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immigration

CLIENT ALERT

August 2015 Immigration Alert

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I. USCIS Issues Guidance on When an Amended H-1B Petition Is Required After *Matter of Simeio Solutions, LLC*

On July 21, 2015, the U.S. Citizenship and Immigration Services ("USCIS") released a policy memorandum ("Memorandum") on when a new or amended H-1B petition is required. This guidance follows the recent Administrative Appeals Office ("AAO") decision in *Matter of Simeio Solutions*, 26 I&N Dec. 542 (AAO April 9, 2015). In *Simeio Solutions*, the AAO announced a broad rule that would have required an amended H-1B petition whenever an employee's job location changed, even if it was only to a neighboring building! In response to employer concerns about the novel breadth and scope of this new rule, and the ambiguity in the amendment process that it created, the USCIS issued guidance in the Memorandum.

According to the Memorandum, employers need to file a new or amended H-1B petition only when the H-1B employee's worksite changes to a location that falls outside the original metropolitan statistical area ("MSA") that provided the basis for the existing H-1B petition. The Memorandum leaves in place long-

standing USCIS policy that requires an amended H-1B petition whenever there is either a material change in the sponsored position or a reduction in the hours and/or compensation for that position. Prior to the Memorandum, however, the USCIS guidance only required H-1B employers to post a new Labor Condition Application ("LCA") in each new worksite. Now, the Memorandum confirms that the USCIS considers a change in the job location outside the MSA listed in the existing H-1B filing to be a "material" change that requires the employer to file an amended petition. In this regard, the Memorandum also indicates that the H-1B employee can commence working at the new worksite upon the filing, not the approval, of the new or amended H-1B filing.

In an effort to address concerns raised by the almost unlimited scope of the *Simeio Solutions* decision, the Memorandum also clarifies that, assuming there are no other material changes to the terms and conditions of employment, a new or amended H-1B is not required in the following instances:

- A change in worksite within the same intended area of employment or MSA; however, an employer is required to post the original LCA from the initial H-1B filing at the new location(s)
- Short-term placement at a new worksite for up to 30 days and, in some instances, 60 days
- Placement at a location that qualifies as a non-worksite pursuant to 20 C.F.R. §655.715

In recognition of the confusion in this area that the *Simeio Solutions* decision generated, the Memorandum also provides a "safe harbor" for employers that may not have been following this newly announced policy for their H-1B employees. Specifically, the USCIS advised that it would not take adverse action against employers for material worksite location changes that occurred on or before April 9, 2015, the date the *Simeio Solutions* decision was published, as long as no adverse action (i.e., notice of intent to revoke, revocation, request for evidence, notice of intent to deny, or denial) had been issued by the government on or before July 21, 2015. The Memorandum also allows employers to file a new or amended H-1B petition for pre-*Simeio Solutions* worksite changes until January 15, 2016. For material worksite changes that occurred after April 9, 2015, but prior to August 19, 2015, the Memorandum instructs employers to file a new or amended H-1B petition by January 15, 2016. An employer must file a new or amended H-1B petition for any material worksite change made on or after August 19, 2015, but, as noted, the employee can start working at a new place of employment as soon as the H-1B petition is filed.

The Memorandum will require greater oversight of H-1B employees and their worksite by employers as well as an additional expense in the management of these employees. No longer will they be able to shift the worksite of an H-1B employee outside the existing MSA at will. Now, the employer must prepare and file an amended H-1B petition that covers the new worksite before the employee can be moved. This requires filing a new LCA that may take up to seven business days to be certified, and then a new or amended H-1B petition once the LCA is certified. It also means increased costs for employers, as they will need to support the legal and government fees associated with new or amended H-1B filings. Armed with the Memorandum, we also expect the government to ramp up H-1B site visits to verify compliance and to start denying H-1B petitions or petition extensions filed after January 15, 2016, where the rules outlined in the Memorandum have not been satisfied.

Under these circumstances, we strongly suggest that you review your H-1B employee population with your Epstein Becker Green lawyer to make sure that you do not confront any unfortunate surprises in early 2016 resulting from this Memorandum.

II. Conrad 30 Waiver Program Will Sunset on September 30, 2015

The Conrad 30 Program ("Conrad Program") will sunset on September 30, 2015, unless it is reauthorized by Congress by that date. The Conrad Program helps the United States retain foreign medical graduates ("FMGs") who largely are willing to work as primary care physicians in medically underserved areas ("MUAs"). Most of these FMGs attend medical school and participate in residency programs in J-1 nonimmigrant status. As a result, they are subject to the two-year foreign residence requirement that both prohibits them from switching to H-1B or L nonimmigrant status and bars them from securing permanent residence, until they have returned home for two years.

