KANTER IMMIGRATION LAW OFFICE

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Update on FY2017 H-1B Cap-Subject Processing

On April 9, USCIS advised the public that it used a computer-generated random selection process, or lottery, to select petitions to meet the FY2017 cap. USCIS received over 236,000 H-1B petitions during the filing period and will begin premium processing no later than May 16, 2016. About the same number was received last year. Last year, regular processed cases were adjudicated anywhere from two to five months after filing.

USCIS will now begin notifying petitioners of selection in the form of a receipt notice. In the past, petitioners received advanced-degree cap receipts first. Shortly afterwards, regular cap-case receipts were mailed. We can expect USCIS to take about a month to announce that all of the receipts have been mailed. However, petitioners cannot confirm selection or rejection until a receipt is received or the H-1B package is returned.

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Foreign Students in STEM Fields Get More Time on Their F-1 OPT

Effective May 10, a new rule published by the Department of Homeland Security (DHS) will make a big difference for foreign students majoring in STEM (science, technology, engineering, mathematics) fields. In an effort to attract and retain more foreign students, DHS is permitting a 24-month extension for foreign students who have U.S. STEM degrees and are doing their Optional Practical Training (OPT) in a STEM field. The current rules allow for a 17-month extension for STEM students after their one year of OPT if their employers participate in E-Verify. While the new rule creates opportunities for foreign students, employers will have additional paperwork requirements in order for their foreign student employees to take advantage of the extension.

In addition to the two additional years of employment authorization post-graduation, STEM students will have additional opportunities to play the H-1B lottery during their 36 months of OPT. With the quota stagnant and the number of petitions rising, this is a huge benefit for foreign students. Summer STEM graduates often take advantage of OPT and are frequently sponsored by their employers for an H-1B visa in April. If they are selected, they transition into H-1B status in October. If not, they can apply for the STEM OPT extension and have two full years to work — and two additional chances to apply for the H-1B visa.

For foreign students to receive a STEM OPT extension, they will need to obtain an updated I-20 form from their Designated School Official (DSO). Students and employers will have to work together to create a formal training plan that identifies learning objectives and a plan to achieve those goals. While mandatory employer enrollment in E-Verify is a holdover from the current OPT STEM extension rule, employers now also must attest to the fact that they possess the resources to implement the training plan, that the work will be an educational

benefit to the student, that no U.S. worker will be displaced, and that the student will be paid the wages and benefits comparable to other similarly situated U.S. workers employed at the work site.

The new rule also requires more oversight of the STEM OPT program. DHS will impose a basic validation requirement six months into the STEM OPT extension that will collect biographic and employment information from the foreign national. At the one-year mark, DHS expects a self-evaluation report to be drafted by the student and provided to their DSO. Any material changes must be reported immediately.

The additional rules and paperwork are a price worth paying for extended employment opportunities that benefit both students and employers. And, the extra chance to play the H-1B visa lottery is a huge collateral benefit for STEM students. It seems that DHS and the Administration are serious in their commitment to attracting and retaining foreign graduates.

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Is Your Employment-Based Green Card Application Pending? What You Need to Know Before Changing Jobs

USCIS recently published a new policy memorandum regarding a provision in the law that permits green card applicants who are beneficiaries of a valid I-140 petition to change jobs or employers in certain circumstances without having to file a new PERM and I-140. This is known as "porting." To successfully change or port jobs/employers, the beneficiary's green card application (I-485) must be pending for at least 180 days and the new job must be in the "same or similar" occupational classification as the job for which the I-140 was originally filed. But, how do you know if your I-140 job and your new job are the same or similar? The following guidance is found in the policy memo.

First, take a look at the "SOC" code that was listed on the labor certification (the PERM form filed with your I-140, page 2). The code is based on the job. For example, 15-1134 is for *Web Developers*. This six-digit number should be your primary focus when considering whether to accept a new position/employer. Your goal is to choose the job that will not result in any changes to your SOC code because USCIS will look at the new job duties to determine the proper SOC code. While other factors like salary, title, education, etc. are considered, nothing carries more weight than the actual job duties the beneficiary will perform. (The government-approved job duties for SOC codes can be found at www.onetonline.org.) If the SOC code from the I-140 petition is identical to the SOC code selected for your new position, USCIS will acknowledge it as the "same or similar" occupation.

If the last digit is different, say, 15-1133 (*Software Developer, Systems*), the USCIS adjudicator will review your job duties to determine the actual degree of overlap. Some professions overlap considerably and may count as "similar," while others do not. A good indicator is the first two digits, "15" in this case. Every computer and mathematical occupation starts with 15, so you have a good chance of finding a similar occupation for porting with the "15" major group.

