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Immigration updates

Introducing mandatory electronic travel authorization (eTA)

With the increased securitization of the world's borders, Canada has introduced a new mandatory entry requirement for visa-exempt foreign nationals. Canada's new Electronic Travel Authorization (eTA) entry requirement will become mandatory beginning September 29, 2016. While in effect since March 2016, Canadian immigration has allowed a leniency period preceding the program's mandatory enforcement beginning in September 2016.

Under the eTA program, all foreign nationals of countries that do not require a temporary resident visa issued by a Canadian Consulate or Embassy abroad in order to travel to Canada will require an eTA to travel to or transit through Canada by air. Citizens of the United States and foreign nationals with a valid temporary resident visa for Canada will be exempt from this new entry requirement, as will foreign nationals who are travelling to Canada by methods other than air (e.g.; land or sea). This entry requirement is also not applicable to Canadian citizens or permanent residents.

The eTA system operates alongside an Interactive Advanced Passenger Information System which allows airlines to prohibit travellers from boarding a flight to Canada if an eTA approval is not obtained prior to travel. Similar to the United States Department of Homeland Security's Electronic System for Travel Authorization, the purpose is to pre-screen travelers for any risk or inadmissibility to Canada prior to arrival at the Canadian port of entry. As a result, foreign nationals will be required to resolve their inadmissibility in advance of their travel to Canada.

To apply for an eTA, foreign nationals will be required to submit an online application, wherein they will be asked to respond to questions pertaining to their admissibility to Canada on health, criminality and immigration grounds. The application will be processed electronically, and in most circumstances approved nearly instantly. An approved eTA will be valid for 5 years or to the expiry of the applicant's passport. As the authorization will be linked to the passport number, any replacement of one's passport will require a new eTA application.

Individuals who have previous criminality should be prepared to receive a request for further information and documentation following submission of the initial eTA application and not expect their application to be immediately adjudicated. For example, court documentation surrounding the applicable offence(s) as well as current police certificates may be requested to further assess inadmissibility. The eTA application may be refused if action to resolve inadmissibility has not been taken in advance of applying for an eTA, for example by obtaining a Temporary Resident Permit or Criminal Rehabilitation approval.

Once the eTA program comes into full effect this fall, an expansion of the program is expected. A proposed change includes eTA expansion for citizens of Brazil, Bulgaria and Mexico, which in turn would waive current requirements to obtain a temporary resident visa for Canada. The Government of Canada has recently announced that the temporary resident visa requirement for Mexican citizens will be lifted December 1, 2016. The proposed waiver date for Brazil and Bulgaria continues to be anxiously anticipated.

H-1B lottery class action filed

Among all of the visas available to enter the United States, one of the most coveted is the H-1B visa. This visa allows skilled foreign nationals the ability to legally seek entry into the United States for employment for up to six years.

On June 2, 2016, a class action complaint was filed against the United States Citizenship and Immigration Service (USCIS) and its director. The complaint alleges that the random lottery process imposed on H-1B visa applications is arbitrary, capricious and not in accordance with the statute under which the H-1B visa process was established that mandates visa applications shall be issued “in the order in which petitions are filed.”

In order to qualify for an H-1B visa, the foreign national must be sponsored by an employer, who has a “specialty occupation” employment need for which the minimum educational requirement is a Bachelor’s degree. The difficulties in obtaining this visa is caused by a yearly numerical cap imposed by Congress. USCIS may only issue, or otherwise provide nonimmigrant status, to 65,000 new H-1B foreign nationals each year. USCIS may also issue, or otherwise provide nonimmigrant status, to an additional 20,000 foreign nationals who obtained a Master’s degree or higher from a United States institution of higher education.

As the fiscal year of the U.S. government begins on October 1, the H-1B visa availability is reset on October 1 of each year. Six months prior to the start of the fiscal year, on April 1, employers may submit applications for H-1B visas on behalf of prospective foreign national employees. As a pre-requisite to every H-1B petition filing, employers must receive a certified Labor Condition Application (“LCA”) from the Department of Labor. By submitting LCA applications, employers attest, among other things, that foreign employees will receive the current market wage for the particular specialty occupation within the work location. If the H-1B visa is approved, the beneficiary employees may begin employment with the sponsoring employer on October 1.

Because of the limited number of visas issued each year, the competition to secure a visa is severe. For the 2008 fiscal year, in an attempt to equalize the H-1B visa availability process, USCIS imposed a random lottery protocol. Under this protocol, if the numerical availability limit is reached in any one of the first five business days after filings can be made, then USCIS will conduct a random lottery of all petitions filed on the first five business days. The petitions selected in the lottery process will continue to be processed and evaluated for a visa; any petitions not selected in the lottery, as well as any petitions received after the 5 day window, will be rejected and returned to the sponsoring company. Since introducing the random lottery protocol for the 2008 fiscal year, USCIS has continued to utilize this protocol when it has received more H-1B petitions than the statutory cap.

