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Immigration Briefing: What Employers Need to Know Now

To date, there have been multiple immigration updates and Executive Orders issued by the new administration impacting immigration case processing and practices by the Department of Homeland Security ("DHS"), the Department of Justice ("DOJ"), the Department of Labor ("DOL"), and the Department of State ("DOS"). In an effort to provide the most relevant information for employers and employees, Wiggin and Dana's Immigration and Nationality Law and Compliance Practice Group is distributing a series of immigration briefings. These briefings do not constitute legal advice and are meant to serve as a resource for consolidated general information. Clients should contact our legal team to review specific situations and concerns. As you read the following briefing, please remember that DHS includes the U.S. Citizenship and Immigration Services ("USCIS"), U.S. Customs and Border Protection ("CBP"), and U.S. Immigration and Customs Enforcement ("ICE"); and DOS includes U.S. Embassies and Consulates.

- NAJIA S. KHALID and PETER J. LEFEBER, *Practice Co-Chairs*

SUMMARY OF THE EXECUTIVE ORDER ISSUED ON TUESDAY, APRIL 18, 2017: "BUY AMERICAN, HIRE AMERICAN"

Although there **should be no immediate impact** to H-1B visas or visa holders, the DHS, DOJ, DOL, and DOS have been directed to review the H-1B Temporary Worker Visa Program for foreign nationals who will perform services in a "specialty occupation" that generally requires a Bachelor's degree or its equivalent, suggest changes to prioritize the most skilled and highest paid positions (most anticipated changes will **likely require legislative action and, therefore, need time** to be worked out), and take action to address fraud in order to protect U.S. workers. It is important to note that there are already anti-fraud provisions in place, recorded cases of fraud are low, employers must adhere

to compliance requirements documenting that U.S. and H-1B workers in the same/similar occupation are treated fairly, and the majority of employers utilizing the H-1B Program do so not to replace U.S. workers, but rather, in efforts to fill specialty positions (often with individuals who have obtained degrees from U.S. educational institutions). Additionally, per the new Executive Order, the Executive Branch will "rigorously enforce and administer" the laws governing foreign workers to ensure that U.S. workers are protected, and maximize the use of goods, products, and materials produced in the U.S. Specific details and related guidance for implementation policies and procedures are to be determined.

*See the full text of the Executive Order by clicking **HERE**.*

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CBP INSPECTION OF ELECTRONIC DEVICES UPON ENTRY INTO THE U.S. & TRAVELER TIPS

CBP's inspection of electronic devices at U.S. points of entry is causing concern to many, especially business travelers. Subsequently, on April 11, 2017 CBP released guidance outlining its authority through various laws to inspect, search, and detain all persons, baggage, and merchandise arriving in or departing from the U.S. CBP stated that all travelers applying for admission into the U.S. may be subject to inspection of their electronic devices based on a number of factors, including but not limited to: random inspection, having incomplete travel documents, previously violating laws enforced by CBP, or having a name that matches a person of interest in one of the government's enforcement databases. CBP also noted that if a traveler is selected for electronic device inspection, s/he should receive a notice from CBP, the device may be detained for examination/copying, and s/he should be treated in a "courteous, dignified, and professional manner."

See the full text of the CBP handout for Inspection of Electronic Devices [HERE](#).

Although the Supreme Court previously ruled that the Constitution requires police to obtain a warrant to search the smartphone/laptop of someone under arrest, the government does not agree that the same safeguards against unwarranted searches of devices apply to travelers who encounter CBP. Being that the law on this issue is unsettled, it remains advisable for all international travelers to exercise caution, be prepared for CBP delays upon entry into the U.S., carefully review DHS and

DOS travel guidelines, and keep in mind the following tips for appearing before CBP with electronic devices:

- Limit the number of devices and data being carried in and out of the U.S.
- Invest in a travel-only smartphone or laptop that does not contain sensitive information.
- Ship encrypted devices to yourself in advance of travel (CBP claims authority to search international packages).
- Note that forensic searches by CBP can detect deleted items, metadata, and other files.
- Encrypt devices with strong and unique passwords and shut them down when crossing the border.
- Store sensitive data/photos in a secure cloud-storage account, don't keep copies of the data/photos in your physical possession, and disable apps that connect to the cloud-based storage accounts.

REVISED 90-DAY TRAVEL BAN ON ENTRY INTO U.S. FOR INDIVIDUALS FROM SYRIA, SUDAN, IRAN, SOMALIA, LIBYA, AND YEMEN

Effective March 16, 2017, the administration replaced the previously issued Executive Order 13769: "Protecting the Nation from Foreign Terrorist Entry into the United States." Iraq was removed from the list of designated countries for the travel ban of its nationals, and provisions were made to grant waivers to the ban on a discretionary case-by-case basis and to exempt from the ban Legal Permanent Residents of the U.S. ("green card holders") and current

temporary visa holders. Various U.S. courts continue to find that the travel ban cannot be implemented, and DOS is no longer suspending/canceling the issuance of U.S. visas and immigration benefits to nationals of the designated countries. The travel ban is still under review.