If your new job causes a change in the first two digits of your I-140 SOC code, you are likely outside the scope the "same or similar" job and your green card is at risk, except in one case – promotion to a managerial position. All managers have an SOC code that starts with 11. A *Software Developer, Systems*, (15-1133) who is promoted to manager will likely be classified as 11-3021, *Computer and Information Systems Manager*. Because this portability provision is intended to encompass promotions, a comparison of the job duties of a software developer and their manager will reveal significant similarities because of the technicalities of the field. However, not all promotions are handled equally. An individual who has a valid I-140 for a cook position cannot accept a promotion to restaurant manager – the job duties are significantly different in that case.

The policy memo guidance issued by USCIS is intended to give foreign nationals more clarity and thus more job flexibility while they wait for their green cards. Before changing jobs or accepting a promotion, discuss any and all implications on your green card with your immigration attorney.

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Updates from the DOL Regarding the PERM Process – Insights for Employers

For many employers who wish to sponsor a foreign national on an employment basis, they must take steps to establish that there are no willing, qualified, and able U.S. workers available for the position, and that the foreign national will be paid the prevailing wage for the job. This portion of employment-based permanent immigration is handled by the Department of Labor (DOL) and is called PERM labor certification. In the last fiscal year, DOL adjudicated 89,151 PERM cases, an increase of 17% in the number of cases filed. In late February, DOL held a stakeholders meeting to discuss the labor certification process. The resulting report contained three issues that employers will want to consider when pursuing a PERM application: potential fees, job titles, and skill experience.

Perhaps most disheartening about the report is the indication that DOL is considering instituting fees for the PERM process. Today, filing a prevailing wage request and a labor certification is free. But, due to a lack of funding to address the growing number of cases and backlogged audits, DOL is looking for filing fees to cover those costs and it is looking to employers. As an example of the need for increased funding, DOL reported that prevailing

wage determinations, the first step in the PERM process, now take longer than 60 days to reach a determination due to a lack of staffing and funding. While there was no indication when filing fees would be implemented, they are on the horizon.

Another issue mentioned in the report is the job title of the offered position. Employers often have their own ideas about how they want to title a position, what experience will be required, where and how they want to recruit, and how much the salary will be. These ideas rarely align with DOL's expectations, especially the job title and salary. For example, the DOL report confirmed that positions with words like "Senior," "Chief," or "Journeyman" in the title will merit a higher salary, often $8,000 to $12,000 more than expected, even if the position is entry-level. Employers should be mindful of this before adding arbitrary titles to entry-level positions because it will make a difference in DOL's salary assignment.

Also, when an employer is recruiting for a position that requires three years of experience and a specific skill (like C++ programming), they need to be sure that their intended foreign worker has *both* three years of experience and three years of that specific skill. DOL has been issuing denials over imputed quantification of the specific skill. DOL acknowledged this practice in the report and did not express any desire to change. Likewise, DOL has been unkind to employers who describe the salary as "competitive," "negotiable," or "depends on experience," or who fail to include any offered housing in the advertising language.

The PERM process is unforgiving, but if employers have a better idea of what to expect, and how to align their business needs with DOL regulations, chances of a successful PERM filing increase dramatically. This is best accomplished when employers are educated about the basics of PERM applications and work with their attorneys.

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USCIS Processing Times – What to Expect

Immigration cases often move at a snail's pace and require much patience. Processing times often change and often do so without notice. Nevertheless, posted processing times by USCIS have, in the past, served to reasonably estimate when a case should be decided and help all concerned manage their expectations. Now not so. USCIS-posted processing times uniformly appear to be out of synch with reality. Not only are posted processing times not updated regularly, but when inquiries are made with the National Customer Service Center, USCIS representatives frequently advise that the posted processing times are not the real processing times. In response to this lack of transparency as well as a growing backlog in processing, the immigration bar has requested a meeting with USCIS Director León Rodrìguez to discuss the processing times problem. Stay tuned.

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E Visa Holders Can Obtain New Two-Year Admission Period At Land Border But Need to Request It

The immigration rules permit an individual with an expired visa who travels solely to a contiguous territory for up to 30 days to be readmitted to the United States, effectively revalidating that visa. The foreign national is neither issued a new I-94 nor receives an extended admission period, but instead uses the unexpired I-94 period of admission. E visa holders who have unexpired visas and who travel to Canada or Mexico for 30 or fewer days should be issued a new two-year period of admission. However, they are routinely being readmitted to the U.S. on their unexpired I-94s for the sake of expedience. While at an airport, where I-94s are automated, a fresh two-year admission period will be given. But this is not necessarily the case at land borders. To resolve this issue, CBP has advised that such applicants seeking a two-year I-94 at a land border crossing should request one and be able to articulate why it is necessary.

