KANTER IMMIGRATION LAW OFFICE

www.kanterlaw.com

February 2016 Newsletter

- **H-1B Professional Visas — Preparation Begins for April Filings**
- **Employment-Based Immigrant Visa Categories for India and China**
- **Long-Awaited Proposed Rules for High-Skilled Foreign Workers Modest in Scope**
- **New Rules Tweak Certain Nonimmigrant (E-3, H1-B1, CW-1) and Immigrant (Professor/Researcher) Visa Classifications**
- **Supreme Court to Review Administration's Executive Actions on Immigration**
- **What to Do When the Examiner at Your Adjustment Interview Requests Your EAD**
- **Copy of Approval Notice Sufficient for O and P Canadian Travelers**
- **One-to-One Facial Image Comparison Project at JFK Airport**
- **Long Ago Entry -- What to Do If You Lost Your Passport and White I-94 Card and Need to Prove Your Entry**
- **Democrats Introduce Bill that Would Mandate Legal Representation for Unaccompanied Children and Vulnerable Immigrants**
- **ICE Raids Homes of Undocumented Immigrants**
- **News In Brief: Extension of Sudan and South Sudan TPS to 11/2/2017; Groups Request TPS for El Salvador, Guatemala, and Honduras; TPS Registration for Yemen Open until 3/3/2016; Researchers Find that Immigrants Wait on Average 22 Months to Have Their Day in Immigration Court; PA Revokes License to Berks County Family Detention Facility**

Back to Top of Newsletter

February 2016 Newsletter

H-1B Professional Visas — Preparation Begins for April Filings

Once again it is H-1B filing season, and, once again USCIS is likely to receive a record number of petitions and the full allocation of visa petitions in the first week of filing commencing April 1. Once the quota is reached, new H-1B visa requests will not be accepted until April 1, 2017, for work that commences on October 1, 2017.

Visas for professional specialty workers (H-1Bs) are capped at 65,000 per fiscal year. Another 20,000 visas are available to workers with advanced degrees (Master's or higher) obtained at U.S. institutions of higher education. Of the total 85,000 H-1B visas available, some 6,800 visas are set aside for nationals of Chile and Singapore under special rules of H-1B1 visas.

While some H-1B petitions can be filed at any time because they are cap exempt, the vast majority of H-1B petitions for new work must be filed in April. Thus, employers should immediately identify first-time H-1B employees and begin preparing necessary petitions for the early April filing period.

Back to Top of Newsletter

Employment-Based Immigrant Visa Categories for India and China

Professionals from India and China face multiple-year visa waits because their employment-based (EB) visa categories are oversubscribed. Recently, however, there has been some significant forward movement, reducing wait times in some categories by as much as six months. Below is a summary of waiting times and the reasons for the movement:

EB-2 India: In the March *Visa Bulletin*, the EB-2 India final-action date advanced to October 15, 2008, shaving off 8½ months from where the category was just three months ago. The Department of State (DOS) explains that demand was less than anticipated — thus the forward movement — and also reflects a strategy of advancing dates more aggressively earlier in the year in an effort to ensure that cases can be completed and all visa numbers used within the fiscal year. The lower demand may be attributable to fewer EB-3 to EB-2 upgrades than expected, or that the last advancement sufficiently captured the bulk of the demand. Low demand also may be the result of USCIS working through a backlog of EB-2 India cases, which would give the appearance that demand has tapered off. The category, advises DOS, is not expected to move at this pace in the coming months.

EB-2 and EB-3 China: The EB-2 Final Action date for China continues to lag behind the EB-3 China Final Action date in March — August 1, 2012 for EB-2 and June 1, 2013 for EB-3. DOS explains that while demand decreased in November and was relatively low in December, demand for this category was high in October. At the same time, demand for

EB-3 China is on the low side. Thus, EB-3 China continues to advance. Because the EB-3 category cut-off date for China continues to be more than 10 months ahead of EB-2 China, foreign nationals and their employers degrade from EB-2 to EB-3, which in turn causes greater than normal fluctuations in both categories.

On a related note, USCIS has determined that for family-sponsored filings, the "Dates for Filing Visa Applications" chart for March 2016 may be used. For employment-based filings, the Application "Final Action Dates" must be used.

Back to Top of Newsletter

Long-Awaited Proposed Rules for High-Skilled Foreign Workers Modest in Scope

DHS and USCIS published long-awaited proposed rules on December 31 that address issues faced by high-skilled immigrants, but the majority of the changes are very modest and disappointing overall. Many of the proposals codify existing policy and interpretations, and while a few alleviate some of the worst problems, others are far from what was expected and what the Administration could have proposed. Over a year ago, the Administration promised to "modernize" the employment-based immigration system to the extent possible within the boundaries of the current law.