In existence since 1994, the Conrad Program has authorized state health departments and agencies to

recommend up to 30 J-1 FMGs, subject to the two-year home residence requirement, to secure a waiver by agreeing to practice medicine in a MUA. To qualify for the J-1 waiver, the FMG must serve in a MUA for at least three continuous years and work in a full-time capacity. The program has greatly benefitted MUAs by providing a source of qualified primary care physicians. A bill to reauthorize and improve this program, which is titled "Conrad State 30 and Physician Access Act" (S.1189), has been offered by U.S. Senators Amy Klobucher (D-MN) and Heidi Heitkamp (D-ND), but it remains pending. If the Conrad Program is not reauthorized by September 30, 2015, states will still be able to grant J-1 waiver applications to FMGs who were admitted, or acquired J-1 status, before the sunset date.

Health care organizations that rely on the Conrad 30 Program should take note of this possible sunset and contact their government leaders to stress the importance of this program to the communities that they serve. As always, your Epstein Becker Green lawyer will be able to answer any questions about this program that you may have.

III. EB-5 Investor Program Allowing Regional Centers Is Scheduled to Sunset

The EB-5 program offers permanent residence to foreign nationals ("FNs") who invest up to $1 million in the United States in an entity that creates at least 10 full-time jobs. Due to quota backlogs, the EB-5 program has been highly popular with Chinese investors, although the U.S. Securities and Exchange Commission and the USCIS both have cautioned potential investors about the increasing number of scams and other "Ponzi" schemes that are being offered to this and other FN groups.

Presently, the provisions of the EB-5 program permitting investments through Regional Centers are scheduled to sunset on September 30, 2015. Currently, this represents approximately 90 percent of the EB-5 investment, according to the USCIS. There are three separate bills pending in Congress that would extend this facet of the EB-5 program. The expectation is that the program will be extended, but there may be changes. Those planning to take advantage of the current program and invest through Regional Centers must get their paperwork filed by September 30, 2015.

IV. U.S. Department of Labor Issues Guidance on Proper Classification of Workers Under the Fair Labor Standard Act

On July 15, 2015, the U.S. Department of Labor ("DOL"), Wage and Hour Division, issued Administrator's Interpretation No. 2015-1, which confirmed its increasingly expansive definition of what constitutes an "employee" under the Fair Labor Standards Act ("FLSA"). In this guidance, the DOL lays out a six-factor test to determine whether a worker is an employee or independent contractor. However, the DOL suggests that the most important factor is the worker's economic dependence. In short, "[if] the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor."

Under this guidance, more workers are going to be considered employees. Employers faced with these challenges should not lose sight of the immigration aspects of this analysis. Remember, all new employees must complete Forms I-9, while independent contractors are not required to do so. The USCIS has its own regulations that define an "independent contractor" to include individuals who carry on an independent business, contract to do piece work according to their own means and methods, and are subject to control only as to results. See 8 C.F.R. §274a.1(j).

It remains to be seen whether the USCIS will look to the DOL's recent interpretation under the FLSA to assess Form I-9 compliance and, if so, how this might change current enforcement protocols. The bottom line is that employers must consider this development while assessing when to ask for completion of a Form I-9 and should review their worksite compliance programs in this area.

V. District Court Finds California Agency Violated Title VII Based on the Disparate Impact of Employment Questionnaire

On July 21, 2015, the U.S. District Court for the Northern District of California found that the plaintiff, Victor

Guerrero, a U.S. citizen who is Latino and was born in Mexico, sufficiently demonstrated that the California Department of Corrections and Rehabilitation's ("CDCR") violated Title VII because its employment questionnaire had a disparate impact on Latino applicants. *Guerrero v. California Department of Corrections and Rehabilitation*, No.3:13 cv 05671-WHA (N.D. Cal. July 21, 2015).

The CDCR's background investigation questionnaire asked whether the job applicant ever used an invalid Social Security number ("SSN"). Guerrero disclosed on the application that he did. Before acquiring lawful permanent resident status in 2007, Guerrero used a phony SSN at the age of 15 to secure employment and help support his family. Based on this answer, the CDCR disqualified him for a corrections officer position. Guerrero then sued, claiming, among other things, that the CDCR's SSN question was discriminatory under Title VII because it had a disparate impact on Latino applicants.

After a six-day bench trial, the district court upheld Guerrero's Title VII claim. Relying on the decision by the U.S. Court of Appeals for the Ninth Circuit in *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1276 (9th Cir. 1981), the district court found that the CDCR's pre-employment test that has a disparate impact on a racial minority was not "significantly job-related" and did not serve a "legitimate business interest." The district court also rejected the CDCR's claim that its employment question was justified by business necessity based on the Eight Circuit's decision in *Green v. Missouri Pac. R.R. Co*., 523 F.2d 1290, 1296 (8th Cir. 1975). In *Green*, the Eight Circuit applied a three-factor test that took into account the (i) timing of the offense (recency), (ii) relevance of the offense, and (iii) severity of the offense when assessing whether a pre-employment test was justified by business necessity. The *Green* factors have been formalized in U.S. Equal Employment Opportunity Commission guidelines. Based on this precedent, the district court found that the CDCR did not have a "business necessity" for rejecting Guerrero's job application and that his record since he attained green card status was a critical factor that the CDCR should have taken into account when evaluating Guerrero's employment application. On this basis, the district court found that that CDCR's employment practice violated Title VII.

