EMPLOYMENT-BASED IMMIGRATION:

2015 YEAR IN REVIEW AND 2016 FORECAST

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haynesboone

Clients and Friends,

Immigration, particularly employment-based immigration, was a hot topic in the lead up to 2016's election-year fervor. This *Year in Review* highlights several key developments, including:

- The H-1B cap continues to be a challenge for employers and the foreign nationals they would like to employ, and recent legislation may make things even tougher.
- The United States Citizenship and Immigration Services (USCIS) issued long-awaited guidance in several key areas, including clarification of the standard for L-1B specialized knowledge cases, along with what it means for a job to be "same or similar" enough to allow a foreign national with a pending green card application to "port" the application to a new job.
- Congress extended the Immigrant Investor (EB-5) pilot program through September 30, 2016 without change despite strong support for changes to the minimum investment amounts and the Regional Center investment model.
- The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices continued its trend of increased activity, buoyed by its information sharing agreement with USCIS and the E-Verify program.

In 2015, Haynes and Boone represented Fortune 500 corporations, start-up companies, individual investors, and top athletes and entertainers in obtaining and retaining employment authorization and permanent residence. We successfully resolved enforcement matters before lawsuits were filed and negotiated favorable settlements for our clients. We also were active in the nonprofit community, providing pro bono representation for individuals referred by the Human Rights Initiative and Kids in Need of Defense.

This *Year in Review* also previews several issues we expect to see take center stage in 2016.

If you have any questions about the issues covered in this year's Review, please let us know.

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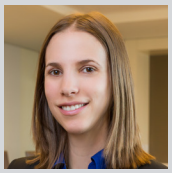

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2015 YEAR IN REVIEW

1. H-1B CAP FILINGS FOR PROFESSIONAL WORK VISAS

The H-1B filing window for Fiscal Year 2017 will open on April 1, 2016. The Cap is again expected to be met within the first week of April and filed petitions will likely be subjected to a computer-generated random selection process to identify those included in the Cap. For Fiscal Year 2016, approximately 233,000 H-1B petitions were filed with USCIS for the 85,000 quota. The 85,000 quota consists of 65,000 regular petitions (including 6,800 set aside for employees from Chile and Singapore) and 20,000 U.S. Master's degree (or higher) petitions.

2. CHANGES TO PLACE OF EMPLOYMENT FOR H-1B EMPLOYEES

Decided in April 2015, *Matter of Simeio Solutions, LLC* (AAO) held that an H-1B employer must file an amended petition upon a change to the H-1B worker's place of employment. As such, an employer can no longer accomplish a change of employment location by merely filing a new labor condition application (LCA).

A change of employment location occurs when the new worksite is outside the normal commuting distance or not within the same Metropolitan Statistical Area. There is no change of employment if: (1) the transfer is a short-term placement of up to 30 days; or (2) the new location is a non-worksite *e.g.* for training, to attend a conference, the employee is transient, casual basis only, or part of a short period of travel.

3. WORK AUTHORIZATION OPENED UP FOR CERTAIN H-4 SPOUSES

On May 26, 2015, USCIS implemented a long awaited rule allowing certain spouses of H-1B visa holders to apply for employment authorization. Previously, dependent spouses of H-1B visa holders were eligible for a dependent visa status (H-4) but ineligible to work.

The rule focuses on the H-4 visa holder whose H-1B spouse has successfully proven his/her eligibility for a green card, but, due to visa backlogs, is not yet eligible to apply for permanent residence. The green card wait for those individuals can be years and sometimes decades, and without the option of employment authorization for their spouses in the interim, many highly skilled foreign workers have elected to leave the U.S. rather than pursue permanent residence. The new rule aims to help attract and retain that foreign talent.

In April 2015, a group of computer workers challenged the rule in federal court, arguing the Department of Homeland Security lacked authority to pass it. The case, *Save Jobs USA v. U.S. Department of Homeland Security*, case no. 1:15-cv-00615, is pending in the U.S. District Court for the District of Columbia. USCIS continues to process applications for employment authorization for H-4 visa holders in the interim.

4. USCIS CLARIFIES L-1B ADJUDICATION STANDARDS

On March 24, 2015, USCIS issued a policy memorandum to provide guidance on the adjudications of L-1B specialized knowledge intra-company transferees. Under the Immigration and Nationality Act, an employee is deemed to have specialized knowledge if he or she has: (1) a "special" knowledge of the company product and its application in international markets; or (2) an "advanced" level of knowledge of the processes and procedures of the company.

