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New Guidance in the Foreign Affairs Manual May Add Challenges to Visa Issuance at US Consular Posts Abroad

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In August 2017, the U.S. Department of State made several revisions to the Foreign Affairs Manual (FAM) that are a direct result of the "Buy American and Hire American" Executive Order (EO) 13788, which the president signed on April 18, 2017. The FAM is the authoritative source for U.S. Department of State (DOS) policies and procedures and provides instructional guidance to U.S. Consular officers when administering the issuance of U.S. visas.

The EO contains directives that seek to help increase both salaries and the number of U.S. workers who are hired. Section 2(b) of the EO, for example, states that "it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad." In addition, section 5(a) directs several government agencies such as the DOS, Department of Homeland Security, and Department of Labor, "to propose new rules and issue new

guidance . . . to protect the interests of United States workers in the administration of our immigration system including through the prevention of fraud or abuse."

Revisions to the FAM

Nonimmigrant Visa Categories: E-1, E-2, H-1B, L-1, O-1, P

Several nonimmigrant visas categories have felt the impact of the Buy American and Hire American EO. These visa categories are:

- E-1 (Treaty Traders) and E-2 (Treaty Investors)
- H-1B (Professional Workers and H-3 Trainees)
- L-1 (Intracompany Transferees)
- O-1 (Aliens of Extraordinary Ability or Achievement)
- P (Athletes, Entertainers, and Artists)

Volume 9, Chapter 402 of the FAM now specifically cites EO 13788 in each of the subsections of these nonimmigrant visa classifications. The new language reiterates the protection of U.S. workers "in the administration of our immigration system, including through the prevention of fraud or abuse" and instructs consular officers to adjudicate cases under each of these visa categories "with this spirit in mind."

While this new guidance doesn't provide any additional insight or explicit instructions to a consular officer for adjudicating an application for the above visa categories, the underlying intent appears to be clear: Consular officers should apply a stricter interpretation of the rules governing each of the visa categories. As such, employers should anticipate that their employees who travel abroad to apply for a visa at a U.S. consular post abroad will likely face a more rigorous adjudication and higher level of scrutiny of their visa applications. As a precaution, employers may want to strategize with their employees well in advance of the visa appointments to prepare for any negative outcomes and to have a strategy in place in the event of a denial.

Nonimmigrant Visa Categories: F-1 Student Visas

The FAM has also been updated to reflect additional language in the chapter concerning F-1 student visas, another nonimmigrant visa classification that has recently been impacted by the EO. The new language expands guidance on the "foreign residence" requirement for F-1 visa applicants by instructing consular officers as follows:

If you are not satisfied that the applicant's present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b). To evaluate this, you should assess the applicant's current plans following completion of his or her study or OPT. The hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application if you are satisfied that the applicant's

present intent is to depart at the conclusion of his or her study or OPT.

With this additional guidance, foreign students should expect an increased level of scrutiny from U.S. consular officers when applying for their F-1 student visas. The guidance appears to give officers even more discretionary power to deny a student's visa application simply because an officer was not "satisfied" with the applicant's evidence. Generally, an applicant for a student visa needs to provide evidence that he or she has a residence abroad that the student has no intention of abandoning and that he or she intends to depart the United States upon completion of his or her studies and/or obtaining a degree. It is therefore more critical than ever that students present persuasive evidence to show their present intent is to depart the United States at the end of their U.S. coursework. This evidence can take the form of proof of the ownership of his or her home abroad (even if the name of the student's parent is on the document showing ownership), bank account statements, and letters and/or affidavits from immediate family members (or even employers abroad) verifying the applicant's intention to return to his or her home country upon completion of a degree.

While consular officers are instructed to assess only the current plans of the student at the time of the student has applied for a visa and to not consider the future possibility of that intent changing, the new guidance will have a deleterious effect in other ways. For example, some applicants who already hold F-1 student status but who have H-1B petitions submitted and pending with the USCIS on their behalf may face an uphill battle in applying for a renewed F-1 visa. In such instances, if a consular officer asks the student whether he or she intends to depart the United States upon completion of his or her studies, the applicant will truthfully need to advise of his or her pending H-1B petition with USCIS. This information in all likelihood will lead to the consulate's denial of the student's F-1 visa application and the applicant will need to remain outside the United States until he or she is able to apply for an H-1B visa. To avoid having one's F-1 visa application denied, it would, therefore, be in the student's interest to not leave the United States at all until and unless the H-1B petition is approved by USCIS, and then apply for the H-1B visa at the consulate abroad at the appropriate time. However, this may not be possible; for example, if there is a family emergency abroad.

Conclusion

The revisions made to the various nonimmigrant visa classifications in the FAM do not substantially alter adjudication guidance to consular officers. However, the revisions appear to instruct officers to apply a more rigorous (and, arguably, protectionist) approach to determining whether an applicant meets the requirements of the visa category in question. For the work visa classifications (E, L, O, P, and H), employers should be aware that their employees (or potential employees) may encounter increased scrutiny at the visa interview and prepare for any setbacks accordingly. Applicants seeking student visas should seek out resources from their school's offices for international students to prepare accordingly. Student visa applicants may also want to communicate with their prospective H-1B employer (if applicable to their situations) about alternate arrangements in the event that the consulate abroad denies their visa applications.