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Kanter Immigration Law Office wishes you warm and joyful winter holidays, and a healthful and prosperous 2017 – we will have more firm news for you in the New Year!

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Reminder: USCIS Filing Fees Increase on 12/23/2016

U.S. Citizenship and Immigration Services (USCIS) Immigration filing fees increase – by a weighted average of 21 percent for most immigration applications and petitions – on December 23, 2016. Make sure your case is being filed with the correct fee. For a full list of fees, see [this list](#) on the USCIS website. (For information on the availability of fee waivers, see the USCIS’s [fee-waiver page](#).)

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Significant New Rule on Employment-Based Immigration, and EADs

The Department of Homeland Security (DHS) made final [a long-awaited rule](#) on issues that impact mostly H-1B professional workers and employment-based visa applicants and their dependents. The rule is intended to clarify and codify issues related to the retention of EB-1, EB-2, and EB-3 immigrant workers and make improvements affecting high-skilled nonimmigrant workers. Its focus is to streamline the processes, increasing job portability and providing consistency in the adjudication of these types of cases. Both employers and foreign employees will largely benefit from the new provisions in different ways. While many of these provisions merely codify current policy and practice, some of the updates clarify areas that have been gray and others make changes that can have significant consequences – mostly for the good. The rule goes into effect on January 17, 2017.

Some of the most important provisions include the following:

Grace Periods, Portability and Priority Dates

- A 60-day grace period or a grace period until the existing validity period ends, whichever is shorter for those in H-1B, TN, O-1, L-1, E-1, E-2, E-3, and H-1B1 status to depart the country or seek new employment to extend their status;
- Curing a catch-22 by issuing temporary H-1B approvals for positions requiring a licensed professional, but where an applicant must have H-1B status before applying for the license;
- Codifying the “portability” procedures that allow certain workers whose green card applications have been pending 180 days or more to change jobs or employers without endangering their approved I-140s;
- Permitting instances where a previously approved I-140 petition remains valid despite a subsequent withdrawal by the employer or the permanent closing of the employer’s business; and
- Finalizing existing USCIS policy that a priority date for an employment-based green card application is generally established upon the filing of a PERM or a relevant petition. That priority date can be retained as long as the I-140 petition is not later revoked for fraud, misrepresentation, invalidation of a labor certification, or material error.

There are significant details in each of these new regulations that affect applicability, scope, and exceptions.

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Clarification on Cap Exempt Employers

The final rule clarifies the requirements associated with the cap-exempt employment of H-1B workers by nonprofit entities that are affiliated with or related to an institution of higher education or other cap-exempt institutions. The final rule adds another way for qualifying as a cap exempt employer: demonstrating a formal written agreement between the entity and the institution of higher learning that establishes an active working relationship and that a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution. Furthermore, the new rule expands the definition of a “governmental research organization” to include state and local organizations as well. Previously only federal research organizations qualified.

In addition, a separate requirement was defined that is associated with H-1B beneficiaries who work ‘at’ a cap-exempt qualifying organization. H-1B workers working at but not employed by a qualifying organization must spend the majority of their time performing job duties at the qualifying institution and those duties must directly and predominately further the mission or purpose of the cap-exempt organization. Finally, the regulations will continue to allow concurrent employment with both a cap-exempt and cap-subject employer, as long as the cap-exempt employment is documented and maintained.

Changes to Employment Authorization

In publishing the final rule, DHS managed to sneak in changes to how it will process applications for employment authorization documents (EADs), particularly extensions. The most alarming change is that USCIS is formally rescinding the regulation that requires EAD adjudications within 90 after filing. This rescission of the requirement to adjudicate EADs within a reasonable period of time certainly does not coincide with the stated intention of “enhancing stability and certainty” to foreign nationals and their employers. USCIS will permit filings 180 days (up from the present 120 days) in advance in some cases, but this will be determined on an EAD category-by-category basis and it remains to be seen whether this will be helpful in its practical application.