DHS IMMIGRATION ENFORCEMENT

On February 20, 2017, DHS Secretary, John Kelly, signed two memoranda in order to implement immigration enforcement provisions of various Executive Orders, namely, "Border Security and Immigration Enforcement Improvements," and "Enforcement of the Immigration Laws to Serve the National Interest." These Executive Orders prioritize the removal from the U.S. of every individual who is without immigration status; make an enforcement priority of any such person who has been charged or convicted of a criminal offense, or who has committed acts that constitute a criminal offense, any type of fraud, has used a fake social security number, or has directly/indirectly received any federal benefit; authorize removal ("deportation") court proceedings to be conducted outside of the U.S.; restrict the use of discretionary authority by DHS officers and prosecutors to grant immigration relief; authorize criminal prosecution of unlawful entry into the U.S.; reinstate the concept of "Secure Communities" (parts of which have previously been found unconstitutional) requiring local law enforcement to share information with DHS; expand concept of having local law enforcement perform functions of federal DHS enforcement officers; order the hiring of 5,000 more CBP Border Patrol Agents and 10,000 more ICE Enforcement and Removal Operations

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Officers; plan to publish a weekly list of criminal acts committed by foreign nationals in the U.S.; promulgate regulations to collect civil fines and penalties from unlawfully present non-U.S. citizens; require the IRS and Social Security Administration to share with DHS data on individuals without immigration status; and remove Privacy Act protections from anyone other than U.S. citizens and Lawful Permanent Residents of the U.S.

Since the release of the Executive Orders and policy memoranda, there has been a noticeable rise in enforcement actions, including those at employer sites. *Please see the following **KNOW YOUR RIGHTS** guidance for Employees if ICE comes to the work place: click **HERE** to view.*

BUSINESS IMMIGRATION LEGISLATIVE AND JUDICIAL UPDATES

Many clients are inquiring about changes to immigration sponsorship and benefits. We will provide updates if and when any immigration law or rule changes are finalized and are to be implemented. At this time, please be advised that representatives are drafting proposals to amend the Immigration and Nationality Act to eliminate annual per-country quotas for employment-based immigrants to obtain green cards, to increase the annual per-country quotas for family-sponsored immigrants to obtain green cards, and to reform the H-1B and L-1 visa programs, in particular to reduce fraud and abuse. Further, the lawsuit filed in 2015 by American workers against DHS in connection with the agency's rule to

permit spouses of H-1B visa workers (H-4 visa holders) to apply for employment authorization documents ("EADs") is still pending. DHS has asked the Washington D.C. District Court for time to evaluate the rule through its standard notice and comment rule-making process. H-4 spouses remain eligible to apply for EADs in the interim.

REMINDER: RULE FOR RETENTION OF EB-1, EB-2, AND EB-3 IMMIGRANT WORKERS AND PROGRAM IMPROVEMENTS AFFECTING HIGH-SKILLED NONIMMIGRANT WORKERS (AUTOMATIC EXTENSIONS OF EADs)

Key provisions of the rule which went into effect in January 2017 are outlined below. We are available to discuss case-specific impact to clients as needed.

- Elimination of regulatory provision requiring USCIS to adjudicate Applications for Employment Authorization ("EAD card") within 90 days of filing and authorizing interim EADs in cases where such adjudications are not conducted within the 90-day timeframe.
- Automatic extension of EAD validity for certain individuals who apply on time to renew EADs in the same employment eligibility category.
- Enablement of U.S. employers to employ and retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions (Form I-140 petitions) by virtue

of increasing the ability of these workers to accept promotions, change positions with current employers, and change employers.

- Improvement of job portability for certain beneficiaries of approved Form I-140 petitions by maintaining a petition's validity under certain circumstances despite an employer's withdrawal of the approved petition or the termination of the employer's business.
- Clarification of when individuals may keep their priority date when applying for adjustment of status to lawful permanent residence.
- Enablement of high-skilled individuals in the U.S. with E-3, H-1B, H-1B1, L-1 or O-1 nonimmigrant status, including any applicable grace period, to apply for employment authorization for a limited period if certain criteria are met.
- Clarification of procedures for obtaining H-1B status beyond the six-year authorized period of admission, determining H-1B cap exemptions, and counting workers under the H-1B cap, H-1B portability, licensure requirements and protections for whistleblowers.
- Establishment of 2 grace periods of up to 10 days for individuals in the E-1, E-2, E-3, L-1, and TN nonimmigrant classifications to provide a reasonable amount of time for these individuals to prepare to begin employment in the country and to depart the United States or take other actions to extend, change, or otherwise maintain lawful status, as well as establishment of a grace period of up to 60 consecutive days during each authorized validity period for certain high-skilled

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nonimmigrant workers when their employment ends before the end of their authorized validity period, so they may more readily pursue new employment and an extension of their nonimmigrant status.

REMINDER: NEW I-9

Employers must comply with the Immigration Reform and Control Act of 1986, which requires the verification of identity and employment authorization of individuals hired for employment in the U.S. after November 6, 1986, as well as the completion and retention for every employee of Form I-9 Employment Eligibility Verification. Effective January 22, 2017, all employers are required to use the new edition of Form I-9, and should follow detailed instructions in the newly published "Handbook for Employers: Guidance for Completing Form I-9. See new I-9 form and Manual at: <https://www.uscis.gov/i-9> and <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>.

Wiggin and Dana's Immigration and Nationality Law and Compliance Practice Group will be providing additional briefings. Please contact Najia Khalid at 203.498.4314 or nkhalid@wiggin.com if you have any questions.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.