June 2016 Special Immigration Alert

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I. New "STEM" OPT Extension Rules Are Effective

On March 11, 2016, the Department of Homeland Security ("DHS") issued its long-awaited final rule ("2016 Rule") allowing F-1 graduates to extend their Optional Practical Training ("OPT") period if they have a degree in science, technology, engineering, or mathematics ("STEM") from an accredited U.S. university and their prospective employer is registered in and using the federal government's E-Verify program to assess the identity and employment authorization of new hires. The 2016 Rule took effect on May 10, 2016.

Each year, foreign student graduates of U.S. universities in F-1 status are allowed up to one year of OPT employment in fields related to their course of study after graduation. Since 2008, DHS regulations ("2008 Rule") allowed eligible F-1 graduates to obtain an additional 17 months of OPT as long as they had a STEM degree from an accredited U.S. university and their prospective employer was enrolled in and using E-Verify. This extended the total OPT period of authorized work authorization to 29 months.

On August 12, 2015, however, the U.S. district court in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security, ____ F. Supp. 3d ____, 2015 WL 9810109* (D.D.C. Aug. 12, 2015) (slip op.), vacated the 2008 Rule on procedural grounds unless DHS corrected errors that were the basis for the district court's decision. The 2016 Rule corrected these errors, established new procedures for securing STEM OPT work authorization, and expanded the period for which the DHS could issue this work authorization from 17 months to 24 months.

The 2016 Rule provides specific procedures for applying for a new period of STEM OPT and for any 17-month STEM OPT extension application still pending on or after May 10, 2016. Also, F-1 students who already have been granted a 17-month STEM OPT extension are eligible to apply for the additional seven months of OPT made available under the 2016 Rule if they have at least 150 calendar days left on their current grant of STEM OPT and file an I-765 application with U.S. Citizenship and Immigration Services between May 10, 2016, and August 8, 2016. The *Washington Alliance of Technology Workers also has challenged the 2016 Rule on the grounds that it exceeds the DHS's legal authority under the immigration laws. See Washington Alliance of Technology Workers v. U.S. Department of Homeland Security, Civil Action No. 1:16-cv-1170 (D.D.C. June 17, 2016).*

DHS has created a new section on its "Study in the States" website to accommodate questions: https://studyinthestates.dhs.gov/stem-opt-hub. Those readers who need additional information should contact their Epstein Becker Green attorney.

II. DOJ Settles Bias Claims Against Residency Programs

On June 20, 2016, the U.S. Department of Justice ("DOJ"), through its Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), announced that it had settled its discrimination claims against 121 podiatry residency programs and the American Association of Colleges of Podiatric Medicine ("AACPM"). According to the DOJ, the programs published job postings that were limited to American citizens when there was no legal authorization or requirement for that limitation. In addition, the programs were accused of improperly rejecting lawful permanent residents who were qualified for the open residency positions. The DOJ alleged that the AACPM facilitated this unlawful discrimination by running these and other discriminatory job postings, and by maintaining an Online Central Application Service for both residency programs and clerkships that illegally required American citizenship for some positions.

In the settlement, the programs agreed to pay $141,500 in civil penalties, while the AACPM agreed to pay $65,000 in civil penalties. In addition, the programs agreed to remove the citizenship requirements from all job postings, except where mandated by law; train staff involved in the advertising and hiring of podiatric residents; and ensure that future residency postings are reviewed by staff trained in equal employment opportunity laws or by legal counsel. The AACPM agreed to, among other things, train its staff on the anti-discrimination provision of the Immigration and Nationality Act and refund all application and other fees paid by those improperly rejected.

