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Immigration Update: Changes Ahead for Highly-Skilled Workers; Stricter Visa Waiver Program

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Proposed Rulemaking

On December 31, 2015, United States Citizenship and Immigration Services (USCIS) published a proposed rule in the Federal Register in furtherance of President Obama's executive action to modernize, improve and clarify certain immigrant and nonimmigrant visa programs. This modernization effort was included with the multiple executive actions first announced on November 20, 2014, and has been eagerly awaited by many skilled workers, particularly immigrant visa applicants from India and China who are stuck in the extraordinarily lengthy backlogs trying to complete their visa processes. The proposed amendments are aimed to better enable U.S. employers to hire and retain foreign workers who are beneficiaries of approved employment-based immigrant visa petitions.

The Proposed Rule "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers" is not yet final and is open for public comment until February 29, 2016. In addition to codifying many existing agency policies and procedures in USCIS implementation of the American Competitiveness in the Twenty-First Century Act (AC21) and the American Competitiveness and Workforce Improvement Act (ACWIA), the proposed rule includes provisions aimed in part at improving job portability for certain approved beneficiaries of immigrant petitions; clarifying retention of priority dates based on prior employment-based filings; improving clarity of cap-exempt employer, portability and licensure aspects of H-1B petitions; and providing a grace period for certain high-skilled nonimmigrant workers when employment ends so that they can more readily pursue new employment and extension of status. In addition, the rule includes authorization for an unrestricted one-year employment period for certain qualified individuals in E-3, H-1B, H-1B1, L-1 or O-1 status if they can establish that they are beneficiaries of an approved I-140 petition, are unable to adjust status due to visa unavailability, and can show compelling circumstances that justify such employment authorization.

This proposed rule brings some long-awaited hope for improvement to the current state of lengthy waiting periods for skilled immigrants stuck in visa backlogs, during which employees are limited in opportunities for career advancement, as changes to employment could have a detrimental impact on immigration status and employers may be hesitant to repeat the sponsorship process for the new position. Advocacy efforts are underway during the comment period challenging that the rule doesn't go far enough to give highly skilled immigrants and employers protection in retention of benefits of a prior approval and that the new one-year employment authorization is unduly restrictive in its requirements.

We will be reporting more on this rule, its various components, and final outcome as it is likely to result in significant changes for nonimmigrant and immigrant workers in the affected employment-based categories.

For the proposed rule and USCIS alert, please [click here](#).

Changes to the Visa Waiver Program

In the aftermath of the Paris and San Bernardino attacks, the Visa Waiver Program (VWP) was amended significantly on December 18, 2015, when the enactment of the 2016 Consolidated Appropriations Act (H.R.

2029) was signed into law and included the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015. The VWP allows citizens of participating countries (currently 38 countries) who meet certain eligibility requirements to travel to the United States without obtaining a visa for stays of 90 days or less. Under the new law, participating countries are now subject to additional restrictions and risk revocation from the program for non-compliance. Additional country requirements include increased passport security requirements, screening protocols and more comprehensive information sharing. Some of these requirements are effective immediately, with others to be implemented in phases throughout the upcoming year.

Effective immediately, individuals who have been present in Iraq, Syria, Iran or Sudan at any time on or after March 1, 2011, are not allowed to participate in the VWP, with few exemptions for national security interests. These exemptions include certain individuals performing military service in the armed forces for a VWP country, or certain qualified individuals carrying out official duties from employment for a VWP country government. Further, any VWP individual participants who are nationals of Iraq, Syria, Iran or Sudan are excluded from participation even if they have never resided or even set foot in those countries.

These amendments were in response to increased scrutiny of the program following the violence and attacks in Paris and San Bernardino, and their full impact through actual implementation and new procedures is yet to be determined.

For general information on the Visa Waiver Program, please click [here](#).

For the full text of the Omnibus Appropriations Bill of 2016, which includes the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, please click [here](#).