The memorandum clarifies that specialized knowledge should be demonstrably distinct or uncommon in comparison to that generally found in

the particular industry or within the petitioning employer. Similarly, advanced knowledge should be greatly developed or further along in progress, complexity and understanding than that generally found within the petitioning employer. The following non-exhaustive factors may be considered: (1) whether the knowledge provides competitive advantage; (2) whether the employment abroad has significantly enhanced the employer's productivity, competitiveness, image or financial position; (3) whether the specialized knowledge can only be gained through the employment abroad; (4) whether the specialized knowledge cannot be easily transferred or taught; and (5) whether the specialized knowledge is sophisticated or complex, or of a highly technical nature.

5. INCREASED OSC ENFORCEMENT

The U.S. Department of Justice's immigration enforcement unit – the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) – continued to increase its enforcement activities in 2015. The OSC is responsible for enforcing the provision of the Immigration and Nationality Act which prohibits employers from discriminating against work-authorized employees on the basis of their citizenship or national origin. Historically the OSC was a fairly quiet agency, but it has become very active in the last few years. Part of this increased activity stems from referrals from E-Verify's Monitoring and Compliance (M&C) branch.

E-Verify is the USCIS-managed, internet-based Form I-9 system that allows businesses to determine the eligibility of employees to work in the United States. E-Verify's M&C branch tracks use of the system and audits employers in real time. The M&C branch combs employer-entered data to identify potential discriminatory practices in employers' use of E-Verify. It also uses search algorithms to detect patterns of possible E-Verify misuse. Thanks to a Memorandum of Agreement between USCIS and OSC, the M&C branch then refers suspected cases of misuse, fraud and abuse to the OSC. Because employers list the documentation they request of potential employees when they use E-Verify, the program has produced a trove of data for the M&C branch to mine through and discover potentially discriminatory practices.

The OSC's caseload hit an all-time high in fiscal year 2015, with 6,000 matters open for the first time in the agency's history. As a recent example, in November 2015, the agency secured a $355,000 settlement from McDonalds in a case alleging that the company required immigrants to produce a green card as part of the I-9 process, which is prohibited.

6. EB-5 PROGRAM EXTENDED WITHOUT CHANGE (FOR NOW)

In December 2015, Congress voted to reauthorize the Immigrant Investor (EB-5) Pilot Program without change through September 30, 2016 despite broad support for proposed legislative changes designed to combat a perceived lack of program oversight. The legislation would have made investing in the program more difficult by increasing the minimum investment amount and changing the calculation of indirect job creation, but Congress was unable to agree on final language despite passing two short term extensions to hammer out the details.

As a result, the EB-5 program continues to provide permanent residence to foreign investors who commit a minimum of $500,000 to a new business that employs 10 full time workers, and investments made via the popular Regional Center route continue to allow for indirect job creation. However, the program sunsets at the end of every fiscal year, so changes may still be on the horizon in 2016.

7. VISA BULLETIN CHANGES ALLOW FOR EARLIER FILING OF GREEN CARD APPLICATIONS

In a move that will bring some relief to prospective immigrant visa (green card) applicants from

historically backlogged countries like India and China, the Department of State and USCIS announced a change to the visa bulletin that will allow many individuals to receive the benefits of filing a green card application sooner than was previously possible.

Passed as part of President Obama's executive actions on immigration, the changes allow prospective green card applicants to file a green card application and receive the attendant benefits, including employment authorization for the applicant and eligible family members and protection of dependent children from aging out of their parents' green card applications, even though a green card is not yet available. The change should go a long way toward promoting the economic growth and family unity that can be stymied by visa backlogs.

8. INCREASED VISITOR VISA/VISA WAIVER PROGRAM SCRUTINY

The Visa Waiver Program (VWP) allows citizens of 38 countries to travel to the U.S. without obtaining visas. The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 implemented VWP changes after November 2015's Paris terrorism attacks. Effective January 21, 2016, there are two key changes. The first change has resulted in increased scrutiny on VWP users, including enhanced passport security requirements, screening protocols and information sharing. The second change excludes certain persons from the VWP: (1) nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen (not based on current residency or country of passport issuance); and (2) those who have travelled to Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen on or after March 1, 2011. However, the Secretary of Homeland Security may waive these restrictions if he determines that such a waiver is in the law enforcement or national security interests of the United States; however, such waivers will be granted only on a case-by-case basis.