One of the most pressing issues in the high-skilled immigration system is the long delays in the green card process, particularly for immigrants from certain countries. These employees are already the beneficiaries of immigrant petitions based on the unavailability of their skills in the U.S. labor market, but their immigrant petitions are currently only valid for the employer who sponsored them. During the long wait for their green cards to become available, skilled immigrants in these backlogs are stuck on employer-sponsored temporary visas, a situation that some employers exploit and that limits an employee's career advancement as often a new employer is unwilling to repeat the expensive employment-based sponsorship process for a new hire. In addition, employment authorization for spouses is limited, and children born outside the United States but raised here are at risk of "aging out" and losing the opportunity to obtain their green cards as derivative dependents of their parents. The proposed rule contains helpful provisions meant to protect these skilled immigrants from the worst problems associated with their temporary visa status.

For example, the proposed rule will allow certain skilled workers with compelling circumstances who have an approved I-140 immigrant visa petition to apply for a one-year employment authorization card if specific criteria are met. Additional criteria include that the individual is currently in the U.S., maintaining E-3, H-1B, H-1B1, O-1 or L-1 status, and cannot immediately move forward with the permanent residence process due to visa backlogs. Although compelling circumstances is left undefined in the proposed rule to provide flexibility for the skilled worker, several examples are outlined by DHS, which

might include the need to relocate because of a disability or illness, employer retaliation for a working conditions complaint, or a compelling need of the employer to have the employee continue employment. Extensions of the one-year period of employment authorization are extremely limited and an individual will be ineligible for such employment authorization if convicted of any felony or two or more misdemeanors. Spouses and children will be eligible for an EAD if the principal spouse or parent is granted an EAD. The EAD of the dependent will only be granted for the same time period of the principal spouse or parent. This is an area where the proposal should have provided more flexibility to immigrants who have followed the rules but may find themselves stuck because of quota backlogs they did not create. The high standard required to justify a grant of employment authorization under compelling circumstances means that many skilled immigrants will not qualify as outlined in the proposed rule.

The proposed rule also allows certain classes of individuals eligible for employment authorization to have the validity of their EADs automatically extended for a period of 180 days as long as the renewal application for an extension was timely filed. H-4 and other spouses with EADs are not eligible for the 180-day benefit. Under the proposed rule, a filing receipt will be required to demonstrate work authorization for Form I-9. Although DHS indicates that it will remain committed to a 90-day processing time period, the 90-day time limit to process EADs is being eliminated under the proposed rule.

In addition, the rule will grant E, L, H-1B and TN workers a sixty-day "grace period" after their employment ends, which will allow them to either look for other employment, change to a different type of temporary visa, or wrap up their affairs in the United States. This is an improvement given that under current interpretation the employee's status ends immediately upon termination of employment. Another proposal will allow for 10-day grace periods at the beginning and end of the validity period for work visa categories other than the H-1B category.

The proposed rule also provides "whistleblower" protections for some employees who report wage and working condition violations, allowing them to change to a new employer or another status even if their employer terminated their employment. It also codifies current administrative practice in a number of areas, including the definition of employers exempt from the annual cap on H-1B visas (universities, nonprofit research organizations, government research organizations, and related or affiliated nonprofit organizations), the eligibility of H-1B employees to work for a new sponsoring employer upon filing of a new H-1B petition, and the ability of H-1B nonimmigrants to have that status extended beyond the general six year limitation during the long green card sponsorship process.

With the change in Administration coming in 2017, it is likely that this proposed rule will become final in the coming months once comments are reviewed and incorporated. Comments are due February 29, 2016.

Back to Top of Newsletter

New Rules Tweak Certain Nonimmigrant (E-3, H1-B1, CW-1) and Immigrant (Professor/Researcher) Visa Classifications

The Department of Homeland Security (DHS) has published new rules, effective February 16, 2016, that tweak the eligibility requirements or the work authorization process for four visa classifications. Below is a summary of what has changed:

Outstanding professors and researchers are eligible for priority worker immigrant visa classification if they can demonstrate international recognition in their academic field, three years of experience in teaching or research, and an offer of employment at an institution of higher learning or research facility. USCIS regulations provide six categories of acceptable evidence to demonstrate international recognition; however, those categories are limiting and do not specifically allow for other kinds of evidence that could equally establish eligibility. The new rule provides for greater flexibility by adding a catch-all category of acceptable evidence — "*comparable evidence to establish . . . eligibility*" — that would permit other significant accomplishments and achievements, such as important patents and peer-reviewed funding grants, for consideration. This additional language aligns with comparable evidence that can be presented in the extraordinary ability category.

