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INFORMATION MEMO
IMMIGRATION

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Business Immigration in the Era of COVID-19

COVID-19 has created a constantly evolving immigration environment. Federal agencies and the White House have responded with several temporary policy and procedural changes to help minimize the spread of the virus and to help employers with compliance during this extremely challenging time. It is essential during the COVID-19 national emergency to take the necessary steps to maintain the nonimmigrant status and work authorization of foreign national employees.

Travel Restrictions Implemented

The White House and the U.S. Department of State (DOS) have implemented travel restrictions to help prevent the spread of COVID-19. Current employees and new hires may be affected by these restrictions.

U.S. Entry Restrictions. Due to four Presidential Proclamations made in the first quarter of 2020, no foreign national can enter the U.S. if they were present in Iran, China (excluding Hong Kong and Macau), Schengen area countries, Ireland and the United Kingdom within 14 days of requesting admission to the U.S. In general, foreign nationals, even those not subject to the current entry restrictions, should remain in the U.S. for the time being if possible, as they may not be able to return to the U.S. for quite some time. The current restrictions on U.S. entry do not apply to U.S. citizens, Lawful Permanent Residents and other limited groups of travelers (e.g., immediate family members of U.S. citizens who are not citizens themselves), but the entry of those individuals to the U.S. may be delayed under the circumstances. In addition, upon return, these individuals will travel to one of 13 designated airports in the U.S., undergo enhanced entry and medical screening at the airport and be required to self-quarantine for a 14-day period.

Canada and Mexico – Non-Essential Travel Prohibited. As of March 20, 2020, the U.S. has prohibited non-essential travel (e.g., tourism or recreational in nature) between the U.S. and Canada and the U.S. and Mexico for at least 30 days (and this date is extendable). This restriction does not apply to U.S. citizens, Lawful Permanent Residents, business travelers and those with valid U.S. travel documents (e.g., U.S. visa stamp or advance parole), but business travelers and those with U.S. travel documents may face additional scrutiny at the borders. Essential travel currently includes travel for medical treatment, to attend educational institutions, for emergency response and public health purposes, to work in the U.S., and for trade and business. Those crossing the borders should carry letters from their employers and other necessary documents proving that their travel to the U.S. is essential.

U.S. Department of State Issues Global Health Advisory. On March 19, 2020, DOS issued a Level 4: Do Not Travel Global Health Advisory. The DOS has advised U.S. citizens to avoid all international travel due to the global impact of COVID-19. Any U.S. citizen who is abroad but who lives in the U.S. should use every effort to return to the U.S. as soon as possible. In addition, all U.S. travelers are encouraged to enroll in the DOS' Smart Traveler Enrollment Program (STEP) to receive DOS alerts and to make it easier to be located in an emergency.

Status of U.S. Consular Services (Embassies and Consulates). As of March 18, 2020, DOS has suspended routine visa services at all U.S. Embassies and Consulates and all scheduled appointments are canceled. Emergency and mission-critical visa services will still be provided, but only as resources allow. Services for U.S. citizens continue to be available and information can be found on the websites of each embassy or consulate. Clearly, this development will have an impact on employees traveling from those countries not currently subject to the U.S. travel restrictions as there will be considerable delays in completing visa processing abroad.

Updates from U.S. Citizenship and Immigration Services

The U.S. Citizenship and Immigration Services (USCIS) has issued a few directives that affect employers and their foreign national employees.

USCIS Closes Offices to Public. On March 18, 2020, USCIS announced that it would be closing its offices to the public through April 1, 2020 and that, as a result, all routine, face-to-face services including interviews and biometrics are suspended. On March 25, 2020, USCIS extended this closure through April 7, 2020. This date will most likely be extended again. At this time, USCIS will continue to perform duties that do not involve contact with the public (e.g., processing petitions, issuing requests for evidence, etc.), so employers should continue to file petitions for both new hires and existing employees.

Premium Processing Suspended. Unfortunately, the processing of most immigration petitions just became even more challenging when, on March 20, 2020, USCIS temporarily suspended premium processing services on all I-129 (e.g., H-1B, O-1, etc.) and I-140 (employment-based permanent residence) petitions until further notice. Under the premium processing program, for an additional filing fee of $1,440, employers could file Form I-907 with USCIS and request that their I-129 and I-140 petitions be processed within 15 calendar days. As a result of this suspension, for those petitions filed before March 20, 2020 that were not yet accepted by USCIS, USCIS will reject the Form I-907 and return the $1,440 fee. For petitions filed and accepted before March 20, 2020, USCIS will issue a refund to employers only if no agency action (e.g., approval, denial, request for evidence, etc.) is taken by USCIS in the 15-calendar day premium processing period. With this service suspended, the processing backlogs at USCIS will only continue to mount and it may be difficult or even impossible to onboard a new foreign national employee at this time.

Electronically Reproduced Original Signatures Greenlit. If there is any good news from USCIS during the COVID-19 national emergency, it is that USCIS is finally stepping into the 21st century and, as of March 21, 2020, is accepting all forms and documents with electronically reproduced original signatures – scanned, faxed, photocopied or similarly reproduced – instead of "wet" signatures. Employers must retain the original documents with the "wet" signatures in case they are requested by USCIS. This policy change will make things easier for employers and their legal counsel when preparing and submitting new immigration petitions to USCIS.