III. OSC Issues Guidance on Questions That Employers Can Ask F-1 Student Employment Candidates

On June 15, 2016, the OSC issued guidance on what questions prospective employer can ask F-1students regarding their potential eligibility for OPT. In this regard, the OSC noted that the immigration laws prohibit denying "protected individuals" employment due to their immigration status. Under the law, a "protected individual" is an American citizen or national, a refugee or asylee, and a recent lawful permanent resident. According to the OSC, an employer that asks all job applicants whether they will require sponsorship now or in the future and refuses to hire those that require sponsorship "would likely not" violate the law. Also, since F-1 visa holders are not protected by U.S. anti-discrimination provisions, an employer that asks questions designed to prefer certain classes of nonimmigrant visa holders (i.e., STEM OPT students) over other classes of nonimmigrant visa holders is also "unlikely to violate" the immigration laws. However, the OSC warns employers not to ask more detailed questions that might deter individuals who are protected from seeking the position.

IV. DHS Clarifies "e-Passport" Requirement for Visa Waiver Program

On April 1, 2016, as part of the Terrorist Travel Prevention Act of 2015, the DHS announced that it will begin to require the use of electronic passports by travelers entering the United States from all 38 countries that participate in the Visa Waiver Program ("VWP") and enter the United States pursuant to the Electronic System of Travel Authorization ("ESTA"). Thus, it is important that travelers check their passports and their current ESTA status to make sure that they are in compliance with the new requirement. Travelers who have obtained a new e-Passport must submit a new ESTA application. It is important to remember that travelers from VWP countries remain eligible to travel to the United States without an e-Passport if they have a valid nonimmigrant visa.

V. OSC Provides Guidance on Anti-Discrimination Rules Applicable Under Export Control Laws

On March 31, 2016, the OSC issued a Technical Assistance Letter providing guidance on an employer's obligation to comply with the anti-discrimination provisions of the immigration laws when verifying an employee's citizenship status under U.S. export control laws, including the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"). Initially, OSC clarified that ITAR does not impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion, or retention of foreign persons; rather, it requires that employers obtain export licenses for non-U.S. employees if their positions require access to information governed by the ITAR. OSC then advised employers to avoid asking all new applicants questions regarding citizenship and immigration status, and limit these questions to only those applicants for positions that are subject to export control restrictions where this information is necessary to assess candidate eligibility. In this regard, however, OSC expressed concern that asking job applicants questions about their immigration or citizenship status for positions that are subject to export control laws might deter certain otherwise eligible individuals, such as refugees or asylees, from applying due to a misunderstanding of their eligibility.

The acceptable interview format the OSC proposed was as follows:

1. I am one of the following: (a) a citizen of the United States; (b) a lawful permanent resident of the United States; or (c) a person admitted into the United States as an asylee or refugee: YES or NO
2. If you answered "NO" to question 1, then please indicate your
   a. Citizenship:
   b. U.S. Immigration Status:

In reviewing these questions, OSC also stated that it was unlikely that an employer would violate the immigration law's prohibition on citizenship status discrimination if it asks the proposed questions of all job applicants for positions subject to export-control restrictions. The OSC stated, however, that an employer may be engaging in citizenship discrimination if it rejected an application from a protected individual based on that individual's answers or if a staffing agency limited the scope of potential assignments based on a protected individual's answers to the questions. Further, the OSC expressed concern that the questions posed could lead to unlawful hiring decisions by human resources personnel who make assumptions about an applicant's eligibility based on his or her country of citizenship. Moreover, OSC also found that the proposed questions could lead rejected applicants who disclosed their country of citizenship to believe that they were denied employment due to their actual or perceived national origin.

Finally, OSC found that the questions, at the very least, implicate the prohibition against unfair documentary practices in the employment eligibility process. OSC confirmed that an employer that implements a document verification process to determine only a new employee's immigration or citizenship status to comply with export control laws is unlikely to violate the anti-discrimination provision if the document verification process is separate and distinct from the employment eligibility process.

VI. Fourth Circuit Finds That Title VII Protects Undocumented Workers

The U.S. Court of Appeals for the Fourth Circuit recently issued its decision in *EEOC v. Maritime Autowash, Inc.,* No. 15-1947 (4th Cir. Apr. 25, 2016). In this case, the Fourth Circuit found that an undocumented worker was eligible to file a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). Specifically, the worker alleged that Maritime Autowash ("Maritime") subjected its Hispanic workforce to unequal treatment based on national origin. The EEOC issued a subpoena to Maritime seeking information, and Maritime moved to squash the subpoena, claiming that the EEOC lacked the power to investigate claims unless the complainant was authorized to work in the United States.

