Special Immigration Alert:

September 2016

I. DOS Announces 2018 Diversity Lottery

The U.S. Department of State ("DOS") just released its instructions for the DV-2018 Diversity Visa (DV-2018) lottery. The registration period begins on *Tuesday, October 4, 2016, at 12:00 p.m. EDT (GMT-4) and concludes on Monday, November 7, 2016, at 12:00 p.m. EST (GMT-5)*.

During the registration period, information, instructions, and the Electronic Diversity Visa Entry Form for the DV-2018 lottery will be available at www.dvlottery.state.gov. Applicants must submit entries electronically during the registration period using the electronic DV entry form (E-DV or DS-5501), which is available at the DV-2018 website. *Paper entries will be not accepted*! We strongly recommend that applicants not wait until the last week of this registration period to enter because heavy demands may result in website delays. No entries will be accepted after 12:00 p.m. EST on November 7, 2016.

Foreign nationals ("FNs") considering filling out a DV-2018 application should carefully review the eligibility requirements and instructions on the DV-2018 website. *Each eligible applicant can submit only one application.* To maximize this opportunity, however, each eligible family member (child or spouse) is considered a separate applicant and can submit his or her own application.

II. New DHS Rule Seeks to Attract Immigrant Entrepreneurs to the United States

On August 29, 2016, the U.S. Department of Homeland Security ("DHS") issued a proposed rule that, if adopted in its present form, would ease the ability of FN entrepreneurs to temporarily enter into and remain in the United States to invest in and grow start-up entities. At the present time, there is no temporary visa classification that permits FNs to make significant investments in new or growing businesses and then remain here to manage them. DHS announced that the proposed rule was intended to spur business growth and job creation at a time when the U.S. economy is poised to attract this type of capital.

To qualify under the proposed rule, an FN entrepreneur would need to establish that his or her admission to this country would provide a significant public benefit because he or she has created within the past three years a new start-up entity here in which the FN has a "substantial" ownership interest and which has a significant potential for rapid growth and job creation. Each application would be assessed on a case-by-case basis. Under the proposed rule, an FN with at least a 15 percent ownership interest in the start-up entity would be deemed to have a substantial ownership interest, and a start-up that had received at least $345,000 within the past year from qualified U.S. investors, or at least $100,000 in qualified government grants or awards, would be considered a qualified investment.

Under the proposed rule, qualified FN entrepreneurs would receive an initial stay of two years, and this could be extended for up to another three years if the start-up continued to provide a significant public benefit, as demonstrated by an increase in investment capital and/or job creation. Comments on the proposed rule are due by October 13, 2016.

III. DOL and DHS Increase Employer Penalties for Immigration-Related Violations

On June 30, 2016, the U.S. Department of Labor ("DOL") and DHS announced interim final rules increasing the amounts of civil penalties for certain violations of the Immigration and Nationality Act ("INA"), certain nonimmigrant visa programs, and the Migrant and Season Agricultural Worker Protection Act. These increased penalties apply to all penalties assessed on or after August 1, 2016, and may be applied retroactively for designated ongoing inspections. The new rules address two main areas:

1. Employment-Related Violations Under the INA: The INA provides civil penalties for unlawful acts relating to Form I-9 employment eligibility verification, the knowing employment of unauthorized workers, and unlawful discrimination. The civil penalties for a substantive or technical violation in connection with the completion of the Form I-9 will increase to a minimum of $216 and a maximum of $2,156 per form. The civil penalties for knowingly hiring, recruiting, referring, or retaining unauthorized workers hired after November 6, 1986, and for unlawful discrimination will increase as follows:

First Offense: = $539 to $4,313 per unauthorized alien

Second Offense = $4,313 to $10,781 per unauthorized alien

Third Offense = $6,469 to $21,563 per unauthorized alien

2. Nonimmigrant Visa Program Violations: The H-1B visa program allows for the employment of foreign workers in specialty occupations. The penalty for unlawful conduct under this category (e.g., misrepresentations on the labor condition application or requirements that the employee pay certain fees) will increase to a maximum civil penalty of $1,782 per violation. More serious conduct (i.e., willful misrepresentations pertaining to working conditions, wages, the labor condition application, or discriminating against employees) will carry a maximum penalty of $7,251 per violation. Further, where a U.S. worker is displaced during the 90-day period before or after the filing of an H-1B petition in conjunction with other willful violations or willful misrepresentations, the employer will be liable for a maximum penalty of $50,758 per violation, a significant increase from the previous maximum penalty of $35,000.