HOT TOPICS FOR 2016

1. PROPOSED REGULATION ON THE STEM OPT EXTENSION

The U.S. Department of Homeland Security (DHS) has issued a proposed rule that will allow F-1 students to extend the period of Optional Practical Training (OPT) if they hold a degree in science, technology, engineering or math (STEM) from a U.S. school.

Currently, OPT allows a student to work in his or her field of study for up to 12 months after graduation, and up to an additional 17 months if the student has a STEM degree and the proposed employer is enrolled in E-Verify. As part of President Obama's executive immigration reforms, if the student has a STEM degree, this period can be extended for a total of up to 36 months after graduation. The comment period on the proposed regulation closed on November 18, 2015 and DHS is in the process of issuing a final regulation. DHS has proposed that employers seeking the STEM extension will be required to set up a formal mentoring and training program, including periodic evaluations, to take advantage of the additional work authorized period.

2. CLARIFICATION RE: "SAME OR SIMILAR" STANDARD FOR GREEN CARD APPLICANTS TRYING TO CHANGE JOBS

U.S. immigration law allows employment-based

green card applicants with approved immigrant petitions to change jobs under certain circumstances, provided the new job is "same or similar" to the job approved on the immigrant petition. The law provides much needed flexibility for applicants stuck in visa backlogs, but guidance as to what constitutes a "same or similar" job has been largely absent, resulting in inconsistent adjudications. Fortunately, on November 20, 2015, USCIS issued a draft policy memo that, once finalized, will clarify how immigration officers adjudicating petitions to "port" green card applications to new jobs should apply the "same or similar" test. The final memo should lead to improved consistency and predictability.

3. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)/DEFERRED ACTION FOR PARENTS OF AMERICAN AND LAWFUL PERMANENT RESIDENTS (DAPA)

On November 20, 2014, President Obama issued an executive order offering protection from deportation and work authorization to individuals who entered the United States as children (DACA) (an expansion of the original program), and parents of U.S. citizens and green card holders. The expanded DACA and DAPA programs were opposed by a coalition of states. During this litigation, U.S. Judge Hanen (Southern District of Texas – Brownsville) issued a preliminary injunction preventing the implementation of these programs. The Fifth Circuit upheld the injunction and the U.S. government has appealed to the U.S. Supreme Court. On January 19, 2016, the U.S. Supreme Court agreed to hear the federal government's appeal. If implemented, expanded DACA/DAPA could offer work authorization to around 5 million people.

4. NEW LEGISLATION THREATENS TO LIMIT THE H-1B PROGRAM

Lawmakers introduced several pieces of legislation at the end of 2015 that would severely limit the H-1B program's ability to attract foreign talent. Republican presidential candidate Senator Ted Cruz introduced a bill in December that would end the OPT program, which allows foreign students to work after graduation under certain circumstances, and which many employers use to evaluate whether to pursue an H-1B visa for a particular foreign national. Called the American Jobs First Act of 2015, the bill would also create a "layoff cool-off period" that would require employers to wait two years after layoffs, employee strikes or furloughs before petitioning to employ a foreign national through the H-1B program. And the bill would effectively set a minimum wage of $110,000 for H-1B employees by requiring employers to pay foreign nationals the higher of (1) what an American worker who did similar work in the prior two years was paid, or (2) $110,000.

Also in December, Senators Bill Nelson (D. Fla.) and Jeff Sessions (R. Ariz.) introduced legislation that would cut the available number of H-1B visas by 15,000. The Protecting American Jobs Act would reduce the visas available to foreign nationals with bachelor's degrees from 65,000 to 50,000 and would prioritize jobs paying the highest wages. With demand for H-1B visas already far outstripping supply even under the current quota, the Act would make the H-1B an even less reliable option for foreign nationals and employers.

Finally, Senators Chuck Grassley (R. Iowa) and Dick Durbin (D. Ill.), both outspoken critics of the H-1B program, introduced the H-1B and L-1 Visa Reform Act of 2015 which, among other things, would require employers to recruit U.S. workers before pursuing an H-1B for a foreign national, increase the Department of Labor's authority to investigate, audit and penalize employers of H-1B visa holders, and establish a wage floor for L-1 workers.

5. CONTINUED OSC ACTIVITY

We expect the trend of increased OSC enforcement to continue in 2016. As more employers sign up (voluntarily or involuntarily) for E-Verify, the information-sharing between USCIS and the OSC will continue to provide ample data for new investigations.