ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

This sixth issue of *The Globe* for this current ISBA year includes two authors that our readers are quite familiar with, another past contributor and a first-time author.

Patrick M. Kinnally currently serves as Vice-Chair of the International and Immigration Law Section Council and is a frequent contributor to *The Globe.* In this issue he has provided us with his article, "Child Abuse: Is It a Removable Offense?" In the past year, Pat has also contributed the following articles: "On Their Own: How We Can Help Immigrant Children Find a Way"; and "Conditional Residency and Immigration Family Law Cases: Who Has the Burden of Proof?"

Florian S. Jörg, with the firm of Bratschi, Wiederkehr & Buob, has provided us with another update on Swiss business law. His column touches on the implementation of the Financial Action Task Force recommendations for revisions in the company laws and International Double Taxation Agreements.

Ahmad Al Dajani is a student at The John Marshall Law School. His article, "The Montreal Convention Governs All Claims on Board an International Flight" is his first submission for *The Globe.*

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Message from the Chair

BY TEJAS SHAH

Welcome to another issue of our newsletter! This is an exciting and important time in the world of international and immigration law. The Department of Homeland Security has continued its steady march towards modernizing the U.S. immigration system through executive actions, including the recent publication of a new memorandum on portability under AC21 and, very significantly, the publication of a final rule extending the additional Optional Practical Training period for international F-1 STEM field graduates in the United States to 24 months. This rule becomes effective on May 10, 2016. Meanwhile, immigration practitioners are in the midst of preparing H-1B applications so they can be filed during the first week of April and, as has been the case for several years, we anticipate that far more applications will be filed than the available quota of 65,000 visas (with an additional 20,000 for U.S. Masters and advanced degree holders). The absurdity of a lottery system is a reminder, once again, of the urgent necessity for modernizing and reforming our immigration laws. Meanwhile, our Presidential political debates have been shaped by discussions about border security, programs providing work authorization to the undocumented

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Editor's comments

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As editor of *The Globe*, I wish to specifically thank Tejas Shah, the current Chair of the International and Immigration Law Section Council for providing regular updates for each issue of *The Globe,* as well as recruiting other authors, including Songhee Sohn, whose article, "DHS Publishes New STEM OPT Rule with effective date of May 10, 2016" appears in this issue.

A recent article in *Crane's Chicago Business* by Greg Hinz, "Here's How Important Exports Are to Chicago's Economy" pulled information from a recent report of the Chicago Metropolitan Agency for Planning, which pointed out that exports, "lately have been growing here at 12% a year…since 2009 slightly above the national rate of 11%, with the region ranking in the top 5 in 13 of the 21 major manufacturing sectors." The article also referred to total exports in this area totaled $42.5 billion in 2014.

With that type of economic impact, international trade issues and the resulting international legal questions should be of major interest to every attorney in the Illinois State Bar Association.

As always, thank you to all of our contributors.

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Message from the Chair

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(which will be at issue when the Supreme Court issues an opinion in *Texas v. USA* this summer), and the admission of refugees and asylum seekers to the United States. The recent tragic and horrific terrorist attack in Brussels will surely add to the local and national debate over balancing our obligations under international human rights conventions and refugee law with our national security considerations.

Our section council continues to remain active on international and immigration law issues impacting us locally. We continue our efforts to educate the local law enforcement and judicial community about the new Illinois consular notification law that took effect earlier this year. Stay tuned for more information about an online educational program on this topic. We are working with local representatives of the diplomatic community to arrange visits to the criminal courts and the civil court systems so that they can better understand the rights and responsibilities of foreign nationals in our local court systems. We are also working on offering additional programming to members, including a CLE focusing on the impact of affidavits of support (required for many immigrant visa applications) on spousal obligations in domestic relations proceedings and a separate CLE focusing on moving people and goods across U.S. borders. Our Section Council also remains committed to expressing its voice on issues pertinent to our members; we submitted a comment describing the negative consequences of a proposed change to DHS regulations that establish a mandatory 90-day period for adjudicating requests for employment authorization filed by foreign nationals.

Lastly, I'd like to remind our members that our section council offers important tools to benefit your practice. Our listserv includes several new and experienced immigration and international law practitioners, and it is a tool for members to ask practice questions and benefit from our collective pool of knowledge.

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Child abuse: Is it a removable offense?

