NIXON PEABODY

Introducing: IMMIGRATION INSIGHTS

The latest developments in U.S. immigration law

April 23, 2019

Employers are facing an ever-changing and increasingly unpredictable immigration landscape. You can rely on Nixon Peabody to analyze all the latest developments in this active area of law, and deliver the guidance you need on a variety of immigration issues.

Introducing: Immigration Insights

Employers are facing an ever-changing and increasingly unpredictable immigration landscape. You can rely on Nixon Peabody to analyze all the latest developments in this active area of law, and deliver the guidance you need on a variety of immigration issues. Nixon Peabody's immigration team is adapting their popular Immigration Update newsletter into a timely Immigration blog on the firm's blog network. Make sure to check this blog regularly for the latest immigration law news you need, delivered by attorneys with extensive knowledge and experience in this area of practice.

Ninth Circuit Court of Appeals upholds California's "sanctuary" immigration laws

On April 18, 2019, the Ninth Circuit Court of Appeals largely upheld a lower court's ruling refusing to block three California "sanctuary" immigration laws. The Trump administration's lawsuit challenging those laws will continue to proceed in district court, although the Ninth Circuit Court of Appeals has concluded the administration's continued challenge to two of California's sanctuary laws, including the Immigrant Worker Protection Act, is unlikely to succeed. California employers should therefore continue to work with employment/immigration counsel regarding their obligations under the Immigrant Worker Protection Act.

What are California's "sanctuary" immigration laws?

In 2017, California passed three immigration laws, all of which went into effect on January 1, 2018. The California Values Act (SB 54) limits state and local law enforcement's "discretion to cooperate with [federal] immigration authorities" or inquire into an individual's immigration status, among

other things, while a second law (AB 103) allows the California Attorney General to inspect immigration detention facilities within the state.

Of importance to California employers, the Immigrant Worker Protection Act (AB 450) prohibited California employers, both public and private, from:

1. Voluntarily consenting to allow an immigration enforcement agent to enter any nonpublic areas of the workplace without a judicial warrant.
2. Voluntarily consenting to allow an immigration enforcement agent to access, review or obtain employee records without a subpoena or judicial warrant, unless the requisite three days' notice (Notice of Inspection) of an I-9 inspection had been provided to the employer.

If an employer received a Notice of Inspection, the Immigrant Worker Protection Act requires the employer to provide notice of the impending I-9 inspection to each current employee as well as any authorized union representative(s) within 72 hours of receiving the Notice of Inspection. If during the course of an I-9 inspection by a federal immigration agency, an employee is identified as either lacking work authorization or possessing deficient work authorization documents, the employer must deliver to each "affected employee" an individual notice describing (1) the deficiencies identified during the course of the inspection, (2) the time period for correcting any potential deficiencies and (3) the time and date of any meeting with the employer to correct deficiencies. The employer must also inform the affected employee of his/her right to representation during any meeting with the employer. Finally, the Immigrant Worker Protection Act prohibits an employer from reverifying the employment eligibility of a current employee in a manner inconsistent with federal law.

What are the implications of the Ninth Circuit Court of Appeals' decision?

In largely upholding the July 5, 2018 decision of a California federal district court judge, the Ninth Circuit Court of Appeals found that the Immigrant Worker Protection Act's requirement to give notice to employees of impending I-9 inspections, and to share the results of such inspections with an "affected employee," were neither preempted by federal law nor impermissibly interfere with federal enforcement activity. As such, California employers must continue to comply with the Immigrant Worker Protection Act's notice requirements.

However, the district court's decision to block portions of the Immigrant Worker Protection Act that prohibit employers from voluntarily consenting to an immigration enforcement agent's request to enter any nonpublic areas of the workplace or to review employee records without a judicial warrant, as well as the provisions prohibiting the reverifying of work eligibility unless specifically required by federal law, will remain in effect.

With regard to SB 54, the Ninth Circuit Court of Appeals found that limiting local and state law enforcement's discretion to cooperate with federal immigration authorities does not impede federal immigration enforcement and, even if it did, it would not be unlawful under the 10th Amendment, which prohibits the federal government from requiring the states to cooperate with federal immigration enforcement. The Ninth Circuit Court of Appeals did, however, take issue with AB 103's reporting requirements regarding the apprehension and custody of immigrants, which it found wrongfully burdened the federal government in its enforcement actions.