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USCIS Proposing to Cancel Interim Employment Authorization (EAD) Cards

Under current regulations, if an initial applicant for work authorization does not receive a decision within 90 days of filing, USCIS must issue an interim work card. However, USCIS recently proposed a rule that will eliminate that obligation. If accepted, the result of this new rule would affect employment-based visas dependent on the EAD card, family-based green card applicants, foreign students, U visa recipients, asylum applicants, and individuals in removal proceedings. In the context of adjustment of status, work authorization and advance parole travel authorization are adjudicated together, thus the new rule could have a negative effect on the issuance of combo cards. The proposal does provide for automatic extensions for applicants who apply to renew their previously granted EADs. Comments to the proposed regulation were due in late February. It is unclear when final rules will be promulgated.

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Supreme Court to Hear Oral Argument on President's Executive Actions on Immigration

On April 18, the U.S. Supreme Court will consider *United States v. Texas*, a politically charged lawsuit about the legality of some of President Barack Obama's executive actions on immigration. The initiatives in dispute – expanded Deferred Action for Childhood Arrivals

(DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) – have been on hold since a district court in Texas issued a preliminary injunction in the case in February 2015. A Supreme Court decision in favor of the United States could clear the way for the initiatives to go forward as early as June 2016 and provide temporary relief from deportation to as many as 3.7 million people.

The case now before the Supreme Court involves a lawsuit filed in federal district court in the Southern District of Texas by 26 states seeking to block implementation of the President's plan to expand DACA and implement DAPA. The states claim that expanded DACA and DAPA violate federal laws and the Constitution. Specifically, they make the following claims:

- Expanded DACA and DAPA violate the "Take Care Clause" of the Constitution, which states that the President must "take Care that the laws be faithfully executed."
- Expanded DACA and DAPA violate the Administrative Procedure Act (APA) because these initiatives are arbitrary and capricious or otherwise not in accordance with the immigration laws.
- The federal government did not comply with certain technical procedural requirements under the APA, including notice-and-comment rulemaking, before it announced the expanded DACA and DAPA initiatives.

The Supreme Court first will consider whether the states have standing, or legal capacity, to bring the lawsuit. In addition, the Court may consider whether expanded DACA and DAPA are lawful or whether they violate the Constitution or the APA.

Should the Justices reach a 4-4 decision, rather than a majority, the Fifth Circuit's decision would remain intact. As a result, the injunction preventing implementation of DAPA and expanded DACA would remain in place, and the district court would proceed to the merits of the case.

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"Habitual Drunkard" Ruled Invalid Basis for Denying Citizenship, But DUI Grounds for Visa Revocation

In 1956, the American Medical Association (AMA) declared alcoholism to be an illness. By 1980, the AMA started establishing policies on the "disease" theory, largely to secure third-party funding, which could only be done if alcoholism was categorized as a disease. Although the AMA's position was solidified in 1987, a Supreme Court case the following year addressed the issue via the withholding of veterans' benefits as a result of the veterans "own willful misconduct." The majority opinion acknowledged the competing medical

literature which refused to classify alcoholism as a disease and further held that the victim "bears … responsibility." Within a short period of time, the American Hospital Association, the American Public Health Association, the National Association of Social Workers, and the American College of Physicians all classified alcoholism as a disease. The National Institutes of Health followed suit in 2008.

This evolution of medical attitudes concerning alcoholism has spilled over into the immigration arena, where the 1952 Immigration and Nationality Act (INA) excluded citizenship from drunkards on the basis that they lacked "good moral character." This standard has never been updated despite several modifications to the INA, and the same standard is applied to cancellation of removal applicants, who are ineligible for that relief if shown to be a habitual drunkard. A driving under the influence (DUI), open container, minor in possession, or public intoxication arrest could lead to the charge that an individual is a habitual drunkard. Absent an alcohol-related criminal charge, the very first question on both naturalization and cancellation of removal applications concerning moral character is, "Have you ever been a habitual drunkard?" The Ninth Circuit decided it was time for the INA to catch up with medical opinion and recently held that alcoholism is a disease and, therefore, the "habitual drunkard" question is irrelevant to moral character and unconstitutional under the rational basis standard.

