ESSENTIAL INFORMATION IMPACTING U.S. IMMIGRATION DURING THE COVID-19 EMERGENCY

03.2020

Like many areas, the U.S. immigration system has been greatly impacted by the COVID-19 pandemic. Below is a summary of the most critical information effecting employers and their foreign workforce during this time.

U.S. Citizenship and Immigration Services (USCIS)

- *Suspension of Services*

USCIS local offices are temporarily closed and in-person services at its field offices, asylum offices, and Application Support Centers are suspended. The closure is currently effective until April 7, 2020. All interviews and biometrics appointments have been cancelled or will be cancelled and automatically rescheduled for a later date once offices re-open and in-person services resume.

At this time, MVA does not expect USCIS Regional Service Centers to close as they do not interact with the public. However, we will likely see extended processing times going forward as a result of COVID-19.

- *Electronic Signatures*

For forms that require an original "wet" signature, USCIS announced that it will accept electronically reproduced original signatures for the duration of the National Emergency. Although, final applications and petitions must still be filed in hard copy, allowing for non-original signatures on forms will make package preparation significantly easier for employers working remotely.

- *Premium Processing Suspension*

The USCIS premium processing fee is $1440 and guarantees action by USCIS on a filing within 15 calendar days from when the petition was receipted. However, since March 20, 2020, premium processing for all Form I-129 and Form I-140 petitions has been suspended. For any petition filed before March 20th under premium processing, USCIS will process the petition in accordance with the premium processing service criteria. Since it is unclear when premium processing will be reinstated, employers should undertake significant advance planning to ensure timely filings.

- *Extended RFE, NOID, NOIR, NOIT, and Notice of Appeal or Motion Response Times*

In an effort to assist applicants and petitioners who are responding to Requests for Evidence (RFEs), Notices of Intent to Deny (NOID), Notices of Intent to Revoke (NOIR), and Notices of Intent to Terminate (NOIT) during this time, USCIS is extending response deadlines by 60 days. Specifically, applicants and petitioners who receive one of these notice types between March 1, 2020 and May 1, 2020, are being given an additional 60 calendar days beyond the date set forth in the notice to respond. Additionally, Notices of Appeal or Motion will be considered timely if submitted within 60 calendar days from the date of the decision.

U.S. Department of Labor (DOL)

- *Electronic Approvals*

The DOL Office of Foreign Labor Certification (OFLC) announced that beginning March 25, 2020, through June 30, 2020, the Atlanta National Processing Center will issue PERM labor certification documents, including the certified Form ETA-9089 and Final Determination letter, electronically to employers and their authorized attorneys or agents in response to the COVID-19 pandemic. The electronically sent form must be printed, and then signed and dated by all required parties prior to filing the Form I-140 with USCIS. USCIS should consider this printed Form ETA-9089, containing all signatures, as satisfying the requirement that petitioners provide evidence of an original labor certification issued by DOL.

- *Worksite Posting Requirements*

Certain nonimmigrant work visas categories have worksite posting requirements as does the PERM labor certification. Considering an increasing number of U.S. employers are offering, if not requiring, their workforce to work remotely from home during this time, DOL recently issued guidance regarding the worksite posting requirements and reiterated the means by which notice may be given. The guidance is as follows:

- Notice of Filing – Labor Condition Application: Employers sponsoring H-1B, H-1B1, and E-3 work visas are required to file and obtain a certified Labor Condition Application (LCA) prior to filing the petition and to provide notice to their workforce that the employer is hiring an H-1B, H-1B1, or E-3 worker. During the COVID-19 emergency, DOL will allow employers to post the notice of the filing of a LCA up to 30 calendar days after the H-1B, H-1B1 or E-3 worker begins work at the new worksite location. This is in contrast to the regulations, which require that notice be made on or before the worker changes worksites. Additionally, in its COVID-19 guidance, DOL reiterated that LCA Notice of Filings can be provided either through a hard-copy posting at the actual worksite(s) where the worker will be employed *or* through electronic notice. The electronic notice may be on the company's intranet or via direct e-mail to affected employees. If done by direct email, only a single email is required, as opposed to the usual 10-day posting elsewhere.
- Notice of Filing – PERM Labor Certification: The PERM regulations similarly require that prior to filing a PERM, the employer must notify its workforce that it seeks to fill a specific vacancy. However, because electronic and hardcopy notice are required for PERM and there is no alternative to this, DOL is expanding the notice period. Specifically, under the COVID-19 accommodation, DOL will accept Notice of Filings that were posted within 60 days after the 180-day deadline has passed, provided that recruitment began between September 15, 2019 and March 13, 2020. Even though it's not explicitly stated, it's appears that DOL will still require that posting be completed at least 30 days before filing the

PERM application.

- *Specific Guidance For H-1B Specialty Occupation Workers*
  - *LCA Posting for Remote Workers:* H-1B workers that are now temporarily forced to work from home and their home address is located in the same Mass Statistical Area (MSA) as their normal worksite listed on their already certified LCA, then the LCA should be re-posted at the H-1B workers new worksite (ie, their home address) for a period of 10 days. Again, as outlined above, DOL is allowing flexibility regarding the posting. As such, the LCA can be posted up to 30 calendar days after the H-1B worker began working at their new worksite. Once the posting is complete, the Public Access File should be updated with posted LCA notice.

If an H-1B worker is forced to work remotely at a location outside of the MSA of their normal worksite, then the regulations require that a new LCA be filed and an amended H-1B petition submitted to USCIS. These situations should be carefully analyzed on a case-by-case basis.

- Furloughing, Benching, Non-productive Status: H-1B employees must be paid the full salary offered on their underlying petition at all times. Even during the COVID-19 pandemic it is impermissible to furlough, bench, or otherwise render an H-1B employee non-productive and stop offering the required wage. Additionally, forcing an H-1B worker to use unpaid vacation or unpaid leave of absence days during a furlough or layoff is also not permitted.
- Converting from Full-time to Part-time status: In the event an employer cannot pay the full salary offered, then converting an H-1B from full-time to part-time status may be a way to keep the H-1B employed. Converting from full-time to part-time requires filing a new LCA and amended petition with USICS. Once the petition is receipted by USCIS, the employee is permitted to commence part-time employment.
- Termination of Employment: In the event of an H-1B termination, employers are required to formally notify USCIS of the termination and withdraw the underlying petition. Failure to timely do so could have consequences later on if the employer were ever audited. Additionally, employers are required to offer any terminated H-1B worker return travel to their home country.

H-1B workers are entitled to a 60-day grace period following their termination. During this time they can legally remain in the US and seek alternate employment and sponsorship. Note that if an employer is able to rehire the H-1B worker back during those 60 days, they simply need to file another H-1B petition with USCIS to bring the employee back on board.

- *PERM Recruitment Extension*

DOL has agreed to extend the 180-day PERM recruitment window by 60 days for all filings that occur by May 12, 2020. Under current regulations, employers filing a PERM labor certification application must begin recruitment measures no more than 180 days before filing their PERM application, and must complete all but one of the recruitment efforts at least 30 days prior to filing. Under the COVID-19 accommodation, DOL will accept PERM filings where recruitment efforts began no more than 240 days before filing, provided that the recruitment was initiated between September 15, 2019 and March 13, 2020, and the ultimate PERM filing

occurs by May 12, 2020. Though not explicitly stated, it is our understanding that the 30-day recruitment-free window before filing remains in place under this accommodation.

Employers who have already completed recruitment steps during the required 180-day timeframe should continue to file their applications in accordance with existing regulatory requirements.