E-2 Treaty Investor visas available for Israelis starting May 1, 2019

Beginning on May 1, 2019, a treaty between the U.S. and Israel will allow qualifying Israelis to apply for Treaty Investor (E-2) non-immigrant visa status in the U.S. Israel joins many other countries, from Australia to the United Kingdom, whose citizens are already eligible for E-2 visas.

What is an E-2 visa?

The E-2 non-immigrant classification allows a national of an eligible country to work in the U.S. based on a substantial investment in a U.S. business. The investor as well as certain key employees are eligible for this classification.

What are the criteria for E-2 visas?

The following criteria must also be met:

- Applicant possesses the nationality of the treaty country;
- U.S. enterprise is a real and operating commercial enterprise;
- Substantial investment has been made and is more than a marginal one solely to support the applicant;
- Applicant is in a position to "develop and direct" the enterprise;
- Applicant will hold an executive/supervisory position or possesses skills essential to the operations in the U.S.; and
- Applicant intends to depart the U.S. when his or her E-2 status terminates.

What is a "substantial" investment?

While there is no specific minimum dollar amount required for the capital investment, to qualify as substantial, the investment must meet two tests, namely 1) the "proportionality test" and 2) the "marginality test."

The "proportionality test" requires that the E-2 capital invested be a significant proportion of the total value of the business enterprise in the U.S., or a significant proportion of the starting cost of the business, if new. The required proportion varies inversely in relation to the value of the business. In general, the smaller the total value or cost of the E-2 business, the larger the percentage of investment required.

To meet the "marginality test," the investment cannot only return enough income to provide a living for the E-2 visa holder. The business must have the capacity, or potential, to support U.S. workers as well.

Decision to terminate TPS for Haiti temporarily blocked

On April 11, 2019, a New York federal judge issued a nationwide injunction blocking the Trump administration from terminating Temporary Protected Status (TPS) for Haitian nationals lawfully

residing in the U.S. The injunction will remain in place until the court issues a final decision regarding the merits of the case.

What is Temporary Protected Status?

TPS is a temporary immigration status granted to individuals who are already in the U.S. and who are unable to safely return to their home countries because of temporary conditions in those countries. The Department of Homeland Security (DHS) may designate a country for TPS for reasons such as an ongoing armed conflict, environmental disaster (such as an earthquake or hurricane), epidemic or other "extraordinary and temporary conditions." Nationals of a designated country who apply for, and are granted TPS, are not removable from the U.S. and are granted work authorization for the duration of the TPS designation. DHS may terminate a TPS designation if it determines the country "no longer continues to meet the conditions" for TPS designation (i.e., there are no barriers to the safe return of its nationals).

Haiti was designated for TPS status on January 21, 2010 following a devastating earthquake in that country. In November 2017, DHS announced the decision to terminate TPS for Haiti, with a delayed effective date of July 22, 2019 to allow for an "orderly transition" of TPS beneficiaries from the U.S. to Haiti.

What is the basis of the lawsuit?

The plaintiffs in this matter, a group of Haitian TPS beneficiaries, argue the decision to terminate TPS violates both the Administrative Procedure Act (APA) and Equal Protection. In his 145-page decision, United States District Judge Kuntz agreed, finding DHS "decided to terminate TPS for Haiti for the sake of 'agenda adherence' to the 'America first' platform, without regard to…consideration of country conditions under the TPS statute, and that the White House extensively pressured… [DHS to] terminate TPS for Haiti." The court reviewed extensive evidence suggesting DHS and other officials had previously recommended to extend the TPS designation for Haiti in light of continued conditions in that country preventing the safe return of Haitian nationals lawfully residing in the U.S.

With regard to the Equal Protection claim, the judge found "there is both direct and circumstantial evidence [of] a discriminatory purpose of removing non-white immigrants from the United States," and this was a "motivating factor behind the decision to terminate TPS for Haiti" raising "serious questions going to the merits of their Equal Protection Claim."

What is next?

The plaintiffs' suit is nearly identical to ongoing TPS litigation in California, where a California judge similarly found that the Trump administration's decisions to terminate TPS for nationals of Sudan, Nicaragua, Haiti and El Salvador raised serious APA and Equal Protection issues. While litigation proceeds in both the California and New York lawsuits, TPS beneficiaries from Haiti (as well as Sudan, Nicaragua and El Salvador) should discuss the impact of pending litigation with their immigration counsel.