BY PATRICK M. KINNALLY

Safeguarding our children from abuse and harm by others should be at the apogee of our legal system. And, for the most part it is. Child abandonment (720 ILCS 5/12-21.50), as well as endangering the life or health of a child are crimes in Illinois (720 ILCS 5/12-21.6). Child abuse is broadly defined to include: inflicting, causing or allowing or creating a substantial risk of physical injury, other than by accidental means, causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function, or committing or allowing to be committed any sex offence, torture, excessive corporal punishment, female genital mutilation, or giving a child access to controlled substances. (See, generally, 325 ILCS 5/3). It arises in civil proceedings as well as criminal venues. It is a topic that has been left unsaid. In word, it is ugly.

Yet, sometimes in the rush to judgment to protect our most vulnerable, (See, *Matter of Soram* (BIA 2010) 25 I&N Dec 378, 382, fn 2 (*Soram*) the objective facts get overlooked, misapplied or forgotten. Of course, this spills over into the immigration arena since "crimes against children" (8 USC 1227 (a)(2)(A)-(F) can make an alien not only ineligible for discretionary relief from deportation but deportable upon conviction or the State Law offense. [See, *Ibarra v. Holder* (10th Cir. 2013) 736 F. 3d 903; (*Ibarra*) and compare with *Florez v. Holder* 779 F. 3d 207 (2d Cir. 2015)(*Florez*).

Too, context as well as historical perspective cannot be ignored. Corporal punishment of children just decades ago was common place. It has occurred in American homes as a part of parental authority. It is still a current practice. For example:

***

> Minnesota Vikings star running back Adrian Peterson was indicted on charges of "injury to a child" for striking his 4-year-old son with a tree branch — what many African-Americans would call a whipping with a "switch." Beard, "Don't Rush to Judge Parents Who Use a Switch." (*Capital Times* 9/25/14).
>
> Peterson cooperated with police, saying that he'd disciplined his son with a "whooping" and, when the event happened he texted the child's mother, who lives in Minnesota, saying he felt bad for overdoing it. Beard, "Don't Rush to Judge Parents Who Use a Switch". (*Capital Times* 9/25/14).
>
> By way of an initial defense, Peterson's attorney issued a public statement stating that the former league MVP is a loving father who merely disciplined his son by using an approach that had been administered to him as a child. And while, clearly, no one condones child abuse, if Peterson's statements are to be believed, he seems to love his child. But parenting practices vary widely, and his are being judged by a media and public not known for being skilled in analyzing issues complicated by race, gender, culture or potential implicit (unconscious) racial bias, which most Americans have. Beard, "Don't Rush to Judge Parents Who Use a Switch". (*Capital Times* 9/25/14) (*Beard*).

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These all come into play when determining whether Peterson's actions arguably went beyond community standards for disciplining his child. (See also, Darcy, *The Plain Dealer* (2014), "Adrian Peterson Whips Open Corporal Punishment Debate" (2014)

Almost all American parents have used corporal punishment to some degree. In 2012, 77 percent of men and 64 percent of women reported that they believed "a good, hard spanking" was sometimes necessary. In general, the parents of boys or black children, Southerners, younger and poorer moms, and evangelical and conservative Protestants are more likely to spank. (*Beard*) Moreover, corporal punishment of minors is commonplace throughout the world (See, *www.corpum.com.archives/2015*).

If Adrian Peterson had been an alien, he may have been subject to deportation for what he did. Did Congress intend such a result in federal immigration proceedings? Let's see.

Condoning excessive corporal punishment is not acceptable. The problem is, how do our laws—and which ones, federal or state statutes—tell us when such discipline or abuse abrogates the line in the area of immigration law.

Elia Ibarra (Elia) came to the United States in 1985. She was four years old. Her father was a lawful permanent resident. He never became a United States citizen. She never became a lawful resident. All of her seven children are United States citizens. In 2004 she pled guilty to "child abuse-negligence-no injury," under a Colorado statute. The records seemed to show she left her children at home alone while she was working. None were injured. (*Ibarra*).

In 2008 the Department of Homeland Security (DHS) commenced removal proceedings against Elia. She admitted she was deportable, but asked for a discretionary remedy, called cancellation of removal (8 USC 1229 b (b)(1). Although she met the criteria for such relief, an administrative, immigration judge concluded she was categorically ineligible because her Colorado conviction was a crime of "child abuse" under federal immigration law (8 USC 1227(a)(2)(E)(i). The Board of Immigration Appeals (BIA) affirmed. Five years after the removal proceeding began the Circuit Court of Appeals declared Elia was eligible for such relief (*Ibarra*).

The court was asked to define what

Congress meant when it said the following provision was a deportable offense.

