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The Devil is in the Details: What Employers and Businesses Need to Know About President Obama's Executive Actions on Immigration

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When President Barack Obama first addressed the nation to unveil his Immigration Accountability Executive Actions, the media and the internet were in a frenzy to see who could get the story out first. Despite the fact that many of the specifics of the planned executive actions were unclear or not yet finalized, legal experts and analysts all across the country were discussing the potential consequences or effects on national security and the economy as a result of the estimated millions of undocumented immigrants in the United States who stood to benefit.

Yet, very little was discussed (or has been discussed to date) regarding how the proposed immigration changes could impact the lives of immigrants legally living here but in limbo due to the lack of visas available. As many employers and businesses know, a large number of these individuals (primarily from India and China) are highly skilled. Unfortunately, these individuals are unable to permanently call the United States their home because of the way our immigration system is set up.

So how does the President's Planned Executive Action affect this? On November 20, 2014, Department of Homeland Security Secretary Jeh Charles Johnson released a memorandum directing U.S. Citizenship and Immigration Services (USCIS) to enact new policies and regulations with the goal of accomplishing the following 7 immigration priorities in the coming months:

1. Form I-485 Pre-registration Process

The proposed Form I-485 Pre-registration process is probably the most anticipated of the proposed changes for highly skilled workers and employers. Why? To date, there are a significant number of individuals who have begun the process of obtaining legal permanent residency but, as a result of visa backlog, are waiting for their priority date to become current. The end result is two-fold. Employees are not only required to wait in line for years (fearful that their children may age out of the process), but employers are also forced to bankroll multiple extension requests in order to keep their highly skilled workforce.

By way of background, each year, Congress limits the number of people who can become permanent legal residents by limiting the number of immigrant visas that can be issued. Someone here on a nonimmigrant

visa cannot adjust to an immigrant visa unless there are visas available for that category. Each month, the Department of State publishes a bulletin—the Visa Bulletin—that notifies the public whether there are visas available for each of the different categories with caps.

If the Visa Bulletin lists a date for a particular visa category, that means there are visas available but only for immigrants whose "priority date" is before the date listed in the Visa Bulletin. Except for employment-based visas requiring a labor certification, the priority date is the date the immigrant visa petition is filed. So if the Visa Bulletin for this month lists "01FEB05" for a particular category, that means visas are only available for immigrants who filed their I-130, I-140, I-526, or I-360 by January 31, 2005. It also means that the wait for that category of visas is over 9 years. Ordinarily, the dates in the Visa Bulletin move forward (as the backlog of visa petitions is processed).

Sometimes, however, the dates move back in time—or retrogress. Visa retrogression occurs when more people apply for a visa in a particular category or country than there are visas available for that month. Retrogression usually occurs towards the end of the fiscal year, as the number of visas gets close to running out. It is not until the new fiscal year begins (October 1) that a new visa supply is made available, which usually results in the dates on the Visa Bulletin returning to where they were before retrogression occurred. For example, the current December Visa Bulletin for the EB-2 category (advanced degree professionals) reflects a backlog for both individuals from China and India of at least several years, if not more in the cases of foreign nationals from India.

Theoretically, the proposed pre-registration process could do away with a lot of the negative consequences of the backlog. Although employees with an approved employment-based immigrant petition (Form I-140) will still have to wait until their priority date becomes current before obtaining legal permanent residency, the pre-registration process should open up the doors for these individuals (and their derivative beneficiaries) to obtain their Employment Authorization Document (EAD) (presumably doing away with the endless H-1B extensions) and Advance Parole (permitting them to travel without having to make the necessary trip back to their home country first before returning to the United States).

2. Green Card Portability

Streamlining the process for the portability of a green card is another welcomed change. Currently, the law provides that an employee can port (or transfer) his approved I-140 to another employer so long as the proposed job is in the "same or similar" occupational classification and the job functions are essentially the same. Yet, the ambiguity in the process itself makes porting to another employer or promotion a risk. To help eliminate these risks, USCIS will be providing clearer guidelines to address worker mobility and career advancement, as well as demystifying the porting process itself.

3. National Interest Waivers for Foreign Entrepreneurs, Researchers & Other Persons of Exceptional Ability

The proposed expansion of the National Interest Waiver (NIW) to other categories might provide additional immigration options for qualified individuals.

The NIW category is an attractive option because it allows eligible applicants to obtain a green card without having to participate in the Department of Labor's PERM process. The caveat to this is that the applicant has to show his or her national importance to a substantially greater degree than other individuals with the same qualifications. Expanding this category to include more individuals of exceptional ability, researchers, and foreign entrepreneurs would create new immigration avenues for critically important groups.

4. Increase OPT Period

It is suspected that the proposed increased Optional Practical Training for F-1 graduates will only apply to graduates in Science, Technology, Engineering, and Mathematics (STEM) degree programs. But among the proposed changes are regulations that will seek to strengthen the relationship between the graduate and the school during the OPT period, expand the eligible STEM fields for OPT, and allow individuals to participate in STEM OPT after attaining a master's degree when only the first degree is in a STEM category.

5. H-4 Spousal Work Authorization

In May 2014, DHS proposed a rule to extend employment authorization to the H-4 spouses of H-1B visa holders with approved I-140 petitions. This rule is expected to be finalized in January 2015.

6. Clarification of L-1B Standard

Currently, the L-1B visa program is in a state of flux due to the lack of guidance and consistent interpretations by USCIS adjudicators and U.S. consular officers. USCIS is expected to release a long overdue policy memorandum in January 2015 that should define "specialized knowledge" and clarify the L-1B eligibility criteria for adjudicators.

7. Overhaul of the PERM Program

Currently, the Department of Labor's PERM program is under fire. As part of his address, President Obama seemed to recognize how antiquated this process is and called for an overhaul of the program with a focus on what can be done to speed up processing.

Again, many of the specific details regarding exactly how things will work are still unknown. And while President Obama's planned action will resolve the immigration situation for some high-skilled immigrants, graduates, and entrepreneurs, it will only go so far. Legislation will still be required.

An additional point for employer and businesses to consider is that while the current administration may seem to some as pro-immigration, this alleged pro-immigration attitude does not necessarily extend to employers. More than ever, employers should be particularly diligent when it comes to complying with the Form I-9 obligations. Remember, an employer faces civil and potential criminal liability for hiring undocumented workers (regardless of whether they did it knowingly or unknowingly). At the same time, it opens itself up to discrimination charges for not hiring newly documented workers who previously presented fraudulent documents. Going forward, worksite enforcement inspections are only expected to increase. And it would not be surprising to see fines increased as well.

In light of this ever evolving area, individuals and businesses are well advised to seek the advice of counsel before blindly navigating the proposed executive action. Our firm is available to assist you with your immigration needs.

For more information, please contact Maria del Carmen Ramos at 813.227.2252 or mramos@slk-law.com.

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