While employers already should be aware of the serious financial and other consequences that can result from these violations and should have addressed them in their risk management policies, readers who need additional information should contact their Epstein Becker Green attorney.

IV. DOJ Settles Bias Claims Against Idaho Seed Company

The U.S. Department of Justice ("DOJ"), through its Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), recently announced that it had settled discrimination claims against an Idaho seed company for nearly $200,000. The OSC alleged that the company discriminated against non-U.S. workers by requiring them to present either a permanent residence card or an employment authorization card to secure employment.

That case and other enforcement actions by the DOJ/OSC involving citizen and/or "green card only" ads for open positions underscore how important it is for employers to satisfy the anti-discrimination provisions of the INA when recruiting. In most cases, employers do not intentionally violate these laws. Liability rests on their ignorance of the INA's anti-discrimination provisions. DOJ warns employers to carefully consider job requirements or the questions they ask candidates for new employment to make sure that they do not violate the INA. If you have questions in this regard, your Epstein Becker Green attorney can help you navigate these increasingly complex areas of the law.

V. Employer Must Pay $183,000 in Back Wages for Improper H-1B Termination

On July 29, 2016, a DOL administrative law judge ("ALJ") ordered MR Global Inc. to pay a Canadian engineer almost $183,000 in back wages because the company failed to terminate this H-1B employee properly. The DOL has taken the position that H-1B employers remain liable for employee wages unless they perform a "*bona fide*" termination when firing H-1B workers. According to the DOL, a *bona fide* termination involves three steps: (i) performing a proper termination under state law, (ii) notifying the U.S. Citizenship and Immigration Services ("USCIS") and asking the agency to revoke the H-1B approval for the terminated employee, and (iii) offering the H-1B the reasonable costs of return transportation home. In this case, MR Global's sponsorship of the H-1B worker for three years began in September 2008, and the record was clear that he was terminated in November 2008. However, there also was no dispute that MR Global never advised the USCIS of the termination or offered the employee the reasonable costs of transportation home. As a result, the ALJ found MR Global liable for back wages from November 2008 until the summer of 2011, when the employee returned to Canada.

The *MR Global* decision is the latest in a series of DOL administrative decisions finding employers liable for back wages for failure to make *bona fide* terminations of H-1B employees. The lesson for H-1B employers should be clear: they must properly terminate H-1B employees or remain liable for the wages that they are required to pay under the terms of the approved H-1B petition.

VI. Conspirator in Employment Tax Fraud Gets 14-Month Prison Sentence

On July 11, 2016, the owner of a labor staffing firm that supplied immigrant workers to hotels was sentenced to 14 months for masterminding a scheme that cheated the government out of nearly $500,000 in employment taxes. See *United States v. Galustyants,* No. 3:14-cr-00012 (W.D. Va. *Sentencing* 7/11/16). The defendant operated North American Management ("NAM"), a company that supplied labor to hotels in the Southeast. In each of its contracts with these hotels, NAM represented that all workers it supplied were legally authorized to work, assumed responsibility for hiring and paying all workers, and ensured that all federal tax responsibilities were satisfied.

Without the knowledge of these hotels, NAM subcontracted the labor services and kept the difference as its profit. While the subcontractors paid the workers and withheld employment taxes from their wages, neither the subcontractor nor NAM ever paid the resulting employment taxes to the government. NAM simply pocketed the funds withheld in the apparent belief that the unauthorized immigrant workers it employed would never discover the scheme or, if they did, would not complain. This prosecution serves as another important reminder to employers that hiring undocumented workers does not exempt employers from federal employment tax requirements.

VII. Colorado Companies Receive Relief from I-9 Recordkeeping

On August 10, 2016, Colorado passed House Bill 16-1114, which eliminated the need for Colorado employers to duplicate existing federal employee verification recordkeeping. Under current Colorado law, within 20 days of hiring a new employee, an employer must complete an affirmation document stating that it has taken the following actions:

1. It examined the legal work status of the newly hired employee.
2. It retained copies of documents required for federal I-9 compliance.
3. It didn't alter or falsify the employee's identification documentation.
4. It didn't knowingly hire an unauthorized alien.