However, the treatment of alcoholism as a disease is a double-edged sword. As USCIS adjudicators, Immigration and Customs Enforcement (ICE) attorneys, and immigration judges in the Ninth Circuit now are being prevented from imputing drunkenness onto one's character for a DUI, the Department of State (DOS) is revoking nonimmigrant visas for the same offense. Under the INA, the inadmissibility statutes include those who have a possible physical or mental disorder associated with harmful behavior. Due to the growing consensus that alcoholism is a disease and the acknowledgement that drunk driving is harmful behavior, DOS has determined that a DUI offense raises doubts about admissibility and has recently authorized consular officers to revoke nonimmigrant visas of visa holders with a DUI arrest that has occurred within the past five years, unless that arrest has already been addressed within the context of a visa application. This means that foreign nationals who are present in the United States on a nonimmigrant visa who are subsequently arrested for a DUI, or who previously had a DUI arrest but that information only now surfaced – information that calls into question the person's continued eligibility for a visa – are at risk for visa revocation. Previously, there was no consequence of a DUI arrest subsequent to visa issuances until the time of the next visa application. Once revoked, the visa is not valid for future travel to the United States but it does not require immediate departure from the United States if the foreign national is currently present here. Revocation does not preclude reapplying for a new visa. During reapplication, consular officers will refer any nonimmigrant visa applicant with one alcohol-related arrest in the last five years or two or more in the last 10 years to a panel physician for a medical examination prior to visa issuance to rule out a medical ineligibility.

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Chinese Nationals Visiting the U.S. Expected to Enroll in Online EVUS System by November

Beginning in November 2016, nationals of China using a 10-year business or tourist visitor visa (B-1/B-2) to enter the United States will be required, before being admitted, to also enroll in the Electronic Visa Update System (EVUS). The requirement is the result of a reciprocal agreement between China and the U.S. to issue visitor visas with a 10-year validity period. Currently, visitor visas are only issued for one year at a time for travelers between the two countries.

The EVUS is the online system that is used to periodically update biographic information in order to facilitate travel to the United States. All visitors from China, including current visa holders, will be required to enroll in EVUS before November. Enrollment consists of completing a form and paying a nominal fee. Enrollment in the system will only stay valid for two years at most, when Chinese nationals will have to re-enroll to continue traveling to the U.S. on a B-1/B-2 visa.

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DOS Phasing Out Employment Authorization for Some A-2 Visa Holders; DOS Retreats from More Restrictive Interpretation for EADs for Certain G-4 Dependents

The Department of State (DOS) is phasing out its endorsement of employment authorization requests for dependents of foreign government employees holding A-2 visas who are considered to be permanently resident in the United States for the purposes of the Vienna Conventions on Diplomatic and Consular Relations. The Office of Foreign Missions will only consider new dependent applications for work authorization if the employment began between July 1 and December 31, 2015. Renewal applications will only be considered if the dependent's work authorization expires on or before June 30, 2016.

On a related note, in late 2015, DOS began implementing a new interpretation of the reciprocity rules between the United States and other countries with respect to work authorization for certain G-4 dependents, restricting such authorization in the United States unless a bilateral work agreement exists between the United States and the principal G-4's country of nationality. Fortunately, in late February 2016, this new policy was reversed, and G-4 dependents can again apply for and obtain work authorization regardless of the status of a bilateral work agreement.

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News in Brief:

The following additional items may be of interest to our readers:

Visa Waiver Program Users Restricted from Traveling to Libya, Somalia, and Yemen: The list of restricted countries for the Visa Waiver Program has grown by three. Libya, Somalia, and Yemen have joined Iran, Iraq, Sudan, and Syria as "red-flag" countries. DHS has limited eligibility for the Visa Waiver Program for individuals that have visited these countries since March 1, 2011. These restrictions do not apply to dual nationals of Libya, Somalia, and Yemen, but continue to apply to dual nationals of Iraq, Iran, Sudan, and Syria. Other individuals such as journalists, government officials, and NGO employees can receive waivers on a case-by-case basis.

Petitioning for a Sibling? Consider Using a DNA Test: The Board of Immigration Appeals (BIA) overruled a USCIS policy that prevented consideration of sibling-to-sibling DNA tests. The BIA held that USCIS had no real justification, scientific or otherwise, to refuse consideration of DNA tests results in sibling cases. Therefore, a DNA test might be worthwhile to include, especially when the siblings are more advanced in years and birth certificates were issued late or not at all. A DNA test that indicates a 99.5% match between the siblings is powerful evidence of a qualifying relationship.

TPS Designation Extended for Guinea, Sierra Leone, and Liberia: Recent DHS notices extended the designation of Guinea, Sierra Leone, and Liberia for Temporary Protected Status (TPS) for six months, from 5/22/16 through 11/21/16. The 60-day re-registration period runs from 3/22/16 through 5/23/16.

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