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Trump Presidency, New Administration, and Efforts Currently in Play

With the inauguration of President-elect Trump less than a month away, attention is centering on how the president-elect and his team will handle his immigration campaign promises, especially because immigration served as one of the campaign’s key cornerstones. But, not everything a presidential candidate says during an election campaign predicts how the candidate will act as president. This is particularly the case for Mr. Trump, who relied on general policy prescriptions without providing many details. Even in this post-election period and transition, relatively little is certain about what President-elect Trump’s immigration policies will, in fact, look like. Nevertheless, his Cabinet nominations may indicate how the new Administration will reshape immigration law, policy, and practice. Here is a summary of two key nominations.

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Attorney General and Secretary of DHS

President-elect Trump's plan to nominate Senator Jeff Sessions to be Attorney General (AG) gives one of the most ardent anti-illegal immigration voices in the Congress tremendous power to reshape immigration enforcement. Senator Sessions strenuously opposed bipartisan immigration reform bills that came before the Senate in 2007 and 2013, arguing that they were insufficiently strict and ultimately led to amnesty. As AG, Sessions is expected to take very restrictive interpretations of the current law that could limit the scope of relief available to individuals facing deportation proceedings and could revive the use of expedited removal authority. The attorney general also exercises control over the Executive Office for Immigration Review, administrative judges who adjudicate immigration court proceedings, appellate reviews, and administrative hearings. The AG also has authority over precedent decisions that bind immigration judges.

Trump's plans to nominate retired Marine Gen. John F. Kelly as Secretary of Homeland Security adds another military officer to his Cabinet. Marine General Kelly is a respected military officer known as a blunt-spoken border-security advocate whose views on cross-border threats are aligned with Trump's. The Department of Homeland Security is the third-largest Cabinet department, with more than 240,000 employees whose jobs include fighting terrorism and enforcing immigration laws. Kelly is not expected to face difficulty winning Senate confirmation. Apparently, Trump's team was drawn to Kelly because of his Southwest border expertise. Like the President-elect, Kelly has sounded the alarm about drugs, terrorism and other cross-border threats that he sees as emanating from Mexico and Central and South America. He would be responsible for work to crackdown on illegal immigration, which would be overseen by DHS components, including ICE and CBP. Kelly would also be called on to help oversee Trump's signature campaign promise: a wall along the U.S.-Mexico border.

We remind our readers that no change to policy can be effected before Mr. Trump takes office on January 20 and most changes to the immigration laws require congressional action, which take time. Nevertheless, there are some changes that as President, Mr. Trump can implement quickly through executive action or proclamation and the adjudications environment can change quickly.

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Have You Been Subjected to Rude Conduct by CBP When Seeking Entry into the U.S.? If So, Let Us Know!

The immigration bar has received several reports about foreign nationals who have been exposed to unprofessional, intimidating, and demeaning conduct by CBP officers during the inspection and admissions process. If you have been subject to disparaging, intimidating, or unprofessional remarks during the inspection process by a CBP officer, you can either report this to your immigration attorney or to CBP directly. In general, to report CBP misconduct, contact the appropriate [CBP Professionalism Service Manager](#), a supervisor at the port of entry, the [Port Director](#), or [Field Office Director](#). In addition, you can [file an online complaint with CBP directly](#) at the CBP Information Center.

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Green Card Sponsorship through your Family's Company? Some Relationships are still too Close

It is possible to obtain a green card through the sponsorship of a company owned or managed by a close relative. However, it is well known that these cases frequently get audited by the Department of Labor, and some are denied if the family relationship could obstruct an honest recruiting effort.

The Board of Alien Labor Certification Appeals (BALCA) recently handed down two decisions that seem at odds with each other. In one case, the sibling relationship between the company owner and the sponsored immigrant resulted in a denial. In another case, the parent-child relationship between the company owner and the sponsored immigrant resulted in an approval. The difference between the two decisions was not found in the type of relationship, but in the position the sponsored immigrant played in the company.

In the case that was denied, the company was a small company that employed 13 people. The immigrant was currently working for the company in a position that oversaw the human resources department, which was responsible for conducting the required recruitment procedures. The brother, owner and sole shareholder of the company, actually conducted the applicant interviews for the company. These factors were enough to tip the scales against the company – the proximity of the sponsored immigrant to the hiring process was simply too much to overcome.

