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immigration

CLIENT ALERT

April 2014 Immigration Alert

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I. USCIS Reaches Fiscal Year 2015 H-1B Cap

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. On April 7, 2014, U.S. Citizenship and Immigration Services ("USCIS") announced that it received a sufficient number of H-1B petitions to surpass both statutory caps. In total, the USCIS received about 172,500 H-1B petitions.

On April 10, 2014, the USCIS conducted a random lottery of all petitions received on or before April 7, 2014. The USCIS conducted the random selection process for the advanced degree exemption first. All advanced degree petitions not selected then became part of the random selection process for the 65,000 limit. Because the USCIS did not release the amount of advanced degree petitions that it received, it is difficult to project the probability of an advanced degree applicant being selected for inclusion into the fiscal year 2015 H-1B Cap. For those candidates with bachelor's degrees, it appears that there is less than a 50 percent chance of selection.

The USCIS has started sending out receipts for H-1B petitions that were properly filed and selected for inclusion in the quota. While requesting premium processing does not enhance the probability of selection,

it does result in expedited notification and adjudication, if selected. The USCIS has started sending these electronic receipts out and announced that it will begin premium processing H-1B cap cases on April 28, 2014. The USCIS anticipates that receipts for all H-1B petitions selected for this year's H-1B quota should be sent by the end of May. During this time, the USCIS also will start returning those H-1B petitions that were not chosen.

Due to the improbability of selection in the quota, employers need to examine contingency plans on how to handle sponsored employees in the event that their H-1B petitions are not chosen.

II. USCIS Implements FDNS Site Visits to Confirm L-1 Employment

The USCIS has expanded the number of site visits conducted as part of its Fraud Detection and National Security ("FDNS") program to employers of L-1 nonimmigrants. This appears to be in response to the 2013 report issued by the Department of Homeland Security ("DHS") that addressed fraud and abuse in the L-1 program. In past years, the focus of the FDNS program has been on H-1B employers.

These FDNS site visits for L-1 employers promise to be similar to those for H-1B employers, but the burden on L-1 employers promises to be disproportionately larger, due to the different rules that apply to L-1 employees. In the typical FDNS audit, the DHS inspectors conduct pre- and post-adjudication site inspections, typically without notice, at the employer's principal place of business and/or at the work location indicated on the visa petition. The auditor seeks to verify the validity of the information submitted with a nonimmigrant petition and ensure compliance with the terms and conditions of the relevant nonimmigrant status. This includes confirming that: (1) the petitioning employer exists and is engaged in the represented operations, (2) the stated job duties are in line with the employee's classification as either a manager or executive (L-1A) or specialized knowledge employee (L-1B), and (3) the company is paying the employee the wage indicated in the petition and that the wage is consistent with the listed duties and level of experience. During the audit, FDNS inspectors seek to review documents, speak with company representatives, and interview the L-1 employee. Inconsistencies between the petition and the actual worksite conditions could trigger a Notice of Intent to Revoke ("NOIR"). Failure to provide the documentary evidence requested in the NOIR also could lead the USCIS to revoke the petition.

The problem with these audits lies in the USCIS rules defining the circumstances that require an amendment of the underlying petition. In the H-1B classification, employers must file an amended petition whenever there is a "material" change in the terms and conditions of employment. In the L-1 classification, by contrast, the USCIS historically has advised employers that amended petitions are required only when the employee is reassigned to a position that is in a different L-1 sub-classification. Thus, no amended petition is required if an L-1A manager is assigned to another managerial position in another location or, in blanket cases, another managerial position with a related company included on the approved blanket L petition. This increases the likelihood that FDNS auditors may issue NOIR in cases where the employee legitimately is no longer at the site or discharging the responsibilities represented in the L-1 petition. Responding to these NOIRs can prove to be a burdensome and expensive proposition for the L-1 employer.