USCIS completes H-1B Cap lottery

On April 10, 2019, U.S. Citizenship and Immigration Services (USCIS) completed its random selection process, otherwise known as the H-1B lottery, to select enough H-1B petitions to meet the congressionally-mandated quota of H-1Bs for fiscal year (FY) 2020: 65,000 H-1Bs for foreign nationals with a bachelor's degree (or equivalent education) from a U.S. or foreign college or university ("regular cap"), and a 20,000 exemption for foreign nationals with a graduate degree from a U.S. college or university ("master's cap").

USCIS will next begin the process of issuing receipt notices for selected H-1B petitions, followed by returning H-1B petitions not selected in the lottery, which could be a several week process.

Lottery process for FY 2020

In accordance with a new rule, which reverses the order in which H-1B petitions are selected in the lottery, USCIS first selected cap-petitions filed on behalf of all beneficiaries (regular cap and master's cap) to meet the regular cap quota, followed by a second selection process to meet the 20,000 master's cap exemption.

By reversing the selection process in this manner, USCIS believes a higher number of U.S. master's degree or higher H-1B beneficiaries will be selected in comparison to years past.

USCIS has not yet implemented the rule's pre-registration process, but is expected to do so in time for the FY 2021 H-1B Cap filing season (April 2020), meaning FY 2020 could be the last year in which employer's need to file full and complete H-1B petitions for the lottery.

Change of status petitions and international travels

Beneficiaries who filed their H-1B requesting a "change of status" are reminded that departing the U.S. while the change of status is pending will result in an abandonment of the change of status request, and any international travel plans should first be discussed with immigration counsel.

H-1B Data Hub

U.S. Citizenship and Immigration Services (USCIS) has launched its H-1B Employer Data Hub to provide information to the public on employers petitioning for H-1B workers. The Data Hub allows the public to search for H-1B petitioners by fiscal year (back to FY2009); NAICS code; or employer name, city, state or ZIP code. This information will enable the public to calculate approval and denial rates, as well as to determine which employers are using the H-1B program.

The Data Hub is part of USCIS's effort to increase transparency in employment-based visa programs. The information in the Data Hub will be updated quarterly.

Premium processing of H-1B cap-subject petitions filed on April 1, 2019

Phase one of premium processing of Fiscal Year 2020 H-1B petitions

Starting April 1, petitioners of cap-subject H-1B petitions requesting a change of status on Form I-129 may concurrently file a request for premium processing of the petition on Form I-907.

The 15-day premium processing clock will not start running upon receipt. Instead, USCIS will announce at a later date the start date, which will not be later than May 20, 2019.

Petitioners requesting a change of status who do not concurrently file a request for premium processing with the petition will still be able to file a request for premium processing when the premium processing clock starts, no later than May 20, 2019.

Phase two of premium processing of Fiscal Year 2020 H-1B petitions

Premium processing of all other cap-subject petitions, which includes petitions requesting consular processing, will not be available until at least June 2019. USCIS will confirm the start date for premium processing of these requests at a later date.

Premium processing of other H-1B petitions

On March 12, 2019, premium processing resumed for all H-1B petitions not subject to the annual cap, including change of employer petitions.

How do the I-797, visa stamp, PED and I-94 expiration dates work?

When a foreign national has differing expiration dates on their U.S. immigration documents, it is important to know which expiration date controls in order to determine when an extension of status is needed.

I-797 Notice of Action

U.S. Citizenship and Immigration Services ("USCIS") issues an I-797 Notice of Action when a nonimmigrant petition or application is approved. The I-797 reflects the visa classification (H-1B, L-1A, etc.) the foreign national has been approved for and the validity period for the nonimmigrant status authorized by USCIS.

Visa Stamp

In order to enter the U.S. in a nonimmigrant status a foreign national must obtain a visa stamp at a U.S. Consulate abroad and be prepared to present it to the inspecting U.S. Customs and Border Protection officer at the U.S. port of entry (with the exception of Canadians who are not required to obtain visa stamps for most nonimmigrant categories). After reviewing a foreign national's documentation, including the I-797 mentioned above, the U.S. Consulate will insert a visa stamp in the foreign national's passport.