At the other end of the spectrum, BALCA approved a case where the sponsored immigrant, despite having a management position that could fill in for the general manager if absent, was able to overcome the presumption that he could negatively influence the recruiting procedures due to his relationship to the company's owner – his mother. In this case, BALCA understood that although the job duty to take over a superior's responsibilities for a brief period of time (illness, holiday) was listed, in the practical world, a substitute general manager would not be hiring and firing individuals and otherwise obstructing or influencing hiring practices, even in a company of 9 employees.

These cases have very, very slight differences that can be hard to reconcile. But for citizens and residents looking to sponsor family members through their company, the answer may lie in the management level. High-ranking managers in small companies can easily reach down and interfere with a hiring process, but it is much more difficult for low-ranking managers to accomplish the same by reaching up. In any case, if you are sponsoring a family member through your own company, the best practice would be to make sure the position is shielded off from the human resources department.

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Electronic Visa Update System Goes Into Effect for Certain Chinese Visitors

DHS has established and has now implemented the [Electronic Visa Update System \(EVUS\) for certain Chinese nationals](#). For now, the EVUS program only applies to unrestricted,

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maximum validity B visas, often issued for 10 years, contained in a passport issued by the People's Republic of China. The program collects biographical information from nonimmigrants of certain countries, by requiring visa holders to enter their information into an online EVUS portal every two years. The information is then scanned for security clearance. If there have been no changes to a nonimmigrant's ability to legally be admitted to the United States, they will be notified of their EVUS compliance online and will be allowed to travel to the U.S. on their nonimmigrant visa. The program was initiated to address the fact that the nonimmigrants who hold visas valid for five, seven, and even ten years may become inadmissible for some reason during their time abroad, unbeknownst to the United States. EVUS compliance does not guarantee entry into the United States, but a failure to comply with the EVUS program will result in being denied entry. This program is still in its infancy and is being tested for accuracy and efficiency. Its success will determine if it is implemented in additional countries and visas.

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News in Brief:

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

Congress Reaches Deal on Continuing Resolution, Containing Extension of Four Popular Immigration Programs: On December 9, 2016 Congress voted to extend the EB-5 Regional Center, Conrad 30 waiver, the Special Immigrant Religious Workers classification (EB-4), and E-Verify programs in a [short-term Continuing Resolution](#). Once signed by the President, these programs will be extended until April 28, 2017.

New I-9 Form Required as of 1/22/2017: A [new Form I-9](#), dated 11/14/2016 (expiring 8/31/2019) must be used by employers to verify the employment eligibility of their workers. The existing form (dated 03/08/2013) will not be accepted after January 21, 2017.

Some ITINs Need to be Renewed: The Internal Revenue Service (IRS) recently announced changes to the Individual Taxpayer Identification Number (ITIN) program that will require some individuals to renew their ITIN. The IRS will send a letter to taxpayers with expiring ITINs. ITINs are used by people who have tax filing or payment obligations under U.S. law but who are not eligible for a social security number. For more info, go to <https://www.irs.gov/individuals/individual-taxpayer-identification-number-itin>.

New N-400 Required as of 12/23/2016: Starting 12/23/2016, the [new edition of Form N-400](#), Application for Naturalization – to be released on 12/22/2016 and dated 12/23/2016 – must be used (and must include the new filing fee).

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52 Percent: Immigration violations remain the major focus of federal criminal enforcement efforts. The latest data shows criminal prosecutions for illegal entry, illegal re-entry, visa overstays, fraud, and other immigration violations made up 52% of all federal prosecutions in FY2016. These numbers are striking considering the federal government is already overburdened with drug, weapons, and other federal violations as well. The steady increase in immigration-related prosecutions continues to reflect a trend started in 1994 when federal authorities started focusing on immigration violations.

Documents for Mexican IV Cases Processed in Ciudad Juarez Can No Longer Be E-Mailed: The National Visa Center will no longer accept documents submitted by e-mail for cases processed at the U.S. Consulate in Ciudad Juarez. Instead, their documents must be mailed. Applicants affected by this change have case numbers that begin with the three letter code “MEP.”

Asylum EADs Now Issued for Two Years: USCIS has increased the validity period for initial and renewal Employment Authorization Documents (EADs) for asylum applicants from one to two years. This change comes from the increasingly lengthy processing times that asylum applicants are facing nationwide. This change only applies to asylum applicants, not those who have already been granted asylum.

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