

Obama's Executive Action – What Does It Mean For Foreign Workers and US Businesses

November 21, 2014

President Obama's immigration address to the nation on November 20, 2014 focused on the undocumented immigrants in the United States. However, there are several interesting policy initiatives that will affect US employers and foreign workers. In the address, the President acknowledged the importance immigrants play in the nation's economy and by virtue of these policy changes, and possibly regulatory changes, he is seeking to retain highly skilled workers and entrepreneurs in the US. At the time of his announcement, the Department of Homeland Security (DHS) issued a memo to the United States Citizenship and Immigration Service to the United States Citizenship and Immigration Service (USCIS) directing actions to support US businesses and foreign workers. None of these changes are immediate and it remains to be seen how they will ultimately be implemented.

Portable Work Authorization for Highly Skilled Workers – DHS Secretary, Jeh Charles Johnson published a memo to USCIS Director León Rodríguez on November 20, 2014 addressing skilled workers and business directing USCIS and the Department of State (DOS) to ensure all immigrant visa numbers are used each year and to consider other regulatory changes to provide stability to individuals with approved I-140 petitions. Specifically, they will make regulatory changes to allow individuals with an approved I-140 Immigrant Petition for Alien Worker, where an immigrant visa is not available, apply earlier to Adjust Status to Lawful Permanent Resident. By doing so, under the "portability" provision of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), after the I-485 Application to Adjust Status has been pending for 180 days that individual can move or "port" to a new job so long as it is in the same or similar occupation. Moreover, USCIS will issue a policy memorandum to provide guidance on "same or similar" occupation in an effort to increase flexibility and career development while maintaining stability with existing green card process. So, although the green card process may still take years for certain classes of foreign nationals, they may have more flexibility in their careers.

- **L-1B Guidance** – DHS will clarify its guidance through a policy memo on temporary intracompany transfers (L-1 workers). L-1B employees are intracompany transferees with specialized knowledge of the company's products, services, or processes. Notwithstanding their importance to multinational companies, over the last few years, bringing specialized knowledge employees to the US has become a challenge due to vague guidance and inconsistent interpretation. In response, Secretary Johnson's memo directs USCIS to issue a policy memorandum to provide clear guidance on the L-1B qualifications, specifically the meaning of "specialized knowledge." It is expected that this guidance will increase consistency in adjudications.

Streamlining the PERM Labor Certification Process – Because we are reaching the 10th year of the PERM Labor Certification process, the Department of Labor (DOL) will take regulatory action to modernize the program. First, the DOL will initiate a review of the existing PERM program and regulations to determine if there are ways to modernize the options for identifying labor forces occupational shortages and methods of recruitment. In addition, the DOL will examine whether the processing of applications may be streamlined by implementing premium processing and options for addressing nonmaterial errors.

- **Employment Authorization for H-4 Spouses** – DHS is already in the process of finalizing new rules that would allow spouses of H-1B visa holders to obtain employment authorization cards if the H-1B holder is either the beneficiary of an approved I-140 Immigrant Petition for Alien Worker or has been granted an extension of their authorized period of admission in the United States under AC21.
- **Augmenting Immigration Options for Entrepreneurs** – In an effort to enhance the economy, DHS will expand options for foreign entrepreneurs that create jobs and generate revenue in the US. Specifically, Secretary Johnson's memo directs USCIS to issue guidance or regulations to clarify the standard by which a National Interest Waiver (NIW) Immigrant Petition may be granted with the aim of increasing its use. Specifically, the NIW is an employment-based green card petition that can be self-sponsored for those individuals of exceptional ability and whose work is in the national interest. The aim is to eliminate the need for a Labor Certification process or market test, if the applicant can show job creation. This is an ideal classification to be used by entrepreneurs; however, depending on the type of business or work, demonstrating the "national" interest can be challenging.

In addition, Secretary Johnson directs USCIS to create a program that will allow entrepreneurs, inventors, founders and researchers, whose work does not yet meet the standards of a NIW but have the promise to create jobs in the US, to be granted "Parole." This would allow them to pursue their work or research in the US, rather than abroad, and continue to strengthen the US economy.

Extending On-The-Job Training for STEM Graduates of US Universities – In order to increase the likelihood that we retain graduates of US Science, Technology, Engineering and Mathematics (STEM) programs, DHS will evaluate and update the practical training work authorization requirements. Presently, F-1 students may request 12 months of Optional Practical Training (OPT) so that they can pursue temporary employment in their field of study. In 2007, regulations were adopted that allow F-1 students who graduate from STEM programs in the US to seek an additional 17 month period of OPT. Secretary Johnson's memo instructs ICE (Immigration and Customs Enforcement) and USCIS to develop regulations to expand the eligible degrees for the additional STEM extension and to extend the period of the additional training.

- **Initiating Visa Modernization** – President Obama is issuing a memorandum encouraging interagency cooperation in order to make recommendation to modernize the system, reduce costs, eliminate redundancy, reduce burdens on families and employers and eliminate fraud.
- **Interagency Working Group for the Consistent Enforcement of Federal Employment, Labor and Immigration Laws** – This working group will seek to ensure agency cooperation in the enforcement of immigration laws and worker protection policies to encourage workers to assert workplace rights and protections regardless of immigration status. The working group is charged with developing policies and procedures to ensure enforcement of labor, employment and immigration laws while solidifying processes to protect undocumented workers asserting their workplace rights.

President Obama's announcement was welcomed by immigration advocates and businesses alike. However, for many of the announced changes, it may be many months before the public can take advantage. As the announcement and memoranda are sketchy as to the details, much of the specific information will come out over the next several months. Stay tuned as these policies move closer to implementation. For additional information, please contact Proskauer Rose's Immigration Group.