PUBLICATION

Immigration Update: New Rule on Unfair Immigration-Related Employment Practices Effective January 18, 2017; Changes to National Interest Waiver Standard

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New Rule on Unfair Immigration-Related Employment Practices Effective January 18, 2017

On December 19, 2016, the Department of Justice (DOJ) issued a final rule that revises the DOJ's regulations implementing certain provisions of the Immigration and Nationality Act (INA) related to unfair immigration-related employment practices. The rule introduces no major changes for employers, but it should be a reminder to review Form I-9 employment authorization policies. The final rule is intended to conform DOJ regulations with existing statutory provisions and to update regulations to ensure effective investigations of unfair immigration-related employment practices.

The final rule defines "discrimination" in the context of immigration-related unfair employment practices, and, in particular, in the process of completing and retaining the Form I-9. The statute requires "intentional" discrimination, which the regulations did not mention in the past. Now the regulations define "discriminate" to include intent, but in a very limited way: "the act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility." In practice, this could result in discrimination charges based on the impact of practices not overtly intended to disadvantage those in the protected class.

The key to navigating the rule is to know what you can ask. For instance, an employer who asks a lawful permanent resident for documentation after the worker fails to provide a USCIS A-Number in Section 1 could be found to discriminate if the employer did not ask other workers for documentation to verify missing information in Section 1. Similarly, an employer stating "I see you are a lawful permanent resident, do you have your green card for Section 2?" may also be acting in violation of the law as employers may not request specific documents for employment eligibility verification purposes based on a worker's citizenship status or national origin. (This scenario has been a subject of frequent DOJ enforcement, and apparently it can be expected to continue.) The rule clarifies that the worker does not need to experience economic harm, for example, due to delay in beginning work, for an employer to be liable for discrimination.

The final rule states that the DOJ can investigate on its own initiative without an employee complaint. Also, statistical evidence based on employers using the E-Verify electronic employment verification system could lead to investigations of employers, and this opportunity for DOJ data mining has been a good reason NOT to use E-Verify. When discussing the comments to the final rule, the DOJ explained that the Department of Homeland Security often refers employers to the DOJ if, for instance, a large percentage of permanent resident workers provided a green card to prove identity and work authorization while U.S. citizen workers present driver's licenses and Social Security cards. These statistical disparities can be important to show a prima facie case of discrimination, but the employer can try to provide a legitimate, nondiscriminatory reason for the disparity such as that employees volunteered to show the documents with no request by the employer.

The final rule does not introduce new requirements, but a rise in employment verification enforcement may be expected. If you have further questions, please contact the Baker Donelson Immigration Group.

To view the new rule click here.

Changes to National Interest Waiver Standard

The USCIS Administrative Appeals Office (AAO) issued a precedent decision overruling the long-standing standard for EB-2 National Interest Waiver green card cases and creating a more realistic three-part test to demonstrate "national interest."

USCIS has discretion to grant a National Interest Waiver (NIW) to professionals with an advanced degree or individuals of exceptional ability who are eligible for the second employment-based preference category (EB-2). The NIW allows individuals in the EB-2 category to avoid the labor certification process if they can show their immigration would be in the "national interest." The term "national interest" remained undefined until the now overruled AAO decision created a confusing standard resulting in inconsistent adjudication.

The new framework establishes a three-factor test that applies more flexibly to circumstances of petitioning employers and self-petitioning individuals:

1. The foreign national's proposed endeavor has both substantial merit and national importance.

Petitioners can show the merit of an individual's work in areas including "business, entrepreneurialism, science, technology, culture, health, or education," and while USCIS may interpret a potentially significant economic impact favorably, such impact is not necessarily required. Research, pure science and the furtherance of human knowledge can establish the endeavor's merit, even if economic benefits are unlikely.

National importance is no longer defined geographically but rather considers the broader implications of the individual's work. Examples of national importance include improved manufacturing processes or medical advances, or, for entrepreneurs, significant potential to employ U.S. workers or create other substantial positive economic effects (especially in an economically depressed area).

2. The foreign national is well-positioned to advance the proposed endeavor.

The second factor considered is the individual's "education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals." The petitioner does not need to show that the individual's endeavor is more likely than not to ultimately succeed; it is sufficient to demonstrate that the individual is in a good position to advance the endeavor.

3. On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

Under the third factor, the USCIS will evaluate whether (1) the individual's qualifications or proposed endeavor would make it impractical for the individual to secure a job offer or for the petitioner to obtain a labor certification; (2) the United States would still benefit from the foreign national's contributions even if other qualified U.S. workers were available; and (3) the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process.

The third prong no longer requires a showing of harm to the national interest if a labor certification was required or comparing the individual against U.S. workers in the field. The new framework applies to a greater number of individuals including entrepreneurs or self-employed inventors for whom it may be impractical to secure a job offer or do a labor certification.

If you have further questions, please contact the Baker Donelson Immigration Group. See the AAO decision here.