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TERMINATION OF EMPLOYMENT FROM AN IMMIGRATION PERSPECTIVE: CONSEQUENCES FOR NOT PERFECTING A BONA FIDE TERMINATION

Ending an employment relationship is never easy. From an immigration perspective, terminating employment has some specific requirements that if not adhered to, can be costly to an employer.

Visa classifications that involve a Labor Condition Application (LCA) filing with the U.S. Department of Labor (DOL), such as the H-1B Specialty Occupation Worker, H-1B1 Singapore or Chilean Worker, E-3 Australian Worker, require the employer to perfect a bona fide termination to end the employer's obligation for continued pay and the provision of benefits to the employee.

The government considers a termination bona fide when an employer (1) expressly terminates the employment relationship with a foreign worker, (2) notifies USCIS of the termination, and (3) complies with any "return transportation" requirement of the visa classification. If the employer fails to make a bona fide termination, the employer's obligation to pay the foreign worker may continue until the H-1B petition expires or until the LCA expires in H-1B1/E-3 cases where an underlying petition was not filed with the U.S. Citizenship and Immigration Services (USCIS).

As noted in recent decisions by the DOL's Office of Administrative Law Judges (OALJ), not fully complying with the bona fide termination requirements may have a price:

- A Senior Software Engineer H-1B worker was awarded back pay of $50,438.46 plus interest from the date his employment was terminated until a "change of employer" H-1B petition was approved (a time period of 180 days). The original H-1B employer waited 6 months to notify USCIS that the employment had ended. The DOL's Administrative Law Judge (ALJ) indicated that the obligation for back pay would have continued to accrue, but for the intervening approval of an H-1B change of employer petition filed by a different employer.
- This same Senior Software Engineer H-1B worker filed a claim with the DOL for back pay for termination by a subsequent H-1B employer. The Department of Labor determined this employer had (1) failed to pay the wages required – the greater of the prevailing wage or the actual wage for the position, (2) failed to

offer either benefits or equal eligibility for benefits as those similarly employed, and (3) failed to offer return airfare upon termination, and awarded the H-1B worker $40,949.76 in back pay and benefits . The parties entered into a settlement agreement in which the employer compensated the former H-1B worker for back pay and the value of stock options not yet vested, and the H-1B worker executed a general release of all claims both known and unknown under state and federal laws related to his employment. Fourteen days later, the H-1B worker filed an appeal with the OALJ alleging that the employer did not perfect a bona fide termination, that additional back pay was due as well as reimbursement for "benefits" including a gym membership and professional publications, and that he was owed airfare to return to his home country. The ALJ denied the appeal determining this H-1B worker never intended to depart the United States and the settlement agreement was a good-faith resolution to the dispute.

- An E-3 Australian worker employed as a Civil Engineer was awarded back pay of $336,730.77 plus interest when terminated 6 days after arriving and working in the United States. While the ALJ was unable to determine costs for actual fringe benefits, $67,346.15 was awarded to the E-3 worker based upon the employment offer which included a bonus of 20 to 30 percent of base pay. The ALJ found the E-3 worker eligible for back pay from the date of his termination to the expiration of the E-3 LCA, a total of 103 weeks, as the employer did not execute a bona fide termination. The employer notified USCIS of the termination 490 days after the employment ended. The employer's argument that the notification letter stated the actual termination date was not sufficient to overcome the delayed notification to USCIS. Likewise, the employer's argument that it was not responsible for the return transportation since the E-3 worker departed the United States once terminated, was not successful.

ACICS Loss of Recognition Potentially Impacts F-1 Students, H-1B workers, and I-140 Applicants

On November 1, 2022, USCIS issued a press release discussing the implications of the U.S. Department of Education's (DOE) August 19, 2022 announcement that it no longer recognizes the Accrediting Council for Independent Colleges and Schools (ACICS) as an accrediting agency. This announcement impacts certain F-1 foreign students applying for STEM extensions of Optional Practical Training (OPT) work authorization following graduation from an ACICS accredited school and also students seeking a change of status to attend an ACICS accredited program, as well as H-1B workers and I-140 applications who are graduates of these schools.

The ACICS loss of recognition as an accrediting agency prevents certain F-1 students from qualifying for a STEM OPT, a 24-month extension of OPT based on graduation with a bachelor's degree or higher in a STEM field. USCIS indicates it will deny the application for STEM OPT if the STEM degree was obtained from an ACICS accredited school and the recommendation for STEM OPT by the ACICS accredited school is dated on or after August 19, 2022.

For individuals seeking a change of status or reinstatement to attend an ACICS-accredited English language study program, USCIS will issue requests for additional evidence (RFEs). Upon receiving an RFE, individuals will be given the opportunity to present evidence that the study program meets the accreditation requirements. If the student fails to submit a new I-20 from a school with recognized accreditation, USCIS will deny the change of status or reinstatement request.