The visa stamp expiration date is typically the same date as the expiration date on the I-797, but there are exceptions. The visa stamp validity period will be different from the I-797 in the following circumstances:

- Foreign national's passport expires prior to the I-797 expiration date;
- Foreign national is being issued an L-1 visa stamp (see PED section below).

U.S. and foreign national's country have a reciprocity agreement that provides for a different validity period (for example, the U.S. and China will only issue visa stamps to each other's nationals in one-year increments in some non-immigrant visa categories);

- Prior to traveling internationally, foreign nationals should check the expiration date on their visa stamp as they will not be able to re-enter the U.S. if they do not have a valid visa stamp (with the exception of certain travelers to Canada and Mexico).

PED expiration on visa stamp

The Petition Expiration Date ("PED") listed on a visa stamp generally reflects the I-797 expiration date and the final date on which a foreign national can enter the U.S. using that visa without a new I-797 approved. While the PED is typically the same as the visa stamp's expiration date, this is not always the case.

L-1A and L-1B nonimmigrants are often issued visa stamps valid for five years. However, the PED listed on the visa stamp will correspond with the (shorter) L-1 expiration date on the I-797. To re-enter the U.S. after the PED, the L-1 foreign national will need to present their visa stamp and a new I-797 reflecting an extension of L-1 status beyond the PED.

PED example: A foreign national was issued an I-797 authorizing L-1A status from October 1, 2016, to September 30, 2019, by USCIS. The foreign national obtained a visa stamp from the U.S. Consulate in his home country, which is valid from October 1, 2016, to September 30, 2021 (the full five years allowed) and reflects a PED of September 30, 2019 (the period authorized on the I-797). The foreign national enters the U.S. and is issued an I-94 by CBP that is valid until September 30, 2019.

Prior to September 30, 2019, the foreign national is issued a new I-797 reflecting the extension of his L-1A status until September 30, 2021. Between October 1, 2019, and September 30, 2021, the foreign national can re-enter the U.S. by presenting the visa stamp with the expiration date of September 30, 2021 (and PED of September 30, 2019) and the new I-797 authorizing his L-1A status until September 30, 2021. The foreign national will be issued an I-94 to September 30, 2021.

I-94 expiration

The I-94 expiration date is the "controlling" expiration date for immigration purposes and determines how long a foreign national can legally remain in the U.S.

Upon entry into the U.S., U.S. Customs and Border Protection ("CBP") issues foreign nationals entering in nonimmigrant status an I-94 record. CBP began issuing electronic I-94 records several years ago (replacing the small white cards that were previously stapled into a passport). The electronic I-94 record should be downloaded from CBP's website after each entry into the U.S.

If an I-94 is issued incorrectly by CBP, the foreign national must take the necessary steps to correct his or her I-94 immediately. Incorrect I-94 records can have a very serious negative impact on status in the U.S. The most common errors tend to be I-94s issued with abbreviated authorized periods of stay and I-94s issued in B-1 business visitor status rather than the approved employment authorized status (H-1B, L-1, etc.).

If a foreign national is unaware of an I-94 error, he or she may inadvertently overstay his or her period of authorized status and lose employment authorization. Overstays and unauthorized employment can have serious negative consequences down the road.

I-94 error example: A foreign national was issued an I-797 authorizing H-1B status from October 1, 2016, to September 30, 2019 by USCIS. The foreign national obtained a visa stamp from the U.S. Consulate in his home country, which is valid from October 1, 2016, to September 30, 2019, and reflects a PED of September 30, 2019. The foreign national enters the U.S. and is issued an I-94 by CBP (in error) that is valid only until June 30, 2019. If the I-94 is not corrected, the foreign national is only authorized to remain and work in the U.S. until June 30, 2019 (not until September 30, 2019).

Premium processing available for all H-1B petitions beginning March 12, 2019

As of March 12, 2019, U.S. Citizenship and Immigration Services ("USCIS") will resume premium processing of all H-1B petitions. Importantly, however, the USCIS notice does not indicate whether the resumption of H-1B premium processing will also apply to Fiscal Year 2020 H-1B Cap petitions, which are to be filed the first week of April 2019 (clarification from USCIS is being sought).

Premium processing had been suspended for many H-1B petition types, including change of employer petitions, since at least September 11, 2018. The resumption of premium processing service is welcome news for H-1B employers, who will now be able to pay an additional $1,410 USCIS filing fee in exchange for a 15-calendar day adjudication period.