In addition, the employer is required to retain a written or electronic attestation for the entire duration of the relevant employee's employment. If an employer "recklessly" fails to adhere to these requirements, it is subject to a first time fine of up to $5,000 and subsequent fines of up to $25,000. As of August 8, 2016, private employers have been relieved of this onerous attestation requirement.

The issue, however, remains unsettled for public contractors. Under current law, public

contractors in Colorado have the option of participating in either Colorado's attestation program or the federal E-Verify program. Thus, it appears that public contractors in Colorado may still elect to utilize the state attestation program to comply with employment verification requirements for Colorado public contracts.

VIII. NLRB Advises Reading Settlement Notices to Immigrants

On June 22, 2016, the General Counsel of the National Labor Relations Board ("NLRB") advised regional offices to consider requiring employers in workplaces with significant immigrant populations, or where literacy is an issue, to read settlement notices aloud instead of simply complying with the posting requirement. The NLRB noted that there are circumstances in which a traditional notice posting remedy may be ineffective because some employees are unable to read the notice, in either English or the language of their country of origin. Thus, the NLRB reasoned that regional offices should be cognizant of potential literacy issues when considering remedies.

The NLRB noted that charging parties will often bring literacy issues to a regional office's attention. At that point, the NLRB now advises the regional office to consider whether a traditional notice posting will sufficiently remedy the statutory violations or whether additional action is required. Further, the NLRB noted that when a region determines that literacy issues might affect the efficacy of a notice posting, it should seek a notice reading remedy in settlement discussions and should plead that remedy in a complaint.

Employers faced with issues in this area should contact their Epstein Becker Green attorney if they are unsure of what action to take.

IX. USCIS Broadens Criteria for L-1A Multinational Managers

Recently, USCIS's Administrative Appeals Office ("AAO") formally adopted the reasoning of *Matter of Z-A, Inc.,* Adopted Decision 2016-02 (AAO Apr. 14, 2016). In this case, the AAO found that USCIS officers must weigh all relevant factors, including evidence of the beneficiary's role within the broader qualifying international organization, when determining whether the beneficiary of an L-1A nonimmigrant petition will primarily manage an essential function. The AAO decision promises to provide employers a better chance to sponsor "functional" managers because it allows them to demonstrate the global managerial role that the sponsored employee had discharged and/or will assume. Therefore, the lack of personnel at the employer's U.S. office will not, by itself, dictate whether an employee can qualify as an L-1A Multinational Manager.

This case serves as important precedent for those companies opening up new offices in the United States and appears to lower barriers for these companies to transfer key personnel to the United States to facilitate their U.S. operations.

X. Food Company Settles for $1.5 Million to Avoid Immigration Charges

On July 22, 2016, the DOJ announced that it had settled its claims that Mary's Gone Cracker's Inc. ("Mary's Crackers") violated federal immigration laws stemming from Mary's Crackers employment of unauthorized aliens. The settlement was reached after Mary's Crackers was forced to acknowledge that it had terminated, or had forced the resignations of, almost 50 employees without valid work authorization in the United States, only to rehire some of them under new names. The agreement/investigation stemmed from an audit of the company's Forms I-9 conducted by U.S. Immigration and Customs Enforcement ("ICE") in 2012. After ICE discovered that 49 employees did not have proper work authorization documents, Mary's Crackers told ICE that all employees, except for one (who provided proper work authorization documents), were let go by the company. In reality, however, Mary's Crackers had rehired at least 13 of these workers under false names. And one of those 13 employees was never really terminated; he simply became an independent contractor to avoid the payroll system.

After a January 2013 search warrant revealed that at least 12 of the other workers were still employed at the company, Mary's Crackers took several corrective steps in addition to agreeing to the significant civil penalties. These steps included firing the workers employed illegally and discontinuing the use of their outside counsel. In addition, Mary's Crackers has agreed to establish a corporate compliance program for its I-9 procedures and use E-Verify to confirm employment authorization of any prospective hires. Further, Mary's Crackers must provide compliance reports to the DOJ for the next two years.