The growing number of these FDNS audit suggests that the burden on L-1 employers will increase substantially. For this reason, we advise all L-1 employers to anticipate site visits and prepare accordingly. First, employers must understand proper compliance and establish internal protocols and best practices in preparation for potential site visits. Second, employers must develop a system of tracking L-1 employees from the original employment location and employer. Finally, employers must prepare a memo for that original site explaining the legal basis for the transfer. Taking those measures, among others, should ensure the relevant information can be readily provided to FDNS in the event of an audit, and also may have the effect of pretermitting a possible NOIR. Companies employing L-1 workers should contact your EBG counsel to discuss these and other issues an expanded FDNS audit program presents.

III. USCIS Ombudsman Reports Mistaken Denials of Work Authorization for Conrad 30 Dependents

On March 24, 2014, the USCIS Ombudsman reported that the agency has been improperly denying employment authorization to the dependents of J-1 doctors who are participating in the Conrad 30 program. Normally, foreign physicians who pursue medical training in the United States in J-1 status must leave the country and return home for at least two years when they finish their residency programs. The Conrad 30 program waives this two-year foreign residence requirement and allows those J-1 physicians selected for the program to change their status to H-1B (exempt from the cap) and apply for a green card if they spend at least three years practicing in an underserved area.

Prior to 2011, the USCIS routinely allowed dependents of J-1 physicians in the Conrad 30 program to change their status from J-2 to another work authorized status if they independently qualified. Beginning in September 2013, however, the USCIS began denying requests from J-2 dependents to change their status to anything other than H-4. According to the Ombudsman's report, the USCIS's change in policy is inconsistent with the Conrad 30 waiver program in several respects. First, it ignores the fact that the USCIS approval for J-1 physicians selected for the Conrad 30 program applies to both the J-1 physician and all family members. Second, the USCIS's action is inconsistent with guidance by the U.S. Department of State ("DOS") on the same issue, which includes all family members as part of the Conrad 30 waiver approval. Finally, the USCIS's short-sighted action ignores the serious policy implications that may result. The Conrad 30 program is designed to attract J-1 physicians to practice in medically underserved areas. These physicians usually are compensated far less due to the lack of financial resources in these patient populations. In this context, rules that restrict the careers of spouses may be a significant factor in the J-1 physician's decision to relocate. Under the Affordable Care Act, the federal government is placing increased reliance on these types of programs to expand the delivery of medical services across the country. In this context, this USCIS rule creates the type of additional obstacle for J-1 physicians that may further limit the availability of care in already underserved areas.

IV. New California Laws Raise I-9 Dilemma for Employers

On January 1, 2014, several immigrant-friendly laws went into effect in California. Our January 2014 immigration alert summarized several of the laws. Under one such law, Assembly Bill No. 263, employers may no longer discharge, discriminate, retaliate, or take any adverse action against an employee for updating or attempting to update personal information unless the change relates to the employee's professional qualifications for the job. This appears to preclude an employer from taking an adverse employment action against an employee who admits that he or she previously provided a fake name, fake or fraudulent Social Security number, or fake or fraudulent Employment Authorization Documentation in connection with Form I-9 completion.

Prudent employers often have policies that subject employees to termination for presenting false documents or lying on a company or government document. It appears that California's new laws may make such policies unenforceable in that state. It remains to be seen, however, whether courts will enforce state law or find that it has been preempted by the overwhelming federal regulation in this area. For example, what if an undocumented employee provides false information in a Form I-9 or in a resume or employment application? Does the California law preclude the employer from disciplining the employee or even terminating him or her under the employer's honesty policies? How does this square with the federal law that may require the employee's termination? This may prove to be a particularly contentious issue in California, where nearly 2.6 million undocumented immigrants may receive work authorization under comprehensive immigration reform.

While federal law is the primary source of immigration law, employers need to remember that there are a growing number of state immigration laws that might apply to their operations.

V. California Supreme Court Will Determine the Reach of California Senate Bill 1818

On April 2, 2014, the California Supreme Court heard arguments in *Salas v. Sierra Chemical Co*., No. S196568 (Cal.). In *Salas*, a former employee of Sierra Chemical brought a disability discrimination claim, arguing that he was entitled to lost wages from the time of dismissal until the employer discovered that he was not authorized to work in the United States. During discovery, the employer found out that Mr. Salas had used someone else's Social Security number to obtain employment and argued that his claim should be denied because the company never would have hired him if it had known about the misrepresentation. The employee appealed, relying on Section 1171.5 of the California Labor Code, commonly referred to as Senate Bill 1818 ("SB 1818"), which provides, in pertinent part, that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." The intermediate California appellate courts found that Mr. Salas's illegal status and misrepresentations foreclosed his claims because his misconduct had exposed Sierra Chemical to penalties for submitting false statements to federal agencies.

