June 2017 Special Immigration Alert:

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1. President Trump Notifies Congress of Intent to Renegotiate NAFTA

On May 18, 2017, President Trump officially notified Congress of the administration's intention to renegotiate the North American Free Trade Agreement ("NAFTA") among the United States, Canada, and Mexico. This notification opens a 90-day window for the administration to consult with congressional leaders on the best approach to improving this agreement.

NAFTA Appendix 1603.D.1 contains a list of occupations that citizens from the three NAFTA countries can perform in the other treaty countries. These individuals are eligible for TN status. But TN eligibility requirements could be affected if the renegotiation of NAFTA involves Appendix 1603.D.1. So far, immigration has not been a hot-button topic of the anti-NAFTA rhetoric, probably due, in part, to the relatively small number of TNs issued annually.

During the campaign, candidate Trump was harshly critical of NAFTA, calling it a "disaster" for the American economy and threatening to terminate this agreement. In issuing this notification,

however, the administration indicated a more deliberate and nuanced approach. Robert Lighthizer, the U.S. Trade Representative, indicated that the administration was looking to "build on what has worked with NAFTA, but change and improve what has not." NAFTA was negotiated in 1994 and, according to Lighthizer, now is "clearly outdated." In making this announcement, the administration has indicated that it wants to complete the renegotiation process this year. It remains to be seen what impact, if any, this may have on NAFTA's immigration provisions.

2. DHS Extends the Designation of Haiti for Temporary Protected Status

On May 24, 2017, the Department of Homeland Security ("DHS") announced that it would extend the designation of Haiti for Temporary Protected Status ("TPS") for six months, until January 22, 2018. The TPS designation is designed to provide temporary immigration relief to eligible citizens who cannot return to their home countries due to armed conflicts, environmental disasters, or other extraordinary and temporary conditions. In January 2010, a major earthquake struck Haiti and the United States gave TPS designation to Haitians in this country so that they would not have to go home and further compound the relief efforts in Haiti. According to the DHS, Haiti has made "significant strides" in recovering from this earthquake, but conditions there continue to support a limited TPS designation, which DHS will review again in six months.

3. DOS Seeks Heightened Screening/Vetting for Visa Applicants

On May 4, 2017, the Department of State ("DOS") issued a proposed rule that requested emergency authority for six months to perform heightened screening and vetting for visa applicants. The proposed rule directs all consular posts to develop a list of criteria that will identify applicants at the particular post who warrant additional scrutiny, and then ask additional questions. Suggested areas of inquiry include (i) the applicant's travel history and/or addresses for the past 15 years; (ii) the applicant's prior passport numbers; (iii) the applicant's prior employers, positions, and locations of employment for the last 15 years; and (iv) all phone numbers, social media, and email addresses used by the applicant for the past five years. Because these procedures are new, U.S. consular posts have been asked to provide applicants with advance notice that this information may be required. Needless to say, implementation of these enhanced vetting procedures, coupled with other changes that the DOS recently has made in the visa issuance process, promises to further delay the visa appointment and visa issuance process.

4. USCIS Addresses "Cap Gap" Protection for F-1 Students Without Notification of H-1B Quota Selection

On May 5, 2017, U.S. Citizenship and Immigration Services ("USCIS") announced that F-1 students will continue to enjoy "Cap Gap" protection until they receive a notice indicating that the H-1B petition filed on their behalf has been rejected. This follows the May 3, 2017, announcement by USCIS that it had completed the H-1B lottery and would soon start issuing rejection notices for cases that were not selected. Once the rejection notice issues, the standard 60-day grace period begins either on that date or the program end date, whichever is later, during which time the F-1 student must prepare to depart the United States.

5. CBP Expands Searches of Digital Devices at the Border

The U.S. Customs and Border Protection ("CBP") generally is the federal agency that inspects international travelers when they arrive in the United States. While the Fourth Amendment to the U.S. Constitution protects individuals from "unreasonable" searches, the courts have long recognized an exception for searches of individuals at the border and held that no warrant or probable cause is required. In this regard, the Supreme Court of the United States views such searches as an incident of national sovereignty and reflects the government's constitutional obligation to determine who and what enters the United States. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 152 (2004). American law mirrors these broad Fourth Amendment exemptions. See 19 U.S.C. § 1582, which authorizes the search of all persons and baggage arriving in the United States.

The CBP's current policy on searches of electronic devices at the border was released in 2009. Under this policy, all electronic devices, including those owned by American citizens, can be searched at the border without reasonable suspicion. This may include information on these devices. The increasingly challenging international situation has seen a dramatic rise in the number of electronic device and media searches of those arriving in this country. Recent press accounts suggesting that terrorist organizations may be trying to conceal explosives in laptops likely will see this trend grow. Individuals coming to the United States or returning from international travel may want to seek legal advice before arriving in the United States if they plan to carry an electronic device.