While the Guerrero decision arose in California, the legal principles that the district court used to uphold his Title VII claims all are based on federal law. Thus, employers need to take this case into account when developing prescreening employment questions to ensure that applicants are disqualified for legal reasons.

VI. California Farm Labor Contractor Company Found to Have Committed Citizenship Discrimination

On May 27, 2015, the U.S. Department of Justice ("DOJ") announced that it reached a settlement with Luis Esperanza Services, Inc. ("LES"), a farm labor contractor company based out of Bakersfield, California, that the DOJ alleged committed citizenship status discrimination. Here, the DOJ reviewed LES's practice of requesting Department of Homeland Security documents from work-authorized non-U.S. citizens, and not asking the same from U.S. citizen workers. The DOJ alleged that this constituted an Unfair Immigration-Related Employment Practice ("UIREP") that violated the antidiscrimination provisions of the U.S. Immigration and Nationality Act ("INA"). Under the INA, it is discriminatory for an employer to request additional documents from workers based on citizenship status. In the settlement, the DOJ levied a civil penalties fine of $320,000 and required LES to (i) pay lost wages to a worker that was impacted by this discriminatory practice, (ii) undergo training on the antidiscrimination provisions under the INA, (iii) revise its current protocol for verifying workers' employment, and (iv) be monitored by the DOJ closely for three years.

The DOJ's enforcement action against LES is another reminder to employers that the INA contains its own discrimination provisions that must be satisfied when recruiting. See 8 U.S.C. §1324b. One of these provisions prohibits an employer from requesting additional and/or specific documentation from workers than is necessary to satisfy the Form I-9 requirements.

We repeatedly have warned that employers seeking to satisfy the Form I-9 requirements must temper their compliance policies so that they do not inadvertently commit UIREPs in the process. Proper training and a review of your current employment verification procedures should help prevent such discriminatory practices from creeping into your organization's employment verification protocol. Your Epstein Becker Green lawyer will be able to assist in this regard.

VII. Pennsylvania Company Pleads Guilty to Harboring Illegal Aliens

On July 14, 2015, the U.S. Attorney's Office for Eastern District of Louisiana announced that M.D. Basciani and Sons, Inc. ("BSI"), a Pennsylvania corporation, had pled guilty to one count of harboring illegal aliens at one of its farm sites in Independence, Louisiana. According to the government, BSI rehired unauthorized workers, who were identified during a prior immigration inspection, under different names. Although BSI's records indicated that the unauthorized workers had been terminated, they continued to work on the company's farm and the company was aware of this. As a result, the BSI farm manager and another supervisory employee pled guilty to "a pattern of practice of employing illegal aliens." The government also required BSI to forfeit more than $1 million, the amount the government claimed that BSI gained as a result of employing these unauthorized workers. The plea also subjects BSI to comply with future immigration inspections and requires the company to provide immigration compliance training to its employees with hiring authority.

This is another poignant reminder of the consequences that employers face when trying only to pay lip service to the laws regulating worksites.

VIII. OCAHO Imposes $600,000 Fine for Form I-9 Violations

An administrative law judge ("ALJ") in the Office of the Chief Administrative Hearing Officer ("OCAHO") recently imposed a fine of $602,250 for 808 Form I-9 violations. See United States v. Hartmann Studios, Inc., OCAHO Case No. 14A00008 (July 15, 2015). In Hartmann, the government alleged, and the ALJ found, that the company had failed to prepare Forms I-9, had failed to ensure that Forms I-9 were completed properly, and had failed to re-verify Forms I-9 where the employee's employment authorization had expired. Following discovery, the government moved for summary judgment. Finding no dispute regarding any material facts, the ALJ granted the motion, finding Hartmannn responsible for 808 violations and assessing $602,250 in fines. In reaching the conclusion, the ALJ noted that fines in this area "should have a deterrent effect on an employer's behavior and not just merely be a cost of doing business."

This case represents yet another warning that employers must exercise diligence in satisfying their worksite enforcement obligations.

IX. DOS Issues August 2015 Visa Bulletin

The U.S. Department of State ("DOS") has issued its Visa Bulletin for August 2015. 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 August 2015 Visa Bulletin showed that the employment-based second ("EB-2") preference for China advanced to December 15, 2013, and India advanced to October 1, 2008. The EB-2 cutoff date for the rest of the world remained current. In the August 2015 Visa Bulletin, the cutoff dates for the employment-based third ("EB-3") preference category are as follows: July 15, 2015, for all chargeability, including Mexico. The Philippines, India, and China regressed to June 1, 2004. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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