California enacted SB 1818 in reaction to the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). In *Hoffman Plastics*, the Supreme Court limited the remedies available to undocumented employees under the National Labor Relations Act. In response, California passed SB 1818 to ensure that undocumented workers remain covered by all the rights and protections given to other workers in that State. During oral argument, the California Supreme Court appeared skeptical of Mr. Salas's claim and noted that, if accepted, it would give undocumented workers more rights than other lawful workers. The outcome of this case will be important for employers in

California because it will help define how far that State will go under SB 1818 to protect the rights of undocumented workers.

In California, Epstein Becker Green is fortunate to have professionals in our San Francisco and Los Angeles offices who can help guide you through this maze. Contact Jang Im in San Francisco or David Jacobs in Los Angeles if you need more assistance with these rules or any other issues relating to the impact of immigration issues on your employment relationships.

VI. Department of Commerce Issues Fine for Export Control Violations

On February 24, 2014, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") and Intevac, Inc. ("Intevac"), entered into a voluntary settlement agreement regarding alleged violations of the Export Administration Regulations ("EAR"). Under the EAR, the release of controlled technology to an FN in the United States is "deemed export" to that FN's home country. Under this "deemed export rule," organizations in the United States must apply for an export license if: (1) they intend to release or allow the release of controlled technology or technical data to an FN in the United States, and (2) the release of this technology or technical data to the FN's home country would require an export license. In the "deemed export" context, a release could include making the technology or technical data available for visual inspection, providing instruction or guidance about the technology or technical data, allowing access to a server on which the data is stored, or even having a conversation about the technology or data.

The BIS alleged that Intevac allowed a Russian national employed at the company's facility in Santa Clara, California, to access EAR-controlled drawings and blueprints without first obtaining an export license. Further, the BIS also claimed that, while Intevac eventually applied for a license, it allowed the employee to access the controlled technology three times while the license was pending. The BIS concluded that Intevac's knowledge of these subsequent releases was an aggravating factor in its penalty determination. Finally, the BIS alleged that in 2010, Intevac allowed a Chinese national working at one of its subsidiaries in China to access EAR-controlled technology stored on an Intevac server in Santa Clara, California.

There are several important reminders for employers from this settlement. First, deemed export liability can attach regardless of where the FN who receives the improper release is located. He or she can be inside or outside the United States when the illegal release occurs. Second, sponsoring employers must carefully consider whether an export license is required for the FN to assume the anticipated responsibilities. Indeed, the USCIS petition form now requires the sponsoring employer to certify whether an export license is required, and the BIS uses the answers on this form in developing proof of the violations and determining the appropriate fine in the event of a violation. Third, this BIS fine proceeding serves as a reminder to employers that sponsor FNs that they must have proper compliance procedures in place to mitigate the risk of deemed export violations if they have controlled technology stored on servers. Finally, the fines imposed by the BIS for deemed export violations can be substantial. In this case, the BIS fined Intevac $115,000, but the failure to obtain an export license can result in civil fines of up to $500,000 per violation. Also, willful violations can result in criminal liability, including up to 20 years in prison, and a criminal fine of up to $1,000,000, *per violation*. Thus, it is important for organizations to factor possible deemed export liability into their risk management policies and procedures.

VII. Important Developments Have Arisen in Health Care-Related Immigration

Below are three important developments in health care-related immigration that we need to bring to your attention:

1. **Valid Health Care Certificates Are Required for Immigration Applications**: Many health care workers are under the impression that the health care certificates they used to enter in valid nonimmigrant status are valid indefinitely and need not be renewed to support renewal or green card applications. The USCIS, however, requires FNs to submit a valid health care certificate with each application, both nonimmigrant renewals and green card applications, until the FN is admitted to lawful permanent residence. As a general rule, these certifications are valid from three to five years, but can take several months to renew. For this reason, it is important for employers to make sure that the FNs continue to have a valid health care certification so that they can remain in status without an unanticipated interruption.