The Fourth Circuit held that Maritime could not refuse to comply with the EEOC subpoena even though the complainant was not authorized to work in the United States and did not have Title VII protection. However, the Fourth Circuit did not address the broader issue of whether undocumented workers are entitled to protection and damages under a Title VII complaint.

This case serves as another critical reminder to employers that the practice of hiring undocumented workers does not relieve the requirement to comply with applicable federal labor and employment laws.

VII. Tennessee Expands E-Verify Requirements

On April 21, 2016, Tennessee passed S.B. 1965, which now requires private employers with more than 50 employees to enroll in the E-Verify system and use the program for all workers hired after January 1, 2017. Additionally, the new law will impose a penalty of $500 per day for violations of E-Verify requirements and speed the complaint and complainant procedures. Tennessee employers should be mindful that they must comply with both federal and state immigration laws.

VIII. Realty Company Accepts Ban on Use of Nonimmigrant Workers Based on DOJ's Claim of Citizenship Discrimination

On March 21, 2016, Barrios Street Realty ("Barrios") agreed to a three-year ban on employing non-immigrant visa workers in response to the DOJ's allegations that Barrios discriminated against U.S. citizens by rejecting 73 qualified U.S. workers in order to hire foreign workers under the H-2B visa program. The debarment of Barrios represents the first time that the DOJ has obtained such a concession in a settlement based on allegations that an entity violated immigration anti-discrimination provisions. As part of the settlement, Barrios also agreed to pay $30,000 in fines and $115,000 in back pay, and the company is subject to three years of federal monitoring.

This case appears to be part of the DOJ's continuing efforts to penalize employers that seek to utilize the immigration laws improperly to deny positions to qualified American workers. Employers seeking to outsource work abroad should carefully consider this decision and the DOJ's other efforts in this area before finalizing their employment plans.

IX. Indiana Appeals Court Discusses Law Governing Undocumented Worker's Damage Claims

On March 31, 2016, an Indiana appeals court held that a jury must be the final arbiter of whether an undocumented immigrant's future wage claims in a workplace injury claim should be calculated on what he would earn in his native Mexico or what he would earn in the United States. *Escamillia v. Shiel Sexton Co., Inc.,* No. 54A01-1506-CT-602, __ N.E.3d __ (Ind. Ct. App., March 31, 2016). The court held that Escamilla's undocumented status made his ability to continue working in the United States speculative, but the record failed to show that he would be deported back to Mexico. Under these circumstances, the court held that, "[b]ecause the amount of damages to award for lost future income is a question of fact historically left to the jury, we decline to determine as a matter of law where, but for his injury, Escamilla might have worked in the future."

This decision underscores the options available to employers faced with claims by undocumented workers. Under this Indiana decision, employers have the right to offer evidence about not only the claimant's legal right to remain in this country but also the

laws governing the wage rate under which his or her damage claims should be assessed.

X. Visa Sting Is a Stark Reminder to Employers to Carefully Vet Recruiters

A recent DHS visa fraud sting operation involving a fake university is a reminder to employers that they must carefully vet recruiters who are connecting them with F-1 foreign students with work authorization. On April 8, 2016, federal prosecutors announced that 21 employers, recruiters, and brokers had been arrested after allegedly conspiring with more than 1,000 foreign nationals to secure student and employment visas through the University of Northern New Jersey, a fake college created by DHS investigators in 2013.

With many recruiting and consulting companies caught in the sting, the crackdown is an important reminder to employers to be careful about the recruiters they use. Further, employers must understand that receiving an endorsed I-20 is the starting point, and not the end point, of an employment inquiry when determining whether an F-1 student is authorized to work. At the same time, employers must be careful not to go overboard when reviewing work authorization documents from foreign students because of the anti-discrimination provisions present within the immigration laws. Your Epstein Becker Green attorney will be pleased to guide you through this minefield.

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