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> (E)(I) Domestic violence, stalking, and child abuse. Any alien who at any time after admission, is convicted of a crime of domestic violence, stalking, or a crime of child abuse, child neglect or child abandonment, is deportable. 8 USC 1227 (a)(2)(E)(I)

***

The court held the BIA got it wrong since its definition was impermissibly broad when it applied to ciminally negligent omissions where no injury results to the child. (See, *Soram*, *supra*) and *Matter of Velazquez-Herrera* 24 I&N Dec 503 (BIA 2008). It found that a crime requires an abuser to be criminally culpable not merely negligent.

Employing the categorical approach to try and discern what "child abuse" denoted under federal law, The Circuit Court of Appeals, found Congress did not provide a definition of "crime of child abuse, child neglect or abandonment." (*Ibarra*) Thereafter, the court examined the criminal laws of all fifty states and the District of Columbia at the time the Congressional law was passed (1996). At that time, the court found the majority of states did not criminalize endangering children or exposing them to a risk of harm absent injury if there was not a culpable mental state or criminal negligence. It concluded Elia's conviction was of the latter ilk and not a deportable offense. It reversed the Board of Immigration Appeals. The *Ibarra* opinion is well researched and includes five appendices. Take a look at it. (Compare, *Ramirez v. Lynch* 810 F.3d 1127 (9th Cir. 2016)).

Undeterred, the Board of Immigration Appeals refuses to follow *Ibarra* adhering to its strained construction of what constitutes "child abuse" under the federal removal provision that does not say what that term means. *Matter of Mendoza Osorio*, 26 I&N Dec (BIA 2016) citing *Florez v. Holder* 779 F.3d 207 (2015)(pet. for cert.filed *sub nom Florez v. Lynch*, No. 15-590 2015 WL 677 4583).

Nilfor Florez was a lawful permanent resident. Twice he was convicted of child endangerment under New York Law. The latter related to a Driving Under the Influence when his two children were in the automobile he was operating. This statute, which was the predicate for his conviction and removal charge, stated an offense occurs where a person, "knowingly act[ing] in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than 17 years old" (N.Y. Penal Law Sec. 260.10(1)(NYPL). The immigration court held this definition fit the generic federal definition of a "crime of child abuse" and ordered Florez removed. The Second Circuit Court of Appeals affirmed (779 F.3d 207 (2nd Cir. 2015)).

This court held that Florez's conviction under this New York law was categorically a crime of child abuse." To get there, it deferred to the administrative legal opinion of the BIA, since it was charged with interpretation of the Immigration and Nationality Act (INA) It found the federal phrase "a crime of child abuse" to be ambiguous, but yielded to the BIA in its adjudicatory role to establish whether a state criminal law met the federal definition. *Chevron U.S.A. Inc. vs. Natural Res. Defense Council Inc.* 467 U.S. 837 (1984) The court held that the BIA's decision was based upon reason even if the court would have read the statute differently. (Florez).

Florez is a curious precedent. First, the BIA does not have any special expertise interpreting state criminal laws. It may have some ability to interpret the INA but not the NYPL, or any state law for that matter. Finally, the *Florez* court ceded to the BIA its "reasonable" interpretation of state statutes in determining that the NYPL statute met the federal definition of "crime of child abuse." Respectfully, this was a mistake since *Florez* in relying on *Soram* largely relied on what constituted "child abuse" in civil contexts, not criminal ones. [*Ibarra*] This distinction is significant because civil infractions do not require a *mens rea* or culpable state of mind which is required, in this context, for a crime to have occurred.

More importantly the United States Supreme Court has stated clearly that in interpreting similar statutes with generic federal "crimes" the referent point is how the relevant term is used in the criminal law of most states. *Taylor v. United States* 495 U.S. 575 (1990) This make a great deal of common sense since, the federal reference, "a crime of child abuse" has no definition whatsoever.

Unfortunately, child abuse, as well as what is perceived as child abuse, does not provide a demarcation line that is clear. What it is to one person, it may not be to another. Corporal punishment is condoned throughout the world. When it becomes excessive, it crosses the line into child abuse. Again, the boundary's location is not easy to decipher. Our federal government failed to do so in telling decision makers what constitutes "crimes against children." Hopefully, our United States Supreme Court will take up this issue and provide some direction in an area where clear guidance is paramount, for decision makers, parents and those whom need it most, our children. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, currently serving as Vice-Chair of the International and Immigration Law Section Council, can be reached at Kinnally, Flaherty, Krentz & Loran, PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

Updates in Swiss business law

BY FLORIAN S JÖRG

In the period from 1 July 2015 to 1 February 2016, the following significant changes have become effective from the perspective of Swiss business law:

1. Second part of the implementation of the FATF recommendation revised in 2012 for company law

The FATF (Financial Action Task Force; French: Groupe d'action financière, GAFI) revised its recommendations concerning money laundering and the fight against terrorism in 2012. The Federal Act on the Implementation of the Recommendations entered partially into force as early as 1 July 2015; the second part of the implementation now became effective on 1 January 2016:

- Amendment, Civil Code: In the interest of increased transparency, church trusts and family trusts must now also be listed in the commercial register.
- Amendment, Federal Act on Debt Collection and Bankruptcy: In the case of auctions, amounts in excess of CHF 100,000 must no longer be paid to the Debt Collection Office in cash.
- Amendment, Criminal Code: In future, not only a criminal offence but also a qualified tax offence can be a predicate offence for money laundering, provided that the amount of evaded tax exceeds CHF 300,000 per fiscal year.
- Amendment, Federal Act on Administrative Criminal Law: In order to correctly implement the FATF recommendations in the field of indirect taxation, administrative criminal law now no longer only deems customs smuggling, but also qualified fraud in the field of withholding tax and stamp duties to be a predicate offence for money laundering.
- Amendment, Anti-Money Laundering Act: The scope of application of the AMLA has been extended.

In future, it will no longer only be financial intermediaries who are subject to the provisions of the AMLA but also any person who is involved in commercial trade. This is in connection with the new provision concerning traders' duty of due diligence, which is applicable whenever a cash payment in excess of CHF 100,000 is made in a commercial transaction. In addition, the AMLA now provides that financial intermediaries must take appropriate measures to establish which private individuals control a majority of a legal entity. Furthermore, two new categories of politically exposed persons (PEPs) are created (Swiss PEPs and PEPs in international organisations), and the higher due diligence standards arising in connection with PEPs will in future be regulated at statutory level.

2. Entry into force of the Financial Market Infrastructure Act (FMIA)

The newly created Financial Market Infrastructure Act (FMIA) entered into force on 1 January 2016.

This act subsumes provisions concerning the organisation and operation of financial market infrastructures (such as stock exchanges and other trading systems) that had previously been spread across a variety of statutes. On the one hand, the FMIA enacts supervisory provisions for financial market infrastructures; on the other hand, it also provides norms for the so-called market behaviour rules which are applicable in connection with the trade of securities and derivatives. Besides the provisions concerning the disclosure of stakes, public acquisition offers, insider trading and market manipulation, which were previously enshrined in the Stock Exchange Act, the new market behaviour rules also include provisions concerning trade in derivatives which satisfy international standards.

The newly regulated central obligations in derivatives trading are these: clearing via a central counterparty (Art. 97-103 FMIA), reporting to a trade repository (Arts. 104-106 FMIA), the obligation to increase capital resources (obligation of risk mitigation, Arts. 107-111 FMIA) and the obligation to trade standardised derivatives through stock exchanges or other electronic platforms (Art. 112-115 FMIA). In contrast to EU regulations, however, exemptions were created for minor contracting parties in the financial sector. In addition, the problems caused by the so-called "dark pools" were tackled with the new transparency provisions for multilateral and organised trading systems, and the legislator introduced position limits for commodity derivatives at the very last minute.

3. Formal requirements for claims to be submitted by creditors in debt collection and bankruptcy proceedings

The FDJP Ordinance on Claims to be Submitted by Creditors in Debt Collection and Bankruptcy Proceedings became effective on 1 January 2016. In a debt collection request, a maximum of ten claims can be asserted (Art. 2). 640 characters are available for the description of the main claim, 80 characters for each of the subsequent claims (Art. 3). If a claim fails to satisfy these requirements in spite of an opportunity for correction, it will be refused (Art. 5).

4. Revision of lump-sum taxation in connection with the direct federal tax

The Federal Act on Lump-Sum Taxation provides for an amendment to Art. 14 of the Federal Act on the Direct Federal Tax; this entered into force on 1 January 2016. In future, lump-sum taxation will only be possible if both spouses satisfy the criteria. In addition, the legislator increased the minimum value for the taxable base to CHF 400,000 and the housing cost limit to seven times the rentable value. The legislator made clear that the worldwide expenses serve as a taxable base.

For people who are already granted lump-sum taxation, a transitional period of five years has been provided for (Art. 205d Federal Act on the Direct Federal Tax).

5. Revision of the Consