

Business Immigration Weekly for May 1, 2015

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Practices: Immigration

NEW REGULATIONS ISSUED FOR H-2B PROGRAM

The Department of Homeland Security (DHS) and the Department of Labor (DOL) recently issued new regulations for the H-2B, Temporary Non-Agricultural Workers Program, that are effective as of the date of publication, April 29, 2015. The H-2B program requires employers to establish that their need for a foreign worker's services is temporary, that there are insufficient U.S. workers that are able, available, qualified and willing to accept the H-2B position and that the hiring of a foreign worker will not adversely affect the working conditions and wages of U.S. workers. The Departments published an interim final rule that outlines new requirements for the H-2B temporary labor certification, as well as a final rule that addresses the procedures for prevailing wage issuance. The new rules require that the recruitment be conducted after the filing of the Application for Temporary Employment Certification with the DOL. Additionally, the State Workforce Agency Job Order posting, and the posting of the position on a newly created electronic national job registry, must remain active until 21 days prior to the need of the H-2B worker versus the prior requirement that the Job Order be posted for only 10 days prior to the Application filing. The new interim final rule also requires that employers offer the H-2B position to former employees who are U.S. workers and has additional provisions addressing an H-2B worker and U.S. worker wages, working conditions and benefits. The rule also lowers the temporary need period from 10 months or less to 9 months or less and now defines full-time as at least 35 hours per week as opposed to 30. Both sets of regulations were issued after months of litigation in the H-2B program.

DHS FINALIZES REGULATIONS ON DSOS AND F-2 AND M-2 VISA HOLDERS

The DHS finalized its regulations affecting the Student and Exchange Visitor Program (SEVP) to eliminate the maximum number of Designated Student Officials (DSO) that an academic institution may nominate and to allow dependent F-2 and M-2 nonimmigrants to engage in studies. The DHS had initially instituted caps on the number of DSOs that a school may have. The intention was to remove these caps until a time when the Student and Exchange Visitor Information System (SEVIS) became fully operational. The DHS now feels that the time is right and has removed these restrictions. Additionally, the DHS has implemented regulations allowing the F-2 or M-2 accompanying dependent spouse of an F-1 or M-1 student to engage in studies. This was previously prohibited unless the dependent spouse changed their nonimmigrant status to their own student status. The F-2 or M-2 spouse must enroll in classes that do not constitute a full course at a SEVP-certified institution. If the F-2 or M-2 spouse desires to engage in a full course of study, they will have to change their status to F-1 or M-1.

H-1B QUOTA UPDATE

As of April 14th, the U.S. Citizenship and Immigration Services (USCIS) began sending email notifications to H-1B employers for premium processing cases that were selected in the H-1B statutory cap lottery. Premium processing is an upgraded process under which the USCIS will conduct an initial review of the petition within 15 calendar days in return for an additional fee of \$1,225. The USCIS has begun mailing receipts for H-1B petitions selected in the random lottery. The USCIS has begun processing petitions selected under the quota and issuing requests for evidence. Both the USCIS California Service Center and Vermont Service Center are aggressively scrutinizing maintenance of status issues particularly for F-1 students working under curricular practical training (CPT) and optional practical training (OPT). For example, the Service Centers are requesting documentation that the position held by the F-1 student employed under CPT or OPT be related to their major. Also, the Service Centers are questioning whether beneficiaries are engaging in a full course of study and questioning inconsistencies such as the student's home address being in a different state from the academic institution where they are studying. Unfortunately, the USCIS' scrutinizing eye is always shifting and it is difficult to forecast what the next issue will be.