E-3, H-1B1, and CW-1 are nonimmigrant work visa categories that have been *treated* as the other nonimmigrant work-visas classifications with respect to work authorization "incident to status," even though the regulations did not specifically provide for such. Visa holders in other nonimmigrant work-visa classifications are permitted to work for 240 days during the pendency of a timely filed extension application, but these nonimmigrants were not *expressly* permitted to do so even though in practice they were. The new rule remedies these anomalies and makes the categories consistent.

What are these visas? Available only to nationals from Australia, the E-3 visa is similar to the H-1B professional specialty worker visa. The H-1B1 visa is a result of free trade agreements with Chile and Singapore and is also similar to the H-1B. The CW-1 visa allows certain workers in the Commonwealth of the Northern Mariana Islands (CNMI), a small group of islands within the Mariana archipelago that has been under U.S. control since the end of World War II, to work there. The CNMI has its own immigration laws but is slowly transitioning to U.S. federal immigration compliance.

Back to Top of Newsletter

Supreme Court to Review Administration's Executive Actions on Immigration

President Obama's late 2014 executive order on immigration that would offer protection from deportation (and work permits) to more than four million undocumented immigrants has been tied up in the courts since February 16, 2015. However, the Supreme Court has recently granted *certiorari* to the case known as *Texas v. U.S.*, and will be reviewing the Fifth

Circuit's decision to uphold the court-ordered injunction. The Justice Department's legal brief is due in March, followed by oral argument in late April or early May. The Supreme Court is expected to reach a decision on the case sometime in June.

The Supreme Court has directed the parties to provide a full briefing on the legality of DAPA (Deferred Action for Parents of Americans) under the "Take Care" Clause of the Constitution (Article II, Section 3). This is a unique turn of events because the court rarely adds issues to the case that were not heard on appeal below. Consequently, the Supreme Court's holding in *Texas v. U.S.* may have serious implications concerning the responsibilities and power of the executive branch for this and future administrations.

That said, if the Court were to issue an evenly divided 4-4 decision (now a possibility with the recent passing of Justice Scalia), the opinion would only have the effect of affirming the Fifth Circuit's decision; it would not necessarily preclude other circuits from deciding differently.

Back to Top of Newsletter

What to Do When the Examiner at Your Adjustment Interview Requests Your EAD

Local field offices can ask for EAD (Employment Authorization Document) cards from applicants at the conclusion of successful adjustment of status interviews. This is because once the application has been approved, the foreign national is no longer an applicant for adjustment of status, but a permanent or conditional resident. As a result, the authority under which the EAD was granted no longer applies, and the card is no longer valid. Unfortunately, the EAD is often the only document a foreign national has to demonstrate lawful status in the U.S. Many field offices do not issue an I-485 approval notice at the conclusion of the interview, nor routinely place "I-551" lawful permanent resident stamps in passports immediately after a successful interview. By confiscating the EAD at the interview, the foreign national is left without any documentation regarding his or her status in the United States. Should an officer request an applicant's EAD card at the conclusion of a successful adjustment interview, request an approval letter or an I-551 stamp. While most green cards are being produced and mailed within two to three weeks of the approval, an approval letter or stamp can serve as proof in the interim and in the event that the green card is not delivered as planned.

Back to Top of Newsletter

Copy of Approval Notice Sufficient for O and P Canadian Travelers

Some Canadian O and P travelers recently have been told by CBP officers that their admission may be denied for not having the *original* I-797 approval notices when they seek

to enter the United States. In a recent meeting, CBP confirmed that presentation of a photocopy of an approval notice is sufficient for CBP to verify the petition validity and grant admission. The issue arises because Canadian nationals are exempt from the visa requirement for O and P visas and often are approved with multiple beneficiaries but only receive one original approval notice. Because the beneficiaries frequently do not travel together, only one person will have the original and all others only copies.

Back to Top of Newsletter

One-to-One Facial Image Comparison Project at JFK Airport

Last spring, travelers passing through customs at Dulles International Airport noticed new equipment being tested there. That equipment was the one-to-one facial image comparisons assisting U.S. Customs and Border Protection (CBP) in identifying possible fraudulent usage of valid passports. After a successful testing period at Dulles, DHS has installed the new technology in three terminals at John F. Kennedy International Airport in New York City.

The system was developed by Unisys as part of its Land Border Integration contract with CBP. The facial-comparison technology relies on the personal image on a passport's biometric page (which is electronically stored on the small chip in the ePassport and compares it to a live facial image taken at the CBP booth. The system then generates a match confidence score indicating the likelihood of a match between the two photographs. If there is a successful match, the live facial image is not retained.

Facial image comparisons will be used for returning U.S. citizens with ePassports and first-time Visa Waiver Program travelers. The latter have been included because Homeland Security has identified an appreciable risk of passport and identity fraud among this population of travelers, exacerbated by recent terrorist attacks. Since travel on the Visa Waiver Program accounts for about two-thirds of all business and leisure travel to the U.S., the new technology will be heavily used.

