

DEPARTMENT OF HOMELAND SECURITY

The epicenter of immigration policy action in 2016 will be the federal agencies administering immigration programs, as the final pieces of President Barack Obama's executive action are rolled out during his last year in office. The Department of Homeland Security is working on issuing the remaining regulations and policy guidance associated with the employment-based elements of the action, while at the same time engaging with stakeholders and continuing to move from a paper-based system to an electronic one. Work-site enforcement related to I-9 forms is down, but employers should be mindful of citizenship-status or national origin discrimination charges.

Final Pieces of President's Immigration Executive Action Coming in 2016

The Department of Homeland Security will be issuing regulations and policy guidance in 2016 in a final push to get the remaining elements of President Barack Obama's executive action on immigration up and running before his term runs out, agency representatives and practitioners told Bloomberg BNA.

The executive action involves "a number of policy pieces" as well as formal regulations, "many of which are coming close to completion at this point," U.S. Citizenship and Immigration Services Director León Rodríguez said Jan. 11.

Rodríguez told Bloomberg BNA that the "principles are generally the same" for the regulations and guidance: Available visas should go to those seeking them; the rules should be clarified and well understood; and it should be easier for high-skilled foreign workers to come to the U.S. and adjust their status to that of lawful permanent resident.

"We do believe that that supports our economy," and it's "something that our business community needs," he said.

The USCIS is "getting very close to done with the list that was in the executive action," but the agency is "always interacting with the business community," Rodríguez said. In that regard, if that dialogue suggests that further guidance is necessary, "we'll use our judgment

and meet the needs as we identify and detect them," he said.

The business community is "clearly in the top pantheon of our stakeholders," and "that's a dialogue that we know needs to continue to be very vibrant," Rodríguez said. "I want to make sure that we're still keeping the open-door message."

'Serious' About Executive Action. "One thing that we certainly have seen about the president's executive actions is that he is serious about it," Proskauer immigration attorney David Grunblatt said Dec. 30.

Grunblatt, who practices in Newark, N.J., said the executive action marks a "paradigm shift" within the USCIS, which previously has forgone regulations in favor of informal guidance. "Now we've seen a whole flurry of activity," he told Bloomberg BNA.

For example, Grunblatt mentioned that a federal judge in Washington, D.C., struck down 2008 regulations extending optional practical training for foreign graduates of U.S. universities with science, technology, engineering and mathematics degrees (*Wash. Alliance of Tech. Workers v. DHS*, 2015 BL 258791, D.D.C., No. 1:14-cv-00529, 8/12/15).

OPT allows foreign students to work in the U.S. for up to 12 months post-graduation. The STEM extension

provides an additional 17 months of work authorization, for a total of 29 months.

New OPT Regulations ‘Doubled Down.’ Grunblatt said instead of pulling the STEM extension, the administration “doubled down” by proposing an additional 24 months of work authorization for STEM graduates, rather than 17.

A spokeswoman for Immigration and Customs Enforcement told Bloomberg BNA Jan. 6 that the proposed rule is expected to be finalized in February.

But American Immigration Lawyers Association President-elect William A. Stock said the timeline depends somewhat on the litigation. The court allowed the 2008 regulations to remain in place until Feb. 12 in order to give ICE a chance to replace them. The administration has requested an extension until May.

Stock, who practices with Klasko Immigration Partners in Philadelphia, said he believes that request will be granted.

In a Jan. 8 e-mail to Bloomberg BNA, he added that the timing of the final rule could depend on how the U.S. Court of Appeals for the District of Columbia Circuit rules on the plaintiffs’ appeal. The organization representing U.S. STEM workers is challenging the lower court’s determination that OPT itself is permissible. It also disagrees with that court’s conclusion that the STEM extension would have been acceptable if the proper procedures had been followed in implementing it.

PERM Overhaul. Another major part of the executive action, an overhaul of the permanent labor certification process, also is likely in 2016. The Labor Department has been promising PERM changes “for years now,” and “I have no doubt that that project is in place,” Grunblatt said.

Grunblatt told Bloomberg BNA that the PERM regulations were a “brand new program” in 2005, as was the PERM application form. In a way, the regulations have been a beta test for the past 10 years, he said.

“The form is a masterpiece of mystery and confusion,” Grunblatt said, “and if you make the tiniest mistake on the form, that warrants a denial.”

“They have to do something big” with PERM, which may be “bogging everything down,” Grunblatt suggested.