For those H-1B petitions currently pending with USCIS, the premium processing requests should be sent to the service center currently handling the processing of the H-1B petition with, if applicable, a copy of the notice of transfer. The 15-day premium processing clock will not start until the request is received by the correct service center.

If a Request for Evidence (RFE) has been issued by USCIS, the RFE response should be included with the premium processing request.

DOS announces suspension of visa services in Caracas, Venezuela

As a result of ongoing unrest in Venezuela, the Department of State (DOS) has ordered non-emergency U.S. government employees to depart Venezuela, and has indicated that U.S. citizens in Venezuela should "strongly consider departing Venezuela." The U.S. Embassy in Caracas has suspended visa services, and will have "limited ability" to assist U.S. citizens in Venezuela. Foreign

nationals impacted by the suspension of services should discuss options with their immigration counsel.

For more information, and the most recent updates, please see the U.S. Embassy's website.

Do you have a Corporate Immigration Policy?

Have you ever sponsored a foreign worker for a non-immigrant visa (H-1B, L-1A/B, E-3, etc.) or Lawful Permanent Resident status (i.e., green card)? Do you have foreign employees traveling to the U.S. via the Visa Waiver Program or on B-1 visas? If the answer to either or both of these questions is yes, you may want to consider creating a Corporate Immigration Policy.

A Corporate Immigration Policy outlines the processes, policies and procedures a company has adopted with respect to sponsoring foreign employees for immigration benefits. For example, the policy can stipulate that the employer company will only sponsor non-immigrant visas, or that the employer will only undertake green card sponsorship after a specified period of satisfactory performance. In addition to ensuring the consistent application of the employer's sponsorship practices, creating a Corporate Immigration Policy has a number of other benefits:

- Serves as a potential recruiting tool by communicating an employer's willingness to support non-immigrant and/or immigrant visa processes, which for foreign nationals can be a critical differentiator when weighing career options.
- Ensures that foreign employees entering the U.S. as business visitors via the Visa Waiver Program or B-1 visas are engaging only in activities authorized by that status and not putting the U.S. employer at risk.
- Eliminates the potential for discrimination claims that can result from the inconsistent treatment of foreign nationals.
- Documents the employer's understanding of and efforts to comply with immigration laws and regulations in the event of an audit or investigation.
- Defines the costs to be covered by the company and the foreign national at the outset.

Creating and implementing a Corporate Immigration Policy is not a necessity for every U.S. employer, but it can be particularly helpful for employers that regularly sponsor non-immigrant visas and those offering green card sponsorship.

DOS announces changes to H and L visa processing in China

Effective March 1, 2019, interviews for H (e.g., H-1B) and L-1/2 visas will only be conducted at the U.S. Embassy in Beijing, or the U.S. Consulates in Guangzhou or Shanghai. The U.S. Consulates in Chengdu and Shenyang will no longer be conducting H and L visa interviews. Foreign nationals applying for an H or L visa in China should plan accordingly.

For more information regarding H and L visa processing in China, please see these DOS instructions.

USCIS finalizes changes to H-1B lottery

By notice dated January 31, 2019, the Department of Homeland Security (DHS), and U.S. Citizenship and Immigration Services (USCIS) in particular, issued a final rule changing the process by which H-1B cap subject petitions will be selected each fiscal year (FY). The final rule (1) adds a pre-registration process to the H-1B lottery, and (2) reverses the order by which H-1B petitions are selected in the lottery, thereby increasing the total number of beneficiaries with a master's degree or higher from a U.S. college or university selected. Importantly, while USCIS will implement the reversed selection process for the FY 2020 H-1B cap filing season (April 2019), the final rule's pre-registration requirement will not be implemented until at least the FY 2021 H-1B cap filing season (April 2020).

For more information on changes to the H-1B filing process, see our client alert.

For more information, please contact:

- Jason Gerrol at jgerrol@nixonpeabody.com or 617-345-1372
- Courtney New at cnew@nixonpeabody.com or 401-454-1116
- Mary-Benham Nygren at mnygren@nixonpeabody.com or 617-345-6165

NP IMMIGRATION INSIGHTS BLOG

You can rely on NP to analyze all the latest developments, and deliver the guidance you need.