2. **USCIS Requires a Master's Degree or Foreign Equivalence for Physical Therapists**: Health care employers sponsoring physical therapists for permanent residence often seek to qualify them for the employment-based second ("EB-2") preference to speed up the process. To qualify for the EB-2 preference, however, the sponsored physical therapy position must require a

master's degree (or foreign equivalent) or, alternatively, a bachelor's degree plus five years' progressively responsible experience, and the sponsored physical therapist must satisfy this requirement. Many sponsored physical therapists have obtained degrees in five-year physical therapy programs that standard credentials evaluations equate to the EB-2 qualifying master's degree.

The USCIS, however, has been challenging these evaluations because it does not believe that degrees from these programs equate to the qualifying master's degree. In making this assessment, the USCIS has indicated that it relies almost exclusively on the American Association of Collegiate Registrars and Admissions Office's EDGE database, which does not support the claim that these programs issue degrees equivalent to a U.S. master's degree. Before preparing these applications, therefore, health care employers must first secure an EDGE evaluation to be certain that the sponsored FN has a degree that satisfies the USCIS requirements.

3. **Proper FN Nurse Priority Date Should Be Verified**: As we have noted in previous alerts, most employment- and family-based immigration is limited by annual quotas. These quotas have resulted in significant delays for employers sponsoring FNs for immigrant visas so that they can come here to work as registered nurses ("RNs"). Many RNs were sponsored years ago and no longer have job offers from the employer that filed their original I-140 petition. To immigrate to the United States now, these RNs must find another employer to file a new I-140 petition on their behalf. However, it is important to note that they retain their place in the immigration line (i.e., a priority date) that attached to the initial I-140 petition, unless it has been revoked for fraud or misrepresentation.

   When these new I-140 petitions have been filed, however, the USCIS has not been consistent in granting the new employer's request to retain the sponsored RN's original priority date. For this reason, new employers in this situation must verify that the new I-140 approval notice accurately reflects the proper priority date. If there is a discrepancy, the employer should immediately contact the USCIS to correct the error. It is critical to effect this correction before the file is transferred to the National Visa Center so that the immigrant visa will be issued in a timely manner within the appropriate eligibility period.

At Epstein Becker Green, we have significant experience supporting clients in the health care sector with their immigration needs. Please contact us if you need guidance on these or any other immigration issues.

VIII. OCAHO Continues to Enforce Form I-9 Violations in Hospitality and Construction Industries

The OCAHO has recently issued two Form I-9 enforcement decisions involving hospitality and construction industry employers that should be of interest to all our clients.

In *United States v. Symmetric Solutions, Inc. d/b/a Minerva Indian Cuisine*, 10 OCAHO no. 1209 (OCAHO February 6, 2014), an OCAHO Administrative Law Judge ("ALJ") upheld a $77,000 fine imposed by Immigration Customs Enforcement ("ICE") against a restaurant in Alpharetta, Georgia ("Restaurant"), for Form I-9 violations. ICE claimed that the Restaurant failed to prepare/present Forms I-9 for more than 80 employees, failed to ensure that several employees completed their Forms I-9 correctly, and hired 17 workers knowing that they were not authorized to work. The Restaurant claimed that it was not liable for the violations because, among other things, it did not own the Restaurant at the time of the violations. The ALJ rejected this defense, and upheld the fine, because the evidence established that the original owners retained a 40 percent interest in the business following the sale and continued to play an active role managing the business after the transaction.