Stock said he is hopeful “that the regulation will do away with newspaper advertising for professional-level jobs,” which will put PERM recruitment efforts more in line with employers’ regular practices. He also said new PERM rules should allow the DOL “to grant cases where employers may have made small, but harmless errors in their recruitment efforts.”

Visa Bulletin One of ‘Greatest Disappointments.’ The Visa Bulletin is one area of the executive action where there likely won’t be much momentum in 2016.

In September, the USCIS announced that the monthly Visa Bulletin—which tells immigrants when they can apply for green cards—would be updated to re-

flect new filing times, causing many immigrants to believe they could apply years sooner than originally thought. The idea was to ensure that all visas available in a particular year actually are issued to immigrants seeking them.

But the agency backtracked by severely scaling back who could apply as of Oct. 1, affecting mostly Indian and Chinese workers seeking EB-2 visas.

The change—which Stock called “one of the greatest disappointments” of the president’s executive action—sparked an outcry and a proposed class action (*Mehta v. Dep’t of State*, W.D. Wash., No. 2:15-cv-01543, complaint filed 9/28/15).

“Not only did we have the fiasco in October,” he said in his e-mail, “but for the last three months we have seen a slow-motion version of that fiasco playing out.” The November, December and January Visa Bulletins only allow family-based green card applicants to use the advance filing dates, not those seeking employment-based green cards, he pointed out.

The “basic structure” of the Visa Bulletin is “going to be our structure for the foreseeable future,” Rodríguez told Bloomberg BNA. He said having the two charts—one telling immigrants when to file their paperwork, the other telling them when the green cards are available—will “really enable us to maximize the availability of visas.”

However, “we still know that there needs to be actual legislative reform to provide a real solution” in green card availability, Rodríguez said.

Grunblatt said there’s going to be little movement in the numbers of immigrants who can apply for green cards because of the Immigration and Nationality Act’s restrictions. The law says immigrants only can apply for green cards if they are immediately available—which the USCIS interprets as being available during the fiscal year.

“Everybody can yell and scream” about what the Visa Bulletin should say, “but it’s not going to change anything” about the law, he said.

Don’t Expect Much for Entrepreneurs. Rodríguez told Bloomberg BNA that guidance on bringing in immigrant entrepreneurs under both the parole authority and the national interest waiver is in the works and will come out in 2016, although not necessarily at the same time. He said the USCIS is working on those initiatives “quite actively.”

Parole authority allows immigrants to be admitted to the U.S. outside the normal channels if there is a significant public benefit or for humanitarian reasons, while the national interest waiver allows an immigrant to obtain an EB-2 visa without a petitioning employer and without labor certification.

But Stock said, “The immigration community’s expectations should be quite low for the scope and scale of any proposal in this area,” based on proposed regulations that have been floated thus far. He said the DHS likely will be constrained by the INA, which limits temporary E-2 investor visas to immigrants from certain

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countries, as well as the high investment amounts required for the EB-5 permanent investor visa.

"I expect a relatively narrow program with high standards that are targeted to situations current law is particularly poor at addressing, such as the high-potential entrepreneur who is a significant owner of a company that has obtained a large amount of venture capital financing," Stock said.

New Approach to AAO Decisions? Although he wouldn't say for certain whether the USCIS's Administrative Appeals Office will be issuing precedent decisions this year, Rodríguez said, "I personally believe that they're very useful." The agency will continue to work with the Justice Department to "identify areas" where a precedent decision "can be helpful," he said.

But Rodríguez told Bloomberg BNA that the USCIS will be mindful about "how we roll them out, how we prepare the community, how we dialogue with the community when we issue decisions," including the amount of time and guidance necessary for the affected community to "absorb the impact of those decisions." That is especially true where an AAO decision changes expectations or influences behavior going forward, he said.

The AAO's 2015 precedent decision in *In re Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO April 9, 2015), held that employers that move their H-1B highly skilled guestworkers to a new geographic location must file a new or amended petition with the USCIS. Many employers were taken aback by the decision, arguing that it represented a major shift in agency policy—and a resulting shift in the way employers need to do business—yet was issued without warning.

The reaction to *Simeio* "is an example of how I know we need to do business going forward," Rodríguez said.

Considerations include: whether the decision can and should be retroactive; how long affected parties should be given to comply, to the extent the decision is prospective; and what guidance will be necessary to ensure affected parties know how to comply, he said.

The USCIS's commitment, Rodríguez said, is "to be mindful of all of those issues both before and after we issue a decision."

Yet Grunblatt said he doesn't expect much to come out of the AAO this year.