In the final analysis, the significant efforts that Mary's Crackers took to circumvent the INA's restrictions on employing unauthorized workers undoubtedly contributed to the substantial nature of the civil fines and other penalties that it was assessed. In many jurisdictions, however, this type of intentional misconduct would have resulted in a criminal prosecution. Under these

circumstances, the Mary's Crackers enforcement action serves as another important reminder that Form I-9 enforcement activities are increasing due to the current political climate and that employers should develop programs to make sure that they are Form I-9 compliant. Those needing assistance in this area should contact their Epstein Becker Green attorney.

XI. Microwave Company Settles with DOS Over H-1B Violations

U.S. laws regulate the export of certain items, information, technologies, and/or software where the release of this product and/or information could threaten national security. If something is export-controlled, then allowing access to it by an FN could be a violation of the export control regulations and result in substantial fines and/or criminal prosecution. Under the regulations, exposure to an export controlled item, technology, information, or software is "deemed" to be an export of the country of citizenship or nationality of any FN who has been allowed access. Generally speaking, if the organization is legally prohibited from exporting the items or information to a foreign country or would need an export license to do so, then allowing an FN from that country access to the product and/or information is considered a "deemed" export and cannot be done without first complying with export control requirements.

On June 22, 2016, the DOS's Directorate of Defense Trade Controls ("DDTC") settled with Microwave Engineering Corporation ("MEC"), a Massachusetts-based microwave components company. The DDTC is responsible for licensing permanent and temporary exports, as well as temporary imports, of defense-related items, services, and related technical data into and out of the United States and for ensuring that those transactions support U.S. national security and foreign policy goals. The allegations arose from MEC's self-disclosed export violation, which stemmed from allowing a Chinese employee with an H-1B visa access to controlled technical data due to a flaw in MEC's export compliance program. MEC paid a $100,000 fine for this singular violation.

From September 2009 through September 2011, MEC employed a Chinese national as a research scientist in H-1B status. During this period, MEC maintained a technology control plan that was approved by the Defense Security Service, stating that "no foreign person may be given access to classified material or unclassified information on any project that involves the disclosure of technical data." Further, MEC's export compliance officer briefed the scientist's supervisor that the employee could only work on general research concepts and could not work on anything related to specific product design or production. MEC discovered that it inadvertently violated these provisions and, thus, the export control laws.

Employers that sponsor FNs must understand both the broad reach of export control laws and the significant penalties that can be involved in violating them. Part 6 of Form I-129, Petition for Nonimmigrant Worker, requires each sponsoring employer to certify export control compliance. While USCIS simply checks that the sponsoring employer has completed the form, the DOS, DDTC, and, ultimately, federal prosecutors often use that representation as important evidence establishing a knowing violation of the export control laws. Under these circumstances, it is important for employers whose activities involve controlled technology to remember the potential legal violations that can result from allowing sponsored FNs access to that technology in violation of federal law.

XII. DHS Issues Reminder That 24-Month STEM OPT Students Must Receive Compensation

DOS has issued a reminder that F-1 international students with STEM (science, technology, engineering, and mathematics) degrees who are participating in a 24-month optional practical training ("OPT") extension must receive fair compensation for that training. According to DHS, "fair compensation" is defined as compensation that is comparable to that of U.S. workers who perform similar duties and have similar education and professional experiences. DHS, however, notes that STEM costs are not limited to traditional salary. Employers may also choose to compensate STEM OPT participants for other costs, including housing, tuition waivers, and transportation. What employers cannot do is treat this 24-month period of OPT as an unpaid volunteer internship.

XIII. October 2016 Visa Bulletin Brings Relief

The DOS has issued its Visa Bulletin for October 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 October 2016 Visa Bulletin showed that the employment-based first preference ("EB-1") remained current for all countries. The employment-based second preference ("EB-2") became current for all countries, except China and India. For China, the EB-2 category has reached February 15, 2012; for India, it has reached January 15, 2007. The cutoff dates for the employment-based third preference ("EB-3") category are as

follows: June 1, 2016, for all chargeability, including Mexico. The EB-3 cutoff date for China is January 22, 2013; for India, it is March 1, 2005; and for the Philippines, it is December 1, 2010. The DOS's monthly Visa Bulletin is available at https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

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