In *United States v. M&D Masonry, Inc*., 10 OCAHO no. 1211 (OCAHO March 11, 2014), the ALJ upheld a fine of $228,300 imposed by ICE upon M&D Masonry ("M&D"), a Georgia masonry company, for Form I-9 violations. The government was alerted to possible misconduct by M&D from a newspaper article entitled "Illegal hiring for airport construction," which appeared in *The Atlanta Journal-Constitution*. After an investigation, ICE charged M&D with failing to secure correctly completed Forms I-9 from more than 270 employees and with failing to obtain any Form I-9 from more than 85 employees. The OCAHO ALJ rejected M&D's claims that, among other things, these were at most technical violations and failed to take the company's limited financial resources into account. In this regard, the ALJ upheld the fine of $228,300 after pointedly noting that ICE was "unduly generous" in considering the company's financial situation when establishing the fine, due to the serious and persistent number of violations at issue.

These cases serve as an important reminder to employers of the potentially serious nature of Form I-9

violations and the continuing need to address them as part of any organization's overall risk management policies. These cases also underscore the importance of "due diligence" in this area as part of any merger, acquisition, or other transaction. Most purchase and sale agreements do not have specific set asides for these penalties or provisions to handle the business disruption that can result from ICE directives to terminate undocumented workers. Thus, it is critical to assess these issues prior to closing to avoid the litigation that invariably follows if they are not suitably addressed.

IX. DOS Increases Site Visits for J-1 Hosts and Participants

The DOS recently advised designated J-1 sponsors within the intern and trainee categories that representatives from the Bureau of Educational and Cultural Affairs are increasing and intensifying their site visits at trainee and intern locations across the United States. This announcement comes on the heels of the February 11, 2014, report from the Southern Poverty Law Center that harshly criticized work-related J visa programs, but appears to have been an attempt by the DOS to undercut the impact of that report. In light of these developments, we recommend that employers of J-1 interns and trainees take precautions and implement procedures that anticipate these visits and prepare both participants and host employers on how to handle them. These steps include:

1. establishing and implementing a protocol for handling the DOS representatives who are conducting the site visit so that they are referred to the proper management representative;

2. notifying all J-1 participants that DOS representatives may visit without notice, and asking them to describe their programs and the cultural activities in which they have engaged while in the United States; and

3. reviewing the Approved Training/Internship Placement Plan (DS-7002) to ensure that the J-1 participant is being handled pursuant to that plan.

Many organizations rely on the J-1 program as an important vehicle for interns and trainees. It is important that they comply with all aspects of that program to remain eligible to utilize it.

X. Federal Court in Texas Rules That Former Employees Lack Standing to Bring RICO Claim

On March 31, 2014, the U.S. District Court for the Northern District of Texas held that employees lacked standing to sue their former employer under the Racketeering Influenced and Corrupt Organization Act ("RICO") on the basis that their wages were depressed because the employer transported, harbored, and hired undocumented immigrants. See *Varela v. Gonzales*, No. 3:13-cv-01278 (N.D. Tex. 2014). The court found that the plaintiffs failed to prove that the alleged RICO violations were the proximate cause of their depressed wages.

Under RICO's civil provisions, a plaintiff can establish a violation by demonstrating that the defendant committed a "pattern of racketeering activity" within the past 10 years. Certain immigration violations fall within the definition of "racketeering activity" under this statute. Successful RICO plaintiffs can recover treble damages, plus counsel fees. Although this case was dismissed, the RICO claim raised by the plaintiffs serves as another reminder of the risks associated with the employment of undocumented workers and underscores the importance for employers to develop, implement, and enforce proper hiring practices that ensure that all employees are authorized to work in the United States.

XII. DOS Issues May 2014 Visa Bulletin

The DOS has issued its Visa Bulletin for May 2014. 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 May Visa Bulletin showed that the EB-2 preference for China continues to lag behind the employment-based third ("EB-3") preference for that country. The EB-3 Chinese quota has reached October 1, 2012, while the EB-2 quota has only reached April 15, 2009. In the May Visa Bulletin, the EB-2 quota for India has remained at November 15, 2004. The EB-2 cutoff date for the rest of the world remains current. In the May 2014 Visa Bulletin, the cutoff dates for the EB-3 category are as follows: October 1, 2012, for all chargeability, including Mexico. The EB-3 cutoff date for India is October 1, 2003, and, for the Philippines, it is November 1, 2007. The DOS's monthly Visa Bulletin is available http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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