The focus, he said, is on putting out regulations and policy guidance intended to have a positive impact on immigration. Precedent AAO decisions, on the other hand, tend to "make a negative point," where the USCIS has identified a bad practice that it wants to rectify, Grunblatt said.

H-1B Demand Up, But Not Cap. "Of course we're expecting more H-1Bs this year," Grunblatt said, although he has little hope for legislation to expand employers' access to the guestworkers. He did say there appears to be "unified opposition" to information technology staffing firms' use of H-1B visas, but it is unlikely that a bill will focus solely on that issue.

Such companies have a distinct advantage in the H-1B application process because their business model comports with the visa application cycle, Grunblatt explained. Employers petition for H-1B visas during the first week of April, but the visas don't become available until October, the start of the next fiscal year.

"A normal company doesn't work like that," he said.

Grunblatt said he has a "gut feeling" that there will be at least a 50 percent increase in H-1B petitions in

2016 from the 233,000 submitted in 2015. He told Bloomberg BNA that there is a "buildup" of foreign workers who didn't get the visas in the past few years because the number of petitions filed far exceeded the 65,000 available visas, with an additional 20,000 for workers with advanced degrees from U.S. colleges and universities.

Stock, who agreed that demand for H-1B visas will be at least as high as last year, said the relatively low cap incentivizes multinational companies to ship jobs overseas if they can't get the visas. He also said the system "ironically" creates an incentive for companies to rely on contractors: Instead of competing for an H-1B visa for a direct hire, employers can rely on a contractor that has been successful in obtaining visas for its workforce.

Fewer I-9 Inspections. "The feeling out there" is that Immigration and Customs Enforcement has been conducting fewer inspections of employers' I-9 employment eligibility verification forms "and nobody seems to know why that's the case," Grunblatt said. The administration appears to be focusing more on removals rather than employers, although "there isn't a smoking gun memo" stating that's the new policy, he said.

ICE spokeswoman Danielle Bennett Jan. 6 said different branches of the agency deal with removals and work-site enforcement, so "one would not impact the other." However, she acknowledged that I-9 inspections are down from prior years.

According to figures provided to Bloomberg BNA, I-9 inspections over the past seven years hit a peak in fiscal year 2013 with 3,127. Since then, the numbers have been declining, with 1,320 inspections in FY 2014 and 1,242 in FY 2015.

At the same time, however, ICE's work-site enforcement is affecting businesses. For example, FY 2013 saw 120 indictments and 143 convictions, while there were 194 indictments and 176 convictions in FY 2014 and 190 indictments and 167 convictions in FY 2015. Judicial forfeitures, fines and restitution orders also went from \$2.2 million in FY 2013 to \$35.1 million in FY 2014, dropping back down to \$11 million in FY 2015.

The jump in FY 2014 is largely a result of a \$34 million settlement in November 2013 with information technology outsourcer Infosys Ltd., which ICE said was the largest payment ever made in an immigration case.

"ICE's Homeland Security Investigations (HSI) continues to focus its worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers," Bennett said in a statement.

"ICE is committed to establishing a meaningful, sustained Form I-9 inspection program to promote compliance with the law, part of a comprehensive strategy to address and deter illegal employment," she continued. "Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files or banking records."

Don't Lower Guard on Enforcement. Grunblatt said the enforcement agency to watch in 2016 is the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices.

The OSC has been bringing more and bigger discrimination cases against employers, he said, although it's unclear whether that is the result of a policy change or whether the office—which is relatively new—is "just maturing."

There is also “greater cooperation between the agencies,” which could be a factor leading to the rise in OSC enforcement, he said.

“I wouldn’t take my guard down,” Grunblatt warned. A lot of investigations are sparked by a seemingly random tip, and there is “no sense of predictability,” he said.

Stock also cautioned employers to be wary of state-level enforcement of I-9 requirements, as well as the potential to lose government contracts—and even some private ones.

Supreme Court Action. The U.S. Supreme Court’s Jan. 19 announcement that it will hear the case over the Obama administration’s deferred action programs has the potential to add even more to the mix of executive actions being implemented this year.

Stock said he believes a “narrow majority” of the court will uphold the programs as part of the president’s authority to prioritize the removal of some immigrants but not others. At the very least, he said, the justices likely will overturn the decision by the U.S. Court of Appeals for the Fifth Circuit that the states have standing to challenge the programs (*Texas v. United States*, 2015 BL 372610, 5th Cir., No. 15-40238, 11/9/15).

“We will be ready” to implement both the deferred action for parents of Americans and lawful permanent residents program and expanded deferred action for childhood arrivals program if and when the Supreme Court rules in the administration’s favor, Rodríguez told Bloomberg BNA.

