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Updates on the Potential Changes to U.S. Immigration

Almost one year ago, I wrote an article describing the potential changes in immigration that we may see in the upcoming year (*Keeping Up With All the Potential Changes to US Immigration*). Today's article will provide an update on those proposed changes and explain the many other immigration policy updates and enforcement actions we have seen so far in 2018. These changes have all been part of the current administration's efforts to build an "invisible wall," with the overarching goal of limiting legal immigration. While family separation and refugee policies have stolen headlines in recent months, there has also been a quiet movement by government agencies to revise other long-held immigration policies. These furtive changes make it even harder for companies that rely on skilled and legally employed foreign nationals, and more difficult still for those foreign nationals to continue to live and work in the United States.

Worksite Compliance

In the past several months, Immigration & Customs Enforcement (ICE) has kicked up compliance actions. While attorneys and employers suspected I-9 enforcement would be on the current administration's agenda, ICE exceeded expectations by quadrupling worksite enforcement actions. ICE opened 3,510 worksite investigations and conducted 2,282 I-9 audits between October 2017 and May 2018- an almost 60% increase. ICE is planning to conduct up to 15,000 I-9 audits per year moving forward. This is a huge expense for employers, as employers can face fines of more than $1,500 per I-9, including technical violations, such as writing "Pennsylvania" as the issuing authority for a driver's license, instead of "PA DMV." ICE has even fined employers if the employee left the space for Apartment Number blank, as opposed to writing "N/A." While these seem like small issues, the cost can be substantial when scaled across hundreds or thousands of I-9 forms.

The Social Security Administration (SSA) has also jumped in on the enforcement actions by picking up a practice that was shelved 6 years ago – issuing "no-match" letters to employers when the tax documents do not match SSA records. If an employer does not correct this information within 60 days, they could be subject to IRS penalties. This is another agency within the government that is working to make it harder for employers to

manage their employees. While the intent is to weed out undocumented immigrants, the mismatch letters are instead often issued affecting U.S. citizens in cases of a name change or administrative errors.

Immigration Procedures

This summer, U.S. Citizenship & Immigration Services (USCIS) issued a new policy that it can deny immigration filings without issuing a Request for Evidence or a Notice of Intent to Deny. Previously, USCIS would issue these requests to allow employers or applicants the opportunity to correct a record before issuing a denial which can have drastic consequences. While USCIS did previously have the ability to deny a case outright, this new policy denies employers and individuals the opportunity to supplement the filing or correct a small oversight. A denial could result in a person accruing unlawful presence in the U.S. and having to depart the U.S. immediately or possibly face bars to returning to the U.S. in the future.

Even before announcing the aforementioned policy, USCIS had greatly increased the number of Requests for Evidence (RFE) issued and denials. For the H-1B, the RFE rate was 17% for the last quarter of the Obama administration. For the third quarter of 2017, it rose to 23%, and for the fourth quarter of 2017, it skyrocketed to 69%, with a 72% rate for Indian citizens. This substantial increase is part of a coordinated strategy to make it onerous on employers to sponsor for a foreign worker. The intended result is for employers to forgo the H-1B worker as a resource in the United States, even if they were the best qualified and no comparable U.S. worker was comparable.

USCIS also implemented a policy on October 1 to initiate removal proceedings by issuing a "Notice to Appear" (NTA) when a case is denied. USCIS plans to apply this policy in instances of fraud, criminal offense, or unlawful presence. Currently, the agency is not issuing NTAs for all cases, but it has done so in many cases. As a result, anxieties are further increasing for foreign nationals living in almost constant fear they will be put in removal proceedings. The foreign national cannot simply choose to depart once the removal process has been initiated; rather they need to appear in Immigration Court and request permission to leave the U.S. voluntarily. This puts even more strain on the already overburdened immigration court system which has a backlog of over a million cases.

USCIS has also proposed a new regulation that would greatly expand the definition of public charge. Currently, a "public charge" is defined narrowly as an individual who is likely to have more than half of their income be from cash-based income assistance. The proposed definition would extend this assistance to include Medicaid, food stamps, and other benefits. While this is only supposed to account for part of the analysis of a public charge, other factors include whether a person has a large family, has an ongoing health condition but no private health insurance, is under 18, or is over 65. If found to be a public

charge, the immigrant would still be allowed to obtain an immigration benefit by posting a bond of $10,000, to be forfeited if the immigrant uses social services.

This rule is more lenient than prior leaked versions, which indicated that a person would be penalized even if the public benefits were accepted for a dependent U.S. citizen child. The concern from communities it that people will now not take advantage of any benefits available out of fear that it will later impact their immigration- even if the benefit is for a U.S. citizen child.

Same-sex Partners of Diplomats

The U.S. State Department will no longer issues visas to same-sex partners of foreign diplomats or staffers of U.S. based international organizations. Rather, the same-sex partners will need to marry and apply for spousal visas. Same-sex partners already in the U.S. will need to submit proof of marriage to the State Department by December 31, 2018 or depart the U.S. by the end of January. They can get married in the U.S., even if the marriage is not recognized by their home country, and the U.S. can then grant a spousal visa.

For those not yet in the U.S. or planning to return to their home country, this can cause substantial risk. Only 25 countries recognize same-sex marriage; and in more than 70 countries, it is punishable by law.

The State Department has indicated that its motivation for this is to treat foreign diplomats the same as U.S. diplomats serving abroad — which does require marriage to obtain a visa, as the U.S. recognizes same-sex marriage. While at the surface, this policy, may seem fair – the State Department has focused on reciprocity to its detriment. The U.S. is adhering to the policies of foreign countries, which is limiting the ability of same-sex couples of enjoying their life together without limitation.

These coordinated efforts by ICE, USCIS, and Department of State have all placed a chilling effect on U.S. immigration. When you take these less headline-worthy changes into account alongside the travel ban, family separation, changes to the refugee program, and other similar policies, it is obvious that this administration is working hard to build any kind of wall it can – including an invisible one.