6. The Consolidated Appropriations Act of 2017 Includes Immigration Provisions

On May 3, 2017, Congress agreed upon a stop-gap spending bill to cover the balance of the federal government's fiscal year, which ends on September 30, 2017. President Trump signed this bill on May 5, 2017. In addition to agency appropriations, this legislation contains funding for increased interior immigration enforcement and detention and for new immigration judges. This legislation also allows DHS to increase the H-2B cap for temporary workers, directs the Department of Labor to accept private wage surveys for H-2B applications, and provides special relief to the seafood industry. Finally, the bill extends through the end of fiscal year 2017 the EB-5 Immigrant Investor program, the Conrad 30 Waiver program for foreign medical graduates, and the classification for special immigrant religious workers.

7. Courts Expand the Definition of a "Joint Employer"

On May 11, 2017, a federal court in Florida held that the Consolidated Citrus Limited Partnership ("CCLP"), a citrus fruit grower with numerous groves in Florida, was a joint employer of guest workers admitted under the H-2A program for temporary agricultural workers. *See Garcia-Celestino v. Consolidated Citrus Limited Partnership*, 2:10 C 542 (M.D. Fla. May 11, 2017). CCLP contracts with numerous labor contractors that then recruit farm workers for CCLP under the H-2A program. CCLP would advise the contractors how many guest workers it needed for the harvest and then the contractors would locate, hire, sponsor, and place the workers on CCLP's groves in the United States. The workers claimed that they were not paid what the H-2A program and Florida law required, and sued CCLP as a "joint employer." The district court

initially granted CCLP's motion for summary judgment and found that CCLP was not a joint employer under the "suffer or permit to work" standard of the Fair Labor Standards Act.

On appeal, however, the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded to the lower court to assess whether CCLP was a "joint employer" under common agency principles. *See Garcia-Celestino v. Ruiz Harvesting, Inc.*, No 16-10790 (11th Cir. Dec. 15, 2016). After reviewing the record, the district court found that CCLP controlled the "manner and means" of the work and, thus, satisfied the common law definition of a "joint employer" under the H-2A regulations.

This decision could have a significant impact beyond the H-2A program. Organizations found to be "joint employers" could be liable for wages, benefits, and other compensation due regular employees. Also, organizations may be subject to Form I-9 liability if the government concludes that they should have completed these forms. Employers that place H-1B and other foreign workers off-site may find the government challenging the placements because there is no H-1B petition covering this joint employment. We will follow developments in this area and report on whatever ripple effects result from this potentially significant decision.

8. Fourth Circuit Upholds Injunction Against Trump Executive Order

On May 25, 2017, the U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, affirmed the lower court's decision to issue a nationwide injunction regarding Section 2(c) of President Trump's March 6, 2017, executive order ("March 6 EO"). Citing national security concerns, the Trump administration had issued the March 6 EO after its January 27, 2017, executive order also was enjoined by the courts. In pertinent part, the March 6 EO suspended the entry of foreign nationals from six designated countries. To the Fourth Circuit, the issue was whether the plaintiffs could challenge an executive order that "in text speaks with vague words of national security, but in context drips with religious intolerance, animus and discrimination." Slip op. at 12. Relying largely on statements by candidate and President Trump, a 10-3 majority of the Fourth Circuit found that the March 6 EO was both an impermissible Muslim ban and properly enjoined by the lower court.

The Trump administration has indicated that it plans to appeal the Fourth Circuit's decision to the U.S. Supreme Court. Before doing so, however, it may await the decision by the Ninth Circuit on related claims so that both cases can be appealed together. Stay tuned. . . .

9. DOS Issues June 2017 Visa Bulletin

The DOS has issued its Visa Bulletin for June 2017. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continued to show backlogs due to the heavy demand for these visas. On the employment-based side, the June 2017 Visa Bulletin showed that the employment-based first preference ("EB-1") remained current for all countries, except China and India, which regressed to January 1, 2012. The employment-based second preference ("EB-2") remains current for all countries, except China and India. For China, the EB-2 category has reached March 1, 2013; for India, it has reached July 1, 2008. The cutoff dates for the employment-based third preference ("EB-3") category are

as follows: April 15, 2017, for all chargeability areas, El Salvador, Guatemala, Honduras, and Mexico. The EB-3 cutoff date for China is October 1, 2014; for India, it is May 15, 2005; and for the Philippines, it is May 1, 2013. The DOS suggests that the high demand for EB-3 visas from China may require retrogression in the near future.

The DOS's monthly Visa Bulletin is available at travel.state.gov/content/visas/en/law-and-policy/bulletin.html.

For more information or questions regarding the above, please contact:

Robert S. Groban, Jr.

New York
212/351-4689
rgroban@ebglaw.com

Pierre Georges Bonnefil

New York
212/351-4687
pgbonnefil@ebglaw.com

Patrick G. Brady

Newark
973/639-8261
pbrady@ebglaw.com

Jungmin Choi

Newark
973/639-5226
jchoi@ebglaw.com

Jang Hyuk Im

San Francisco
415/399-6067
jim@ebglaw.com

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