Extended Time to Respond to RFEs and NOIDs. On March 27, 2020, USCIS advised that applicants and petitioners who receive a request for evidence (RFE) or notice of intent to deny (NOID) dated between March 1 and May 1, 2020 will be given 60 additional calendar days after the response deadline set forth in the RFE or NOID to respond to the RFE or NOID.

Considerations for H-1B Visa and Other Nonimmigrant Employees

While COVID-19 has created a host of challenges, there are unique challenges to ensuring that H-1B visa and other nonimmigrant employees remain in status and eligible to work in the U.S.

LCA Compliance Issues. As a result of the COVID-19 national emergency, many employees, including H-1B visa employees, are working remotely from home or another location. For H-1B visa employees, a change in work location may trigger compliance issues related to the Labor Condition Application (LCA) which certifies to the U.S. Department of Labor (USDOL) and USCIS the geographical area where the employee will be working and that the salary to be paid to the employee meets the prevailing wage for that position in said geographical area.

According to a FAQ issued by the USDOL's Office of Foreign Labor Certification (OFLC) on March 20, 2020, a new LCA is not required if the H-1B employee is simply moving to a new job location within the same geographical area covered by

the approved LCA. If the move is to a geographical area not covered by the approved LCA or includes a material change in the terms and conditions of the H-1B visa employee's employment, the employer would have to obtain a new LCA and file an amended H-1B visa petition with USCIS. The Public Access File also must be updated to include the new LCA.

Under USDOL regulations, on or before the date any H-1B visa worker begins work at a new location, employers must provide either electronic (can be done through company intranet, by e-mail or other form of electronic distribution) or hard-copy notice for a total of 10 calendar days at the new worksite location. For those H-1B employees who are working in their homes, the LCAs must be physically posted in their homes for 10 calendar days. As a result of service disruptions created by COVID-19, USDOL will consider the notice timely when placed as soon as practical and no later than 30 calendar days after the worker begins work at the new location. For LCAs filed with USDOL in connection with new H-1B visa petitions, employers can also meet the 10-calendar day notice requirement electronically. This notice requirement must be completed on or within 30 days before the date of the LCA filing with the USDOL.

Other Nonimmigrant Employees. For other foreign national employees who are not in H-1B visa status and who are working remotely or at another worksite, it is important for employers to consider the changes in employment and ensure compliance with immigration regulations. For instance, F-1 employees on optional practical training (OPT) should review changed employment conditions and report any necessary changes through the Student and Exchange Visitor Information System (SEVIS).

Some foreign national employees may choose to remain outside the U.S. during the COVID-19 national emergency or are unable to return to the U.S. at this time. These individuals may be able to work remotely from the countries where they are residing, but employers are advised to make sure that this is permissible under the laws of the countries where the employees are located. Tax implications should also be reviewed by a tax professional.

Timely Filing of Petitions with USCIS. With everything that is going on, it is important for employers to timely file immigration petitions on behalf of foreign nationals they are intending to employ and on behalf of those employees who need their current status extended. For the latter, employers must file extension petitions before their status expires for them to continue working uninterrupted.

Form I-9 Compliance

Under Section 274A of the Immigration and Nationality Act, employers are required to review an employee's identity and employment authorization documents in the employee's physical presence. However, with companies working entirely remotely as a result of COVID-19, this requirement obviously cannot be met. Thankfully, on March 20, 2020, the Department of Homeland Security (DHS) announced its "Flexibility in Completing Form I-9." As a result of this policy change, the Form I-9 physical presence requirements are deferred for employers for 60 days or within three business days after termination of the COVID-19 national emergency, whichever comes first. Under this policy change, the rules are as follows:

- Section 1 of Form I-9 must still be completed on or before the employee's start date. Employers are permitted to inspect the employee's documents remotely (e.g., over video link, fax or e-mail, etc.) and obtain, inspect and retain copies of the documents within three business days in order to complete Section 2 of Form I-9.
- After normal business operations resume and employers can physically inspect documents in front of an employee, employers should enter "COVID-19" as the reason for the physical inspection delay in the Additional Information field in Section 2 of Form I-9. Physical inspection must occur within three business days once normal operations resume.

- Once the documents have been physically inspected, employers should add "documents physically examined" with the date of inspection to the Additional Information field in Section 2 on Form I-9, or in Section 3, if the employee is being reverified or rehired.

It is important to note that this policy change only applies to employers and workplaces that are operating remotely. According to DHS, for those employers who have employees physically present at a work location, no exceptions are being made at this time for in-person verification of identity and employment eligibility documentation. The DHS also advises that it will evaluate on a case-by-case basis when there are newly hired or existing employees who are subject to COVID-19 quarantine or state lockdown protocols. At all times, employers can still utilize authorized representatives to complete the physical inspection of identity and work authorization documents and to complete Forms I-9 on their behalf. The authorized representative can be a friend or family member of the employee, but it is important to remember that the employer is liable for any violations in connection with the form or the verification process.

Bond is continuing to monitor COVID-19 legal issues and is hosting weekly webinars on the latest federal and state developments. You can register for the complimentary weekly webinar here.

If you have any questions about this memorandum, please contact Joanna L. Silver, any attorney in the Immigration Practice Group, or the attorney in the firm with whom you are regularly in contact.

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