For persons receiving degrees from ACICS accredited schools after August 19, 2022, these degrees will no longer qualify as a U.S. degree for the H-1B advanced degree exemption from the H-1B quota (also known as the "Master's Cap"). Additionally, a degree from an ACICS accredited school will not establish that the individual meets the requirements for an H-1B specialty occupation by holding a US baccalaureate degree required for the specialty occupation from an accredited US college or university under 8 CFR 214.2(h)(4)(iii)(C)(1).

Further, H-1B petitions claiming an H-1B cap or ACWIA fee exemption as an institution of higher education will no longer be able to claim these exemptions if the underlying degree comes from an ACICS accredited school, unless some other basis for exemption exists, if the degree was issued after August 19, 2022.

In the "green card" context, employer petitions for an Immigrant Visa (Form I-140) filed for beneficiaries holding ACICS accredited degrees, filed under the advanced degree or professional classifications, may be affected if the position requires the beneficiary's educational credentials be a U.S. degree or foreign equivalent degree, if the actual degree was issued after August 19, 2022. Degrees issued before this date will be considered to be a degree from an accredited institution and can be used to qualify for the H-1B Master's Cap exemption and for I-140 petitions under the EB-2 advanced degree or EB-3 professional categories.

NONIMMIGRANT VISA PROCESSING UPDATE

In our August 2022 Business Immigration Monthly, we reported on the difficulties Visa Units of U.S. Embassies and Consulates faced to timely process nonimmigrant visas. The Department of State (DOS) made some progress on its backlog during fiscal year 2022 (October 1, 2021 to September 30, 2022) and reported processing eight million nonimmigrant visas. The primary priorities continue to be nonimmigrant visa processing for students (F-1/M-1), academic exchange visitors (J-1), healthcare workers and crew members who are essential to maintaining global supply chains.

Individuals who are applying in their country of nationality or residence to renew a visa in the same classification which has expired in the past 48 months may request interview-waiver processing when submitting the application. The interview-waiver visa processing is not available to E-1 Treaty Traders or E-2 Treaty Investors whose company registration has expired, or to Blanket L-1 Intracompany Transferees. For interview-waiver processing the applicant must be applying to renew the visa in their country of nationality or residence and may not provide their passport and supporting documents while remaining in the United States.

While interview-waiver visa processing avoids an in-person appearance at the Visa Unit of a U.S. Embassy or Consulate, we have reports that the processing of the visa may take several weeks. If an appointment can be obtained, visa processing is generally 3 to 10 days, provided administrative processing is not needed. Visa Units have provided guidance that if the application is routed for interview-waiver visa processing, the applicant can contact the Visa Unit and request an interview appointment.

While nonimmigrant visa processing delays continue, the DOS has also renewed its advice stating: "We urge any visa applicant who can travel to another embassy or consulate with shorter wait times to consider doing so. There is no penalty for applying anywhere appointments are available, even outside your home country." Individuals who opt to secure a visa appointment outside their country of nationality or residence,

should consider any requirement to obtain a visa to travel to that country, and the risk that their visa application may be subject to administrative processing. Processing in a country other than the country of nationality or last residence is still completely discretionary. If the consulate refuses to issue the visa to the third country applicant, the applicant may then have to travel from the country where he/she was denied the visa to his/her home country in order to reapply for the visa.

The DOS recently updated the information on its website about nonimmigrant visa processing times - Visa Appointment Wait Times (state.gov). The DOS now posts information on wait times for an interview as well as interview-waiver processing. It also provides information about processing times for more nonimmigrant visa categories.

VISA BULLETIN UPDATE – CERTAIN CATEGORIES RETROGRESS

The DOS recently issued the Visa Bulletin for December 2022. The Visa Bulletin is issued on a monthly basis and summarizes the availability of immigrant visas for both family and employment-based cases for a given month. Notable changes in the employment-based categories include the following:

ESTABLISHMENT OF EMPLOYMENT SECOND PREFERENCE FINAL ACTION PRIORITY DATE AND FILING PRIORITY DATE

As mentioned in the November 2022 Visa Bulletin, the DOS determined it has become necessary to establish a worldwide Employment Second Preference final action and application filing dates to hold number use within the maximum allowed under the FY2023 annual limit. Except for China and India, all countries are subject to a Final Priority Date of November 1, 2022 and a Filing Priority Date of December 1, 2022.

