Immigration Alert: Changes Affecting Employment-Based Immigration

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On April 18, 2017, President Trump signed an Executive Order titled, "Buy American and Hire American." The stated purpose of this Executive Order is to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering the immigration laws. President Trump directed the secretaries of state, labor, and homeland security, as well as the attorney general, to propose new rules and issue new guidance to implement the Executive Order. The H-1B visa program was specifically identified as requiring reform, to ensure that H-1B visas are awarded to the most-skilled or highest-paid beneficiaries.

Since the issuance of the Executive Order, the following changes have occurred impacting employers:

- **Substantial increase in the number of Requests for Evidence (RFEs)** issued by the U.S. Citizenship and Immigration Services (USCIS), especially in the H-1B category. The increase in RFEs slows down the processing time and requires employers to provide even more lead time before hiring a foreign national worker. In addition, with slower processing times, employers are frequently required to file petitions with premium processing to ensure timely adjudication, which is an additional $1,225 filing fee.
- **Requiring in-person interviews before approving employment-based adjustment of status applications (Form I-485)**. Previously, USCIS only conducted in-person interviews for employment-based cases in very limited circumstances.
- **Added burden when filing extensions.** Previously, a USCIS Policy Memorandum provided that adjudicators give deference to prior petition approvals when adjudicating an extension. Thus, absent evidence of fraud, an extension request involving the same parties and the same underlying facts as the initial petition was given deference. A new Policy Memorandum was issued rescinding that prior policy, removing any element of required deference, and requiring employers to re-establish that an extension petition merits approval the same as for initial filings. The change in policy prevents employers from relying on prior Service determinations and makes

the extension process much less predictable and more costly.

- **Change in interpretation of existing laws and regulations.** USCIS has begun interpreting existing laws and regulations in a different manner in various immigration categories. For example, USCIS issued a memorandum indicating that computer programmers no longer necessarily qualify for H-1B visa status. USCIS also recently issued guidance restricting the Economist category under the TN visa regulations. We anticipate that USCIS will continue to interpret existing laws and regulations in a more restrictive manner, making the employment-based immigration process less predictable for employers.

What can employers expect next? The Department of Homeland Security has identified the following items on its regulatory agenda:

- **Establishment of an electronic registration program for H-1B cap subject petitions**, such that employers would no longer need to submit a full H-1B petition until the petition was selected for processing. Although a change has not yet been announced, the USCIS will be assessing this next month (February). We would anticipate that if a change were to occur, it would be implemented beginning April 2, 2018 (Mon).
- **Revising the definition of "specialty occupation"** to increase focus on providing the limited number of available H-1B visas to the best and brightest foreign nationals. Revising the definition will add uncertainty to the types of positions that will qualify for H-1B visa status as we approach the beginning of the cap-subject H-1B filing season. Employers should be mindful of a potential change when recruiting foreign national workers who would require H-1B sponsorship. The timetable for this proposal is October 2018, so we do not expect any potential changes to affect this year's H-1B filing season.
- **Revising the definition of employment and employer-employee relationship** to better protect U.S. workers and wages. The change will likely impact any employers who place H-1B workers at third party worksites.
- **Removing H-4 dependent spouses from the class of aliens eligible for employment authorization. Details have not yet been released, but we would anticipate that any H-4 employment authorization documents that are currently valid or pending would not be affected by this change. The USCIS will be reviewing this proposal next month.**
- **Reform of the Optional Practical Training (OPT) Program for international students**. Proposed revisions include increased oversight of the schools and students participating in practical training programs to ensure compliance with the requirements of the program. Changes could come in the form of requiring employers to provide attestations regarding their workers on OPT, or could come in the form of eliminating the STEM OPT program. The USCIS will be reviewing this proposal in October 2018.

If you have any questions regarding the potential changes affecting employment-based immigration, we encourage you to contact your Vorys attorney.