“There was a lot of infrastructure in place that hasn’t gone anywhere” despite a federal judge halting implementation of the programs in February 2015, he said, stressing that the USCIS complied with the order and stopped “any element” of preparation.

Although the USCIS won’t start accepting applications the day after a favorable Supreme Court decision, “we will move with all deliberate speed” to get the programs up and running, Rodríguez said. “I am very confident” that they will be in place before the end of the Obama administration, assuming the court finds for the government, he said.

Other USCIS Initiatives. Along the same lines, Rodríguez said the USCIS has “made progress” on issuing timely employment authorization documents to immigrants applying for DACA renewal. “There is no backlog right now in DACA-related EAD processing,” he told Bloomberg BNA.

“We’ve taken a number of affirmative steps to make sure the process works,” Rodríguez said. The steps include sending notices about renewal sooner and accelerating the time when renewal applications are first reviewed so that there is more time to address any issues that arise. The USCIS also continues to encourage DACA recipients to file their renewal applications between 120 and 150 days prior to expiration of their current DACA periods and EADs, he added.

“We still want people to both renew and enroll,” Rodríguez said, pointing out that about 90,000 immigrants age into the DACA program each year.

Rodríguez also said the USCIS is continuing its transformation from a paper-based system to an electronic one, with three “big” forms expected to be available on the agency’s Electronic Immigration System this year: the applications for naturalization, temporary protected status and deferred action, including DACA.

Currently the USCIS has about 16 percent of its workload on ELIS, he said. Adding those three applications will bring it up to about 30 percent.

He also said a “handful” of draft request-for-evidence templates are “about to come out very soon,” although he declined to go into detail as to which areas they will cover. The drafts are part of the USCIS’s RFE Project, which aims to produce templates that are clear and concise, consistent, relevant for the visa classification being adjudicated and adaptable to the facts and needs of individual cases.

EB-5 Legislation Possible. “The thing that is always lurking in the background” is that “none of what we’re talking about is a substitute for immigration reform,” Rodríguez told Bloomberg BNA. We need to “keep our eye on that ball long-term,” he said.

Rodríguez emphasized his four priorities for the USCIS: implementing the president’s executive action; managing refugee flows to maximize humanitarian benefits and protect national security; continuing to modernize the agency from a technological and business standpoint; and maintaining customer service and stakeholder engagement.

For many of the issues addressed in those priorities, “the actual, real, smart solution is legislative reform,” he told Bloomberg BNA.

In the absence of a comprehensive overhaul, Grunblatt said there “probably will be some legislation” related to the EB-5 immigrant investor program. There has been bipartisan, bicameral agreement on certain changes to the regional center program—the primary vehicle for EB-5 investment—but the changes ultimately weren’t included in omnibus spending legislation funding the government through the end of fiscal year 2016.

The EB-5 program provides a green card to immigrants who invest \$1 million—or \$500,000 in a rural or high-unemployment area, known as a “targeted employment area”—in a new commercial enterprise that creates at least 10 U.S. jobs. The regional center program allows immigrants to pool their investments and count indirect job creation toward the visa requirements.

Stock told Bloomberg BNA that the likelihood of EB-5 legislation “comes down to whether the industry can come to a unified position on a number of key issues,” including whether investments should be funneled into rural areas, whether visas should be allocated among different types of projects and how to define the term “targeted employment area.”

He said any changes probably will be “noncontroversial,” considering that they will be tied to another government spending measure.

Some State-Level Activity Possible. Ann Morse, program director for the National Conference of State Legislatures’ Immigrant Policy Project, told Bloomberg BNA the “trend line” for state legislation in areas such as driver’s licenses, the E-Verify electronic employment eligibility verification system and health care “will continue” in 2016.

“We do see a number of bills each year that include the E-Verify piece,” Morse said, but she is skeptical that states that haven’t already enacted such laws will do so now. Rather, E-Verify “will continue to be an area of interest” in the 22 states that already have a law on the books, Morse said Jan. 12.

For example, she said, in 2015 North Carolina added private sector employers to those required to use the system, supplementing a law that required its use in the public sector. Missouri is poised to do the same in 2016, she said.

The “new trends” in state legislation relate to “this big fight with the federal government” over Syrian refugee resettlement and so-called “sanctuary cities”—where local law enforcement won’t turn over informa-

tion to federal immigration authorities, Morse said. However, legislation aimed at refugees likely won’t “get much traction,” she said.

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