wages. In this regard, the ALJ noted that the employer's vacation policy was a "benefit" normally paid out of the employee's final paycheck upon resignation. In addition, the ALJ noted that other debts due by employees, such as tuition reimbursements, also were deducted from the last paycheck for all employees, not just H-1B employees. Under these circumstances, the ALJ rejected the DOL's argument that the ERA violated the DOL's regulation precluding the deduction of H-1B expenses from wages.

Employers interested in requiring H-1B employees to execute ERAs should pay careful attention to the facts of the *Woodmen* decision. If the employer plans to deduct these costs from a final paycheck, it must be certain that this is permissible under state law. The employer also must make sure that the repayment process satisfies the DOL's regulation and does not result in a deduction from the employee's wages.

VII. DOS Issues Consular Guidance on Inadmissibility for Drunk Driving-Related Offenses

On November 15, 2016, the DOS announced a new policy that requires consular officers to prudentially revoke (without making a determination that the individual is inadmissible) nonimmigrant visas of FNs arrested for, or convicted of, driving under the influence ("DUI")/driving while intoxicated ("DWI"), or similar alcohol-related arrests or convictions that have occurred within the previous five years. This new requirement, however, does not apply when the arrest or conviction occurred prior to the date of the visa application and already has been considered in approving the visa application.

Under the immigration laws, alcohol-related driving offences may indicate a possible ground for inadmissibility if they are associated with harmful behavior that is likely to pose a threat to the property, safety, or welfare of the applicant or others. DOS's new prudential revocation policy reflects that a DUI/DWI arrest or conviction may demonstrate to consular officers that the applicant may now be inadmissible to the United States.

In most situations, this will not affect the nonimmigrant status of the visa applicant and his or her family as long as they remain in this country. If they leave the country, however, the applicant and all family members will have to apply for and obtain new visas. Depending on the severity and circumstances of the DUI/DWI, this may not be possible. Thus, it is critical that FNs faced with this situation secure competent legal advice before leaving the United States.

VIII. Conspirator in $14 Million B-2 Visa Fraud Scheme Pleads Guilty

On October 6, 2016, Eyal Katz, the owner of a mall kiosk business, pled guilty to a visa fraud and money laundering plot involving 140 foreign workers from Israel that earned $14 million over three years. See *United States v. Gur*, Case No. 4:16-cr-00017 (E.D. Va. 2016). According to the plea agreement, Katz, operating from an office in Tel Aviv, Israel, identified, recruited, and sent FNs from Israel to the United States on B-2 visitor visas. FNs on B-2 visas are not permitted to work in the United States. Once in this country, Katz employed these FNs at one of several U.S. business entities, known collectively as RASKO—a mall-based kiosk business in Virginia, Georgia, Pennsylvania, and New Jersey through which they sold Dead Sea salt products. To facilitate this work, Katz and co-conspirators provided housing and transportation to the FNs.

Since 2011, the conspirators, led by Omer Gur in the United States and Katz in Israel, recruited over 140 FNs from Israel to work at the kiosks. From 2012 through 2014, RASKO received over $14 million through its kiosk-based sales. Several million dollars from these sales were then routed to Israel-based accounts, including accounts controlled by Katz, and spent on lodging,

travel, kiosk rentals, and other expenses of the scheme. As part of the plea agreement, Katz faces up to 25 years in prison.

This case should serve as another reminder to employers of the potentially serious ramifications that can occur from deliberately circumventing the B-2 nonimmigrant classification by employing FNs admitted in that status in violation of the immigration laws.

IX. Disney Dodges Worker Visa Abuse Claims

On October 13, 2016, a federal judge in Florida dismissed a pair of punitive class action lawsuits against Walt Disney Parks and Resorts and two consulting companies, dismissing allegations that they conspired to replace Disney employees with foreign workers in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). See *Perrero v. HCL America, Inc. and Walt Disney Parks and Resorts U.S., Inc.*, Case No. 6:16-cv-112-Orl-31TBS (M.D. Fla. 2016).

In this case, Perrero sued Disney and two consulting companies, HCL and Cognizant, claiming that they conspired to replace 200 to 300 U.S. employees with FNs hired under the H-1B visa program. Relying on RICO, Perrero claimed that these companies engaged in a "pattern of racketeering" activity by falsely stating on the DOL's Labor Condition Application ("LCA") forms that the H-1B employees would not adversely affect the working conditions of similarly situated U.S. workers. The court agreed with HCL and Cognizant that this LCA representation applied only to their employees, and not to Disney's. Moreover, the court also noted that the consultants were correct that the LCA representation about U.S. workers does not apply to exempt H-1B workers who are paid at least $60,000 a year, and that the workers at issue were exempt under this definition.

X. California Outlaws Immigration Evidence in Injury Lawsuits

On August 17, 2016, California Governor Jerry Brown signed into law A.B. 2159, which becomes effective on January 1, 2017. A.B. 2159 bars the admission or discovery of evidence related to a person's immigration status in wrongful death and personal injury cases. Previously, some defendants had argued that damages in these cases should be based on what a plaintiff would prospectively earn in his or her country of origin or what medical costs would be in his or her country of origin, rather than in California.

Employers in California should take particular note of this decision because it is another reminder to employers that hiring an undocumented worker does not alleviate the employer's liability for compliance with employment laws.

XI. IRS Announces Changes to the Rules Governing Individual Taxpayer Identification Numbers

The Internal Revenue Service ("IRS") has announced changes to its program for Individual Taxpayer Identification Numbers ("ITINs"). These changes will require some taxpayers to renew their ITINs, starting in October 2016.

An ITIN is a number issued to individuals who, among other things, may not be eligible for Social Security numbers ("SSNs"). This could include FNs who are not eligible for SSNs because they are not authorized to work. Under the IRS's new rule, ITINs will no longer be valid if they have not been used on a tax return for the past three years. In addition, ITINs issued prior to 2013 that have been used on a tax return within the past three years still must be renewed before they can be used on another return. Individuals interested in complying with this new rule should check the IRS website, www.irs.gov.

XII. December 2016 Visa Bulletin

The DOS has issued its Visa Bulletin for December 2016. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration advanced slightly but continued to show backlogs due to the heavy demand for these visas. On the employment-based side, the December 2016 Visa Bulletin showed that the employment-based first preference ("EB-1") remained current for all countries. The employment-based second preference ("EB-2") remains current for all countries, except China and India. For China, the EB-2 category has reached September 22, 2012; for India, it has reached February 1, 2008. The cutoff dates for the employment-based third preference ("EB-3") category are as follows: July 1, 2016, for all chargeability, including Mexico. The EB-3 cutoff date for China is July 1, 2013; for India, it is March 15, 2005; and for the Philippines, it is June 1, 2011. The DOS's monthly Visa Bulletin is available at travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

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