In April 2016, USCIS received over 236,000 applications for the upcoming 2017 fiscal year. Over the past four years, USCIS has rejected approximately 425,500 filings after conducting the random lottery selection. The class action complaint alleges the rejection of these filings was improper and each of these petitions should have been accepted and receipted by USCIS. Similar to the practice currently performed under other immigrant visa petitions, such as the I-130 Petition for Alien Relative or I-140 Immigrant Petition for Alien Worker, complainants hold the H-1B visa petitions should have been assigned a priority date, based upon either the date of the LCA certification or when the application was received by USCIS. H-1B applicants would then have to wait until a visa becomes available, based upon the assigned priority date.

Furthermore, complainants allege USCIS lacks a statutory basis to allow a five day window to accept H-1B applications. Complainants claim that, if Congress had intended for the H-1B visa applications to be accorded under a lottery process, Congress would have specifically mandated a lottery process as it did under the "Diversity Visa Lottery." Similar to the H-1B visa, the Diversity Visa is subject to a yearly numerical quota. However, the Diversity visa specifically states that visas "shall be issued to eligible qualified immigrants strictly in a random order."

If the complainants' action is successful, it will cause a backlog in H-1B visa issuance, with employers potentially waiting three years or more under the current cap restrictions for an initial visa for an employee. Conversely, with a large number of businesses dependent upon foreign workers, especially in the technology sector, Congress may be forced to address and remedy the failings of the business immigration system for the United States to remain competitive in the global marketplace.

F-1 students and expansion of the STEM OPT program in the United States

As part of its mandate to attract the best and brightest international students to the United States, the U.S. Department of Homeland Security (DHS) issued a final rule "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students" (2016 Final Rule) on March 11, 2016.

The 2016 Final Rule amends the DHS regulations pertaining to the F-1 nonimmigrant classification and the optional practical training (OPT) provision for F-1 students with degrees in science, technology, engineering or mathematics (STEM) from U.S. institutions of higher education. The 2016 Final Rule went into effect on May 10, 2016.

F-1 nonimmigrant students

The F-1 nonimmigrant classification was established under section 101(a)(15)(F)(i) of the Immigration and Nationality Act for individuals seeking temporary admission to the United States to enroll in a full course of study at an academic institution or in an accredited language training program. OPT is available to F-1 students for temporary employment that is directly related to a student's major area of study in the U.S. OPT is permitted during and/or after completion of an academic program. F-1 students may apply for 12 months of OPT at each education level (e.g., undergraduate, graduate, and post-graduate) and while in school, work for 20 hours maximum per week pursuant to pre-completion OPT.

STEM OPT program

OPT for STEM graduates was introduced in a 2008 interim final rule to allow specific F-1 students to participate in practical training opportunities with U.S. employers for an additional 17-month period, thereby totaling 29 months. An F-1 student's STEM degree must be awarded by an accredited U.S. college or university and be in a STEM field recognized by the DHS. As part of the program requirements, U.S. employers must enroll and remain in good standing in the E-Verify electronic employment eligibility verification program (E-Verify) under the auspices of USCIS.

Regulatory changes for F-1 STEM OPT students

Under the 2016 Final Rule, F-1 STEM OPT students may:

- Extend their current OPT extension period from a 17-month period to a 24-month period for a total amount of 36 months;
- Receive an additional 24-month OPT extension when they earn another qualifying STEM degree at a higher educational level;
- Utilize a prior STEM degree from a U.S. institution of higher education to apply for a STEM OPT extension of 24 months if the F-1 student is in a 12-month period of post-completion OPT based on a non-STEM degree;
- Qualify for a 90-day maximum period of unemployment during the initial 12-month period of post-completion OPT and an additional 60-day period of unemployment for a 24-month STEM OPT extension; and
- Continue to benefit from cap-gap relief which allows a temporary extension of an F-1 student's duration of status and current employment authorization to October 1st of the fiscal year that corresponds to a timely filed H-1B petition and a pending or approved change of status by the USCIS.

To guide F-1 students with STEM OPT extensions, the DHS has implemented a transition plan. A designated student officer (DSO) should be able to assist an F-1 student who qualifies for a STEM OPT extension according to the transition plan.
F-1 STEM OPT students also have reporting requirements that consist of:

- A six-month validation period to verify the F-1 student's biographical, residential and employment information;

- An annual self-evaluation to report progress on practical training to the DSO;
- Changes in employment status pertaining to the F-1 student; and
- Material changes to and from the F-1 student's formal training plan to the DSO.

