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## Welcome to the T&R Newsletter

March 2021

H-1B Cap registration begins today at noon and we have two weeks for H-1B cap registration! The Biden administration rescinds Trump-era immigrant visa ban (but not the nonimmigrant visa ban). The USCIS has extended flexibilities to F-1 Students filing form I-765. And the Biden administration rescinds two policies of the Trump administration impacting employment-based visas. To learn more about these important topics, read our March 2021 Newsletter.

### **H-1B CAP REGISTRATION OPENS THIS WEEK**

Schedule Assessments for H-1B Employees Now

The H-1B cap season is upon us! The USCIS will continue to use the process implemented in 2020 requiring employers seeking to file H-1B cap-subject petitions to first register online. The H-1B registration period will remain open for 14 days. Once the registration period closes, the USCIS will conduct the lottery selection process on properly submitted electronic registrations.

#### **Important dates to remember:**

- **March 2:** Petitioners and registrants can begin creating H-1B registrant accounts at noon Eastern;
- **March 9 - March 25:** The registration period will open at noon Eastern on March 9, and close at noon Eastern on March 25; and
- **March 31:** Date by which the USCIS intends to notify selected registrants.

From the date selected in the registration, employers will have 90 days to file the H-1B petitions.

**Time is running out!** Please contact Trow & Rahal as soon as possible if you or one of your employees still needs to be put into this year's H-1B cap registration in March.

### **BIDEN ADMINISTRATION RESCINDS TRUMP-ERA IMMIGRANT VISA BAN**

On Wednesday February 24, President Biden issued a proclamation to revoke Former President Donald Trump's Proclamation 10014 which banned the issuance on new green cards for certain individual outside of the United States and was set to expire on March 31, 2021. The former proclamation was enacted in April 2020, on the premise that the Trump administration wanted to protect U.S. workers who lost their jobs during the COVID-19 pandemic. Critics of the ban, however, had long noted that the ban primarily targeted relatives of legal permanent residents living in the United States, as well as older parents of Americans while leaving exemptions for U.S. citizens' spouses, healthcare workers, and investors.

In rescinding the order, President Biden's proclamation indicates that the ban "does not advance the interests of the United States." It further elaborates that "*[t]o the contrary, it harms the United States, including by preventing certain family members of United States citizens and lawful permanent residents from joining their families here. It also harms industries in the United States that utilize talent from around the world.*"

The National Visa Center has already begun processing green card applications that have been dormant for nearly a year.

**Nonimmigrant visa ban not included:** Noticeably absent from President Biden's order however,

extended by the Biden administration, or allowed to lapse later this month.

### The USCIS EXTENDS FLEXIBILITIES TO F-1 STUDENTS FILING FORM I-765

Recognizing the impact of extensive delays at certain USCIS Lockbox locations in issuing receipt notices for Form I-765, Application for Employment Authorization, on F-1 students applying for post-completion Optional Practical Training (OPT), the USCIS has implemented several flexibilities to address issues that can arise as a result. These delays are related to COVID-19 restrictions as well as a dramatic increase in filings of certain benefit requests, postal service delays and other factors.

The flexibilities now afforded to F-1 students are:

#### 1. Extension to 14-month OPT Period.

Beginning on Friday February 26, 2021, the USCIS is now approving applications for post-completion OPT with validity dates that reflect the same amount of time originally recommended by the student's Designated School Official (DSO) on Form I-20 (e.g. 12 months within a 14 month period). Applicants who receive an approved Form I-765 for less than the full amount of time recommended by their DSO may request a correction of the EAD due to USCIS error.

Prior to this announcement and due to months-long adjudication times, the USCIS would short-change the amount of time granted on the work authorization document for students requesting OPT starting it on the date of the issuance of the employment authorization. To allow students to complete the full 12 months of OPT for which they are eligible, the USCIS will now allow the 14-month period (during which they receive the 12 months of OPT) to commence from the date of the approval of the Form I-765, Application for Employment Authorization.

#### 2. Refiling Following Rejection.

Applicants for F-1 OPT must file Form I-765 during very specific timeframes, and in general, applications filed outside of these time frames will not be adjudicated. As a result of the lockbox delays, some applicants who timely filed Form I-765 have been at risk of having their applications rejected past the time when they can refile the application within the required timeframes. The USCIS will therefore now accept a refiled Form I-765 for OPT and STEM OPT as filed on the same date as the rejected filing under the following circumstances:

- The original, timely filed application was received on or after Oct. 1, 2020, through May 1, 2021, inclusive; and
- The USCIS subsequently rejected it for any reason.

#### 3. Refiled applications must be received by May 31, 2021.

For the USCIS to treat the refiled application as if filed on the original received date, the application must be received at the USCIS by May 31. Applicants refiling a Form I-765 for OPT or STEM OPT do not need to obtain a new Form I-20 with an updated OPT recommendation from the DSO if they originally submitted the application within the required time frames. For F-1 OPT, the application for work authorization is required to be filed within 30 days of the DSO's recommendation, and for F-1 STEM OPT the application is required to be filed within 60 days of the DSO's recommendation. Applicants refiling an application should include a copy of the rejection notice and should further correct any errors in the application that led the USCIS to reject it.

**Missing or Deficient Signatures.** Applications with missing or deficient signatures are generally rejected at the lockbox, and this policy will remain in place. However, if the lockbox erroneously accepts a Form I-765 application for OPT or STEM OPT with a missing or deficient signature, the USCIS will issue a Request for Evidence rather than reject the application, to give the applicant the opportunity to respond and provide the necessary signature or correct the deficiency.

### THE BIDEN ADMINISTRATION RESCINDS TWO POLICIES OF THE TRUMP ADMINISTRATION IMPACTING EMPLOYMENT-BASED VISAS

**Buy American Hire American.** On January 25, 2021, President Biden signed an Executive Order

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immigration policies implemented during the remainder of former President Trump's term under the guise of protecting U.S. workers. Among many others, these policies included:

- Recission of the USCIS's previous policy of deference to prior approvals in the adjudication of applications for extensions of stay;
- Issuance of the now rescinded H-1B Third-Party Worksite Memorandum seeking to severely limit employers' abilities to petition for employees working offsite; and
- Enhancement of the Fraud Detection and Prevention site visit program for H-1B and L-1 employers.

In addition to these and other policies, the BAHA order resulted in a dramatic increase in Requests for Evidence (RFEs) and denials by the USCIS across all different visa types. While it is too soon to evaluate its full impact, the revocation of this order represents a positive shift in immigration policy with potentially far-reaching impact.

**Computer Programmer Memo of 2017.** Following an adverse U.S. Court of Appeals ruling, the USCIS rescinded another Trump era memo that implemented the policy that computer programmers did not qualify as H-1B specialty occupations.

On February 3, 2021, in response to the Ninth Circuit's decision in the case *Innova Solutions v. Baran*, the USCIS issued a new Policy Memorandum rescinding a Trump-era Computer Programmer Policy Memorandum. The Computer Programmer Memorandum had itself rescinded a policy memorandum published in December 2000 known as the Terry Way Memo that established a presumption in the adjudication of H-1B visas that Computer Programmer positions were specialty occupations.

In *Innova Solutions v. Baran*, the Ninth Circuit held that the denial of an H-1B petition on behalf of a Computer Programmer was "arbitrary and capricious." Significantly, while the USCIS had not explicitly relied on the 2017 Memorandum in its decision, the Court concluded that the adjudicator had followed its logic, thereby rejected the Memorandum's reasoning.

While the USCIS has indicated that further guidance on the subject will be forthcoming, this again represents a very positive development for legal immigration in the United States!

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