U.S. Department of State (DOS)

- *Suspension of Routine Visa Services*

DOS suspended routine visa services in most countries worldwide as of March 18, 2020. This means all routine immigrant and nonimmigrant visa appointments have been cancelled. DOS indicated that embassies will resume visa services as soon as possible but do not have a specific date to provide at this time. Note that MRV fees remain valid for a visa appointment in the country where it was paid within one year of the date of payment.

Due to the uncertainty regarding when services will resume, MVA recommends that applicants log into the visa appointment services website for their consulate and monitor the interview appointment calendar.

- *Suspension of Entry to the U.S.*

To date, there have been four COVID-19 related proclamations aimed at limiting travel to the United States. Currently travel to the U.S. from China, Iran, the European Schengen Region, Ireland and the United Kingdom is suspended. These travel bans suspend the entry of foreign nationals who were physically present any of the designated countries within the 14 days before their attempted entry to the U.S.

The travel bans to not apply to U.S. citizens or a foreign national who meets one of the stated exceptions. However, individuals not subject to a ban may still be required to undergo screening and other measures upon arrival to the U.S.

U.S. Customs and Border Protection (CBP)

- *Canada and Mexico Border Closures*

In joint announcements with both Canada and Mexico, the U.S. has temporarily closed both the Northern and Southern land borders to "non-essential" traffic. These restrictions apply only at land ports of entry between both countries, not to air travel.

Non-essential travel is currently defined as "travel that is considered tourism or recreational in nature." Thus, individuals attempting to enter the U.S. to work who are in possession of a valid visas should still be allowed to cross the border, if necessary, under the theory that their work is "essential". MVA recommends that employers provide their employees with a letter clearly explaining their critical need for travel, as it relates to "essential industries and supply chains."

- *Border Processing of TN and L-1 Petitions*

At present it is unclear exactly how CBP is handling adjudications at ports of entry for TN and L-1 petitions. Based on the notices restricting travel through the land borders, individuals traveling to work in the U.S. are considered essential and should be admitted. However, because there is a lack of clarity from CBP on this issues there have been inconsistent outcomes for individuals attempting to border process TN and L-1 petitions. Therefore, if travel and border appearances cannot be postponed, foreign nationals should contact the particular port-of-entry for guidance prior to appearing.

- *ESTA Travelers and I-94 Extensions*

Currently, there is no blanket guidance from CBP for individuals admitted pursuant to the Electronic System for Travel Authorization (ESTA) under the Visa Waiver Program (VWP) who find themselves unable to timely depart due to COVID-19. Deferred Inspection Offices appear to be handling I-94 extension requests for these travelers on an ad-hoc basis. This is an area MVA is monitoring and will provide updated guidance as it becomes available. In the interim, individuals in the U.S. in under ESTA should make every effort to timely depart. If that is not possible then MVA recommends contacting the nearest Deferred Inspection Office requesting an extension.

U.S. Immigration and Customs Enforcement (ICE)

- *I-9 and E-Verify Flexibility*

Starting March 20, 2020, the Department of Homeland Security (DHS) began allowing employers to complete Section 2 of their Form I-9s remotely (e.g., over video link, fax or email, etc.), instead of the usual in-person inspection. Employers are still required to complete Form I-9, Section 2 within the normal three business days. Once normal operations resume, employers are must physically inspect the documents and appropriate annotate the Form I-9. Information on how to annotate Section 2 can be found on the ICE website. These provisions may be implemented by employers for a period of sixty (60) days since the guidance became effective.

There is less flexibility for users of the E-Verify system. Employees must still be immediately notified of Tentative Non-confirmations (TNCs), but employers are to give them extra time to attempt to resolve the TNC, if their local Social Security Administration or DHS office is currently closed. Employers must still adhere to the usual, three-day timeframe for entering new hires into E-Verify, although they can note "COVID-19" in the "Other" field, if case creation is delayed due to operational challenges.

MVA's Immigration Practice Group will monitor developments with respect to these and other policy changes. Updates will be posted on our webpage and in the firm's COVID-19 Resource Center.