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President Announces Executive Actions Impacting Immigration Law

On November 20, 2014, President Obama announced several executive actions on areas of U.S. immigration law, which will affect both individuals and businesses. These actions include provisions for worksite enforcement consistency; foreign entrepreneurs and investors; foreign national employees facing significant backlogs to obtain a green card; certain foreign national employees being transferred from a U.S. affiliate company abroad; and foreign national students.

Actions and Implications

1. Interagency Working Group

In an effort to better ensure the protection of workers' rights and consistent law enforcement, federal agencies including the Department of Labor (DOL), Department of Homeland Security, Department of Justice, Equal Employment Opportunity Commission, and National Labor Relations Board will form a working group. The group is tasked with developing new policies and procedures to ensure the consistent enforcement of federal labor, employment and immigration laws. This could mean more certainty and consistency in the application of immigration laws, which have previously been subject to different interpretations and treatment from various federal agencies.

2. Foreign Entrepreneurs

The President seeks to allow investors, researchers and founders of startup enterprises to come to the United States or remain in the United States for a limited period if they have been "awarded substantial U.S. investor financing" or "hold a promise of innovation and job creation." These individuals often find it difficult to obtain entry into the U.S. to pursue their ideas and new businesses. The President also directs U.S. Citizenship and Immigration Services (USCIS) to clarify the standards for the national interest waiver green

card category to ensure the inclusion of entrepreneurs, researchers, investors and founders of startup enterprises who are often ineligible for the traditional green card application process, with the aim of promoting its greater use for the benefit of the U.S. economy. These initiatives will offer ways for foreign nationals with funds and new ideas to enter the U.S. to pursue those ideas and grow new businesses. Immigration opportunities for such individuals have been extremely limited in the past.

3. **Permanent Visa Quotas**

There are a fixed number of permanent visas (green cards) available to qualifying foreign nationals based upon their country of origin. Some individuals must wait years before they are able to complete the application process and obtain a green card, due to backlogs in permanent visa availability. Under the President's executive action pronouncement, USCIS and the Department of State (DOS) are directed to work together to more carefully evaluate visa availability, issue permanent visas when available to those who qualify, and provide reliable information about visa availability. Although the President cannot increase the number of visas available without Congress, this action would ensure that those visas intended for use by certain people are actually issued to them. Because of the complexity of the visa allocation process and a lack of cooperation between the responsible agencies, significant numbers of visas that should be issued to eligible people each year go unused. By requiring USCIS and the DOS to work together to closely calculate visa usage and issue all the visas available, the wait for a green card should be shortened for some people.

4. **Ability of Green Card Applicants to Change Jobs during Process**

The President directs USCIS to remove restrictions placed on foreign national employees in the green card process to seek new employment or promotions while they wait for a permanent visa to become available to them. Currently, green card applicants are unable to change jobs or accept meaningful promotions, often for several years, without the significant risk that they may have to start the lengthy and costly application process anew. This action should substantially help businesses and foreign national employees to function naturally in the workplace, fully utilizing the individual's talents and abilities without previous artificial barriers to progress.

5. **L-1B "Specialized Knowledge" Intracompany Transferees**

The L-1B visa category was designed to benefit foreign national employees with "specialized knowledge" who are being transferred to a U.S. company from a foreign affiliate company. USCIS adjudicators have inconsistently applied the definition of "specialized knowledge" for

this visa category, and have increasingly restricted its use. The President seeks to improve consistency and enhance employers' confidence in the system by requiring USCIS to issue a policy memorandum clarifying the requirements of this visa category. This important action would restore the ability for U.S. companies to bring their foreign employees to the U.S. to use their special skills and knowledge about the company and its products and processes to help U.S. companies.

6. **Foreign National Students**

Foreign nationals holding student visas have opportunities to work in the United States upon completion of their degree program under the optional practical training (OPT) program. Special rules allow students with new U.S. degrees in certain Science, Technology, Engineering, and Mathematics (STEM) programs to use the OPT program for longer employment periods. As directed by the President, USCIS and Immigration and Customs Enforcement (ICE) will expand the degree programs eligible for this work program, extend the time period of work authorization, and increase the involvement of the educational institutions in the program to ensure the practical training furthers the U.S. course of study. This would enable businesses to use the talents of STEM-qualified students for longer, before having to apply for immigration benefits on their behalf. It also helps both student and employer evaluate their employment relationship before having to commit resources to obtain employment authorization through such means as H-1B visas.

7. **Green Card Through Employer Sponsorship**

Qualifying foreign national employees are eligible for a green card through employer sponsorship. The process is governed by the DOL and USCIS. The DOL requires employer sponsors to recruit for the foreign national's position with the employer to ensure no qualified U.S. workers are available for the offered position. In support of the President's actions, the DOL will review its application process (labor certification application or PERM) to identify ways to align recruitment requirements with the needs of the labor force. The DOL will also review lengthy processing times and explore expedited processing options, and consider permitting employers to correct nonmaterial errors in applications, a current cause for denial in many PERM cases.

What This Means to You

If these actions are implemented, the implications for businesses will be far-reaching. Waiting times for permanent residence will be shortened; and during the wait, businesses may use the talents and skills of their foreign national employees as they see fit. Foreign national workers may be able to leave

the employers who had petitioned for permanent residence on their behalf. The process of obtaining permanent residence for those workers will be shorter and more predictable, and businesses will be able to bring employees of their foreign affiliates to the U.S. to share their special knowledge and skills. U.S. businesses will be able to employ new foreign university graduates with technical and scientific skills for longer periods. Foreign entrepreneurs will be able to enter the U.S. more freely to start businesses and grow jobs. The immigration application process will become smoother and more predictable, when the various agencies involved begin to cooperate.

However, before these executive actions can be implemented, policy guidance is needed from the DOS, USCIS, ICE and the DOL detailing implementation procedures.

Policy guidance is expected to take several months to publish. With impending changes in congressional makeup and the election of a new President on the horizon, there are no guarantees that these initiatives will be implemented, or that they will be enacted in their current form.

Contact Us

If you have questions related to these initiatives or would like to discuss an immigration matter, please contact Toni Blackwood at 816.983.8152 or Kelli Stout at 816.983.8309.