RETROGRESSION OF INDIA EMPLOYMENT SECOND PREFERENCE FINAL ACTION PRIORITY DATE AND FILING PRIORITY DATE

The DOS indicated that due to heavy applicant demand and significantly lower visa number availability for India EB-2 category for FY2023, corrective action was necessary to keep number use within the maximum allowed under the FY2023 annual limits. However, higher than expected levels of demand in the Employment First and Employment Second categories has materialized this year, and as a result, fewer additional numbers will be available to India in the Employment Second category than originally estimated when the October and November priority dates were established. Therefore, the DOS indicated that further corrective action is necessary to ensure that the limited supply of visa numbers is allocated by priority date.

The Final Action Priority Date chart, which indicates when an immigrant visa may be issued, shows significant retrogression for the EB-2 category for India for December. This category retrogressed to October 8, 2011 from April 1, 2012 in the November Visa Bulletin. This means that only persons with priority dates before October 8, 2011 in the EB-2 category India are eligible to receive an Immigrant Visa. In contrast, the EB-3 category for India advanced slightly to June 15, 2012 from the November Visa Bulletin which listed April 1, 2012.

The Dates for Filing Priority Date chart of the Visa Bulletin indicates the dates when a person present in the United States may file for Adjustment of Status with the USCIS. The USCIS posts on a monthly basis whether the DOS Visa Bulletin Filing Priority Date chart can be used for the current month or whether the Final Action

Priority Date chart must be used. For December, the USCIS has indicated that the Filing Priority Date chart may be used to determine filing eligibility.

The December Visa Bulletin also imposes a Final Action Priority Date for EB-2 World applicants (namely applicants from countries other than India and China). This is the first time that a priority date has been established for the EB-2 World category in more than 3 years. EB-2 World applicants must have a priority date earlier than November 1, 2022 in order to be eligible to receive an immigrant visa. To be eligible to file for Adjustment of Status with USCIS, persons in this category must have a Filing Priority Date earlier than December 1, 2022. Because the DOS has established a priority date for this category for the first time in more than 3 years, it is assumed that the DOS will continue to retrogress this category further in the future in order to contain demand in this category within the limits established for FY2023.

REENTRY PERMIT APPLICATIONS MUST BE RECEIVED BY USCIS BEFORE DEPARTING

Lawful Permanent Residents ("Green Card" holders) may apply for a reentry permit to help document their intention to maintain Permanent Resident status during an extended departure of up to 24 months. Additionally having a reentry permit may help demonstrate continuous residence for a future naturalization application if the time outside the United States was more than 6 moths and less than one year.

To apply for the reentry permit, under USCIS regulations [8 C.F.R. § 223.2(b)(l)] the Green Card holder must be physically present in the United States when the application is filed, as well as for any required biometrics processing. An application is filed when USCIS receives the application and accepts the filing fee. In a recent decision by the USCIS Administration Appeals Office (AAO), the denial of a reentry permit was upheld when the Permanent Resident physically departed the United States before the actual application (Form I-131) had been received by USCIS—merely posting the application in the mail to USCIS is not sufficient.

Permanent Residents are encouraged to speak with an MFEM immigration attorney before planning an international departure to review actions to take to maintain the Green Card and options for future U.S. citizenship.

AMERICAN SAMOANS REMAIN NATIONALS, NOT U.S. CITIZENS

On October 17, 2022, the U.S. Supreme Court denied a request to review the appeal from the 10th Circuit Court of Appeals by three American Samoans who sought recognition of U.S. citizenship status since birth. The 10th Circuit determined the question of birthright citizenship for American Samoans was an issue for Congress, not the court. The governments of the United States and American Samoa both contended American Samoans are nationals, not U.S. citizens.

The Citizenship Clause of the U.S. Constitution declares persons born or naturalized in the United States to be U.S. citizens. Nationals of the United States are not entitled to vote, run for elected federal or state office outside American Samoa, or serve on a federal or state jury. They may travel to work in the United States and serve in the U.S. military.

Since 1900 American Samoa is an unincorporated U.S. territory. Under U.S. law, American Samoans hold status as nationals, not citizens. This is also true for the Federated States of Micronesia and the Republic of

the Marshall Islands. While Guam, the Northern Marianan Islands, Puerto Rico, the U.S. Virgin Islands are also U.S. territories, individuals born in these lands are U.S. citizens from birth based upon acts of Congress.

When reaching its decision, the 10th Circuit recognized “that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process.”

On March 16, 2021, Delegate Aumua Amata Coleman Radewagen (R-American Samoa-At large) introduced legislation in the House of Representatives to permit the naturalization requirements of residence and physical presence for U.S. nationals be satisfied by living in the U.S. territory. The bill also proposed waiving the English language and citizenship testing requirements and the naturalization interview and oath. This bill is co-sponsored by the Delegates from Guam, Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands and Representative Bonnie Watson Coleman of New Jersey. This bill was referred to the Subcommittee on Immigration and Citizenship.