Employer obligations under the 2016 Final Rule

The 2016 Final Rule imposed regulatory changes to the STEM OPT program which has increased the legal obligations of U.S. employers.

Basic U.S. employer obligations

U.S. employers must comply with the following basic requirements:

- Implement formal training plans for F-1 students which are to be documented on Form I-983 "Training Plan for STEM OPT Students" and signed by the designated official with signatory authority;
- Attest to specific terms and conditions of a STEM practical training opportunity as commensurate to the employer's similarly situated U.S. workers as certified on Form I-983;
- Permit site visits by the DHS at employer work locations to verify an employer's compliance with the STEM OPT program, including the ability and resources to provide structured and guided work-based learning experiences; and
- Be enrolled in and remain in good standing with E-Verify and report changes to the employment of an F-1 student within five business days to the DSO.

Employer reporting requirements

U.S. employers are required to abide by the above-referenced reporting provisions for F-1 students, including changes in employment and material changes pertaining to the formal training plan. This includes reporting when an F-1 student's employment is terminated (voluntarily or involuntarily) to the DSO within five business days of the F-1 student leaving employment.

Material changes to the formal training plan must be written on Form I-983 and submitted to the DSO. Material changes may include changes in: i) the Employer Identification Number resulting from a corporate restructuring; ii) the reduction of an F-1 student's compensation that is not based on a reduction in hours worked; iii) a decrease in the hours per week a F-1 student engages in a STEM training opportunity; v) a decrease in hours below the 20 hours per week minimum required under the 2016 Final Rule for post-completion OPT; and vi) the employer's commitment or F-1 student's learning objectives as documented on Form I-983.

Evaluations by U.S. employers

With regards to evaluations of the practical training, U.S. employers need to conduct an evaluation within the first 12 months of the F-1 student's STEM OPT start date (if the STEM OPT training period is less than one year, the evaluation must be completed at the end of the period). If the F-1 student has STEM OPT for more than 12 months, a final evaluation is also required at the conclusion of the STEM OPT training period. U.S. employers are expected to sign the evaluation on an annual basis by the designated official with signatory authority. The signed evaluations must be given to the F-1 student, who will provide them to the DSO.

Training plan & Form I-983

U.S. employers may use existing training programs to fulfill the training plan requirement and to evaluate the progress of the F-1 student. The training plan must explain how the STEM employment will provide a work-based learning opportunity and describe the specific goals of the training opportunity. This includes: i) the knowledge, skills and techniques that will be imparted to the F-1 student; ii) how the employer intends to meet the training goals; iii) how the training is directly related to the qualifying STEM degree; iv) the employer's methods for evaluating success of the training opportunity; v) how the employer will oversee and supervise the employment-based training; and vi) compensation that must be commensurate with what is paid to the employer's similarly situated U.S. workers.

An employer also attests that: i) it has sufficient resources and available trained personnel to provide appropriate training in connection with the specified opportunity; ii) the F-1 student will not replace a full- or part-time, temporary or permanent U.S. worker; and iii) the opportunity will help the F-1 student attain his or her training objectives.

ICE site visits

Site visits may be conducted by officers of the U.S. Immigration and Customs Enforcement (ICE) under the direction of the DHS. In the event a site visit is conducted, ICE will provide notice of the site visit to a U.S. employer at least 48 hours in

advance unless it receives a complaint or evidence of noncompliance with the STEM OPT extension regulations. Site visits are intended to verify the information related to the F-1 student's employment and ensure that the training opportunity is consistent with the information on the Form I-983. If ICE determines that updated or corrected information is needed, the request will be sent to the employer in writing with specific instructions on how the employer or F-1 student must submit the new information.

Impact of DHS regulations

With the advent of the 2016 Final Rule, high-technology and engineering students in demand from all over the world, especially China and India, will be able to significantly benefit from the longer temporary employment opportunities in the United States. This will allow U.S. employers to better recruit and compete for global talent in a limited pool of international students among advanced industrial economies.

Many F-1 students study in the U.S. with the goal of building a viable career in the STEM disciplines and to contribute to the U.S. economy on a national scale. These international students seek the opportunity that the STEM OPT program provides them to capitalize on their knowledge, skills and training for long-term rewards, such as obtaining an H-1B specialty occupation visa and sponsorship of a Green Card by a U.S. employer.

While U.S. employers must accept more stringent DHS regulations, it is of benefit to them to take advantage of the extension provisions related to the STEM OPT program. In doing so, they will be positioned to produce innovative technology, products and services as a result of these talented F-1 STEM OPT students.

If you have any questions about the 2016 Final Rule, please do not hesitate to contact one of our professionals.

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