PUBLICATION

Immigration Update: H-1Bs, H-4s and H-2Bs – Oh, My! Big developments in the H Nonimmigrant Visa Classifications; Expanded DACA and DAPA are Temporarily Suspended

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HOORAY! Work Authorization for certain H-4 Spouses

Effective May 26, 2015, United States Citizenship and Immigration Services (USCIS) will begin accepting work authorization for H-4 spouses of two groups of H-1B nonimmigrant workers: those who have an approved I-140 petition and those approved for H-1B status beyond the normal six-year maximum under the "AC21" law.

See our full discussion in our February 25, 2015 alert: http://immigration.bakerdonelson.com/some-h4-spouses-of-h-1bs-can-apply-for-work-cards-beginning-may-26-2015/

USCIS alert at: http://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence

HEED the *Irish Help* decision when preparing H-1B filings

As we approach the March madness of H-1B CAP season, a recent ruling from the Northern District of California provides a cautionary reminder of the H-1B requirements that the offered position be in a "specialty occupation" that requires a "bachelor's or higher degree in the *specific specialty* (or its equivalent)." The decision is *Irish Help at Home LLC v. Melville*, No. 13-cv-00943-MEJ (N.D. Ca. Feb. 24, 2015).

The employer petitioned for a part-time Deputy Controller to prepare financial statements and business reports, and to perform various other budgeting, accounting and planning activities detailed in the employer's H-1B support letter. The foreign national held a degree in finance. The court recognized that the Department of Labor's Occupational Outlook Handbook (OOH) profile of Financial Managers, which described a bachelor's degree requirement of "finance, accounting, economics, or business administration" as typically required, but the court found this evidence undercut the specialty argument as it showed that a "general-purpose bachelor's degree, such as a degree in business administration," could satisfy the minimum requirements. An expert opinion was given little weight because the opinion appeared to be based on the generalized job description provided by Irish Help rather than any specific direct study of the job duties or performance with the employer. Evidence provided in the form of job listings for similar positions was not persuasive because the employer did not establish that the advertising employers were in the same industry or similar in size, scope, scale of operations or revenues.

The decision is a good reminder that the H-1B position needs to be a specialty occupation and that just because a degree may be required, this does not necessarily warrant approval of an H-1B. Timely food for thought as the next wave of H-1B filings begin to flow on April 1.

HELP for H-1B Nurse Filings

On February 18, 2015, USCIS issued a Policy Memorandum providing fairly detailed guidance on the adjudication of H-1B Petition for Nursing Occupations. This Memorandum is to be used as a tool by officers in determining whether an offered nursing position meets the definition of "specialty occupation" required for H-1B purposes. Although the typical RN position does not qualify for H-1B classification, because it does not require a bachelor's degree in nursing, there are some exceptions. Recognizing that the nursing industry has changed in the nearly 12 years since the last USCIS-issued guidance on the topic, the Memorandum discusses the growing preference for more highly educated nurses, detailing examples of specialized nurses whose duties and requirements may categorize the positions as specialty occupations. The Memorandum also notes the future potential for change to state licensure requirements. Although no states currently require a bachelor's degree in nursing for licensure, should a state implement such a degree requirement, an RN position in such a state would be considered a specialty occupation.

The full Policy Memorandum PM-602-0104 is available at:
http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015-0218_EIR_Nursing_PM_Effective.pdf

HALT on H-2B (Temporary non-agricultural workers)

The Department of Homeland Security (DHS) announced on March 17, 2015 that adjudication of H-2B petitions will resume until April 15, 2015, but that it will continue to suspend premium processing for such petitions until further notice.

On March 4, 2015 the Department of Labor (DOL) was ordered to suspend acceptance or adjudicating requests for prevailing wage determinations or temporary labor certifications in the H-2B program, and United States Citizenship and Immigration Services (USCIS) is suspending adjudication of H-2B petitions as of March 5, 2015. These work stoppages were driven by a federal court ruling challenging the DOL's authority under the Immigration and Nationality Act (INA) to issue regulations in the H-2B program. *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015). In the *Perez* decision, the court analyzed the origins of the H-2 temporary labor program in the INA, 8 U.S.C. §§ 1101, *et seq.*, subsequent amendment by Congress to split into the H-2A (Agricultural) and H-2B (Non-Agricultural) programs, and Congressional delegation of enforcement authority to the Secretary of the Department of Homeland Security, and lack of clear rulemaking authority under the H-2B program (as compared to the express grant of rulemaking authority in the H-2A program).

The Florida district court further relied on its prior rejection of DOL's H-2B rulemaking authority when faced with the DOL's 2012 regulations, (*Bayou Lawn & Landscape Services v. Perez*, No. 3:12cv183/MCR/CJK, 2014 WL 7496045 (N.D. Fla. Dec. 18, 2014)), which was affirmed on appeal and concluded that because the 2008 regulations at issue in *Perez* were issued pursuant to the same authority deemed invalid in *Bayou Lawn*, the 2008 regulations should be vacated and the DOL is enjoined from enforcing these H-2B regulations.

On March 16, 2015, DOL filed an unopposed motion to stay the March 4 order until April 15, 2015, which led to the resumed processing of H-2B petitions. DOL and DHS announced on Friday, March 13, that they intend to issue a joint interim final rule by April 30, 2015.

For the alert from DOL and to subscribe to updates from the Office of Foreign Labor Certification:
http://www.foreignlaborcert.doleta.gov/

For USCIS alert on H-2B: http://www.uscis.gov/news/uscis-temporarily-suspends-adjudication-h-2b-petitions-following-court-order

HALT on DACA (expanded) and DAPA Filings

On February 16, 2015, a federal court in Texas issued a temporary injunction preventing the implementation of the expanded Deferred Action for Childhood Arrivals (expanded DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) in an action filed by 17 states (which has now been amended to include a total of 20 states). *State of Texas, et al. v. U.S.A.*, Case No. 1:14-CV-00254 (S.D. TX Feb. 16, 2015). These two programs were announced as part of President Obama's November 21, 2014 Executive Order, and we reported about them at http://immigration.bakerdonelson.com/obama-legalizes-undocumented-tweaks-eb-categories/. As a result, the Department of Homeland Security (DHS) did not begin accepting requests under the expanded DACA guidelines as expected on February 18 and will not accept any requests under expanded DACA or DAPA until the injunction has been lifted. The Court order in *Texas* is currently being appealed and expanded DACA and DAPA programs are suspended until further notice.

The injunction does **not** affect the established DACA program under the guidelines established in 2012 and still in effect. (See: http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca).

For further information see: http://www.dhs.gov/news/2015/02/17/statement-secretary-jeh-c-johnson-concerning-district-courts-ruling-concerning-dapa