Given its success as a test program, Dulles Airport is expected to adopt the new facial-comparison program in February 2016. CBP has not stated whether additional airports will use the one-to-one program, but the agency will be conducting additional tests to evaluate new biometric technologies in different environments in 2016.

Back to Top of Newsletter

February 2016 Newsletter

Long Ago Entry -- What to Do If You Lost Your Passport and White I-94 Card and Need to Prove Your Entry

Foreign nationals who entered the United States before CBP moved over to an electronic arrival/departure system for I-94 records were issued white I-94 cards that were stapled into their passports. That record is important evidence to prove that the foreign national was inspected and admitted. This arises most often when the foreign national is out of status but still eligible to adjust status as an immediate relative of a U.S. citizen (spouse, parent, or child). When that record is lost, the foreign national can request a duplicate from USCIS, but USCIS cannot always find the record. What to do? Other agencies may have copies of the original records. For example, if you applied for a Social Security card – years ago, foreign nationals who had a valid and unexpired visa and I-94 were issued Social Security cards – you can request from the Social Security Administration the documents that were used to request that SS card: the passport number and the I-94 record.

Back to Top of Newsletter

Democrats Introduce Bill that Would Mandate Legal Representation for Unaccompanied Children and Vulnerable Immigrants

On February 11, several Democratic senators introduced the "Fair Day in Court for Kids Act of 2016," which mandates that unaccompanied children and vulnerable immigrants receive legal representation. The bill requires the government to appoint and pay for counsel for unaccompanied children and particularly vulnerable individuals, such as persons with a disability; victims of abuse, torture, or violence; or individuals whose circumstances are such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings. The bill also clarifies and expands access to counsel for other immigrants in removal proceedings, whether or not they are detained, and requires DHS to provide such immigrants with all relevant charging documents before their removal proceedings can move forward. Moreover, information about legal services at detention facilities would be provided through formal procedures that ensure that legal orientation programs are available for all detainees. Also, a two-year pilot program to provide legal orientation programs to *nondetained* asylum seekers would be created in at least two immigration courts.

Our nation has one of the most complicated immigration systems in the world, and one of its huge flaws is that it does not guarantee legal representation to individuals facing deportation. This bill represents a huge step toward ensuring fairness in these complex proceedings.

Back to Top of Newsletter

February 2016 Newsletter

ICE Raids Homes of Undocumented Immigrants

On January 2, 2016, the Obama Administration authorized Immigration and Customs Enforcement (ICE) to raid the homes of immigrant families who had illegally entered the United States through the southern border since 2014. After only two days, 121 people were detained. Advocacy organizations and members of Congress have been lashing out at President Obama over this controversial policy. They argue that the nationwide raids are a violation of due process and are inhumane, spreading terror and anxiety among many Central American immigrant families who suffer from fear of deportation to dangerous and violent conditions in their home countries.

Back to Top of Newsletter

News in Brief

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

Extension of Sudan and South Sudan TPS to 11/2/2017: DHS has extended Sudan's and South Sudan's designation for Temporary Protected Status (TPS) for an additional 18 months. The extended designation is effective 5/3/2016 through 11/2/2017.

TPS Registration for Yemen Open Until 3/3/2016: The deadline to register for Temporary Protected Status (TPS) for Yemen is 3/3/2016. USCIS has been accepting applications for TPS Yemen since 9/3/2015, when DHS Secretary Jeh Johnson designated Yemen for TPS for 18 months.

Groups Request TPS for El Salvador, Guatemala, and Honduras: On January, over 270 civil rights, labor rights, immigrant, human rights, and humanitarian organizations sent a letter to President Obama asking his administration to grant Temporary Protection Status (TPS) to immigrants from El Salvador, Guatemala, and Honduras because of the dramatically escalating violence that has precipitated the humanitarian crisis of refugees fleeing the Northern Triangle countries.

Researchers Find that Immigrants Wait on Average 22 Months to Have Their Day in Immigration Court: As of the end of January 2016, cases in U.S. immigration courts have been open for an average of 667 days, a new high, up 3.7 percent from the end of FY2015, and 17.6 percent longer than at the end of FY2014. For some immigrants, delays can mean buying time before their eventual deportation; for others, it means they have to wait for remedies that may be available to them.

Pennsylvania Revokes License to Berks County Family Detention Facility: The Pennsylvania Department of Human Service informed DHS that it would not renew and

would revoke the operating license for the Berks County Residential Facility, the immigration detention center that jails mothers and children in Leesport, PA, because it was not operating as a child-only residential facility, as required under the Human Services Code or the departments regulations.

Back to Top of Newsletter