



Immigration Law Alert

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Robert Cohen

614.227.2066

rcohen@porterwright.com

Catherine Kang

614.227.2081

ckang@porterwright.com

James Jensen

614.227.2070

jjensen@porterwright.com

Business implications of the president's executive action on immigration reform measures

Last night, President Obama addressed the nation and outlined his long awaited executive order to begin the process of immigration reform. His speech emphasized the policy imperative to improve the system, and encourage economic growth consistent with our values respecting and protecting individual rights. The president, anticipating the Republican response, reiterated that it is the role of Congress to make substantive changes in the laws, but in the absence of Congressional action, he noted several steps that he can take as president to make the immigration system work a little better. Setting aside this constitutional controversy for the moment, the most dramatic and controversial announcement established criteria for approximately 4.5 million undocumented immigrants who are parents of U.S. citizens or permanent residents to apply for "deferred action," including employment authorization and the security of deferred deportation proceedings. There are also several items of interest to the business community.

Following the president's speech, the U.S. Department of Homeland Security issued a series of memoranda that provided more insight into the nature of the executive orders. While more specific than the speech, the memos signed by the secretary of Homeland Security still provide only broad outlines of policy initiatives. Some of the items are purely administrative, but most will require a change in federal regulations. Thus, the process to implement the regulatory reform will include publication in the Federal Register, public comment and additional time for the respective agencies to finalize the new regulations. This process will take several months, and possibly longer, potentially giving Congress an opportunity to act in the interim.

The reforms most important to the business community and employers were set forth in a memorandum addressing the need for highly skilled businesses and workers. This memo identified several areas where administrative reform can make the process easier for employers and their highly skilled workers.

- U.S. Citizenship and Immigration Services (USCIS) published a proposed regulation in June 2014 that would permit spouses of certain H-1B employees who have applied for permanent resident status to be granted work authorization while the application is stalled awaiting an available visa number. The secretary's memo instructs USCIS to publish this final regulation "in a timely manner."
- Optional Practical Training (OPT) is granted to foreign students for one year following graduation. Because the H-1B lottery each April leaves many students



without the ability to transition to H-1B status, USCIS in 2007 provided for an additional 17-month extension for graduates in science, technology, engineering and math (STEM) occupations. The administration has proposed a broader definition of STEM occupations and to extend OPT for an additional period. This will provide E-Verify employers the opportunity to hedge their bets on the H-1B lottery, and to enter as many as three or four times until the individual is selected.

- The Immigration Act of 1990 created a national interest waiver of the labor certification requirement to attract individuals with advanced degrees or exceptional ability where the work or skills of the individual created a “significant public benefit.” However, the Immigration and Naturalization Service (INS), and now the USCIS, have narrowly interpreted this exception in a manner that makes it mostly unavailable. The secretary’s memo recognizes that the national interest waiver is underutilized and directs USCIS to issue either guidance or new regulations that will expand the ability of highly qualified individuals to apply for the national interest waiver.
- Many employers have struggled with the increasingly limited interpretation of specialized knowledge for international transfers in the L-1B context. The administration has promised that it will release guidance clarifying, and hopefully, relaxing the stringent standards that have made it difficult to transfer individuals from overseas to U.S. operations.
- One of the most innovative provisions of the Senate bill passed last summer, and never considered by the House, was the ability of certain foreign entrepreneurs to apply for green cards based upon their ability to start new businesses. While the president does not have the authority to create new visa categories, he has promised to use his discretionary parole authority to permit certain investors to come to the U.S. and begin or expand their business. These new business owners will be able to start and expand their business, but the ability to complete the process and become permanent residents will need to wait for Congressional action.
- The current limited number of immigrant visas has created a significant backlog for many employees whose PERM applications and visa petitions have been approved. In many instances, this backlog is measured in years and in some cases, decades. The administration plans to publish a regulation that will permit applicants to pre-register applications to adjust status to permanent resident. While this will not be an actual application, and permanent resident status cannot be approved until there is an available visa number, pre-registered applicants will have many of the benefits of a pending application, including work authorization and advance parole (a document that permits a foreign national to return to the United States following temporary travel abroad). The proposal will also include increased job mobility and provide applicants the right to change jobs without abandoning the application. This will be a mixed blessing for employers as employees are no longer limited to the petitioning employer, but it will also expand the applicant pool for employers seeking talent. The secretary’s memo notes the increase in economic benefits from eliminating barriers to job mobility, both within a particular company and among different employers.

Many of these reforms can only be implemented by changes in the regulation, and will therefore take time before the specifics are finalized and can be implemented. The president very carefully crafted his list of reforms to limit steps that can be taken by executive action. It is a call to Congress to pass a comprehensive reform package, a step that has thus far been resisted. We look forward to the implementation of these steps, and hope that the provisions will ease some of the burden on employers and employees seeking to comply with the increasingly complex and dysfunctional immigration system.

For more information, please contact [Rob Cohen](#), [Catherine Kang](#), [James Jensen](#) or any Porter Wright’s [Immigration practice area](#) attorneys.

Porter Wright Morris & Arthur LLP
www.porterwright.com

Cincinnati, Ohio
800-582-5813
Cleveland, Ohio
800-824-1980

Columbus, Ohio
800-533-2794
Dayton, Ohio
800-533-4434

Naples, Florida
800-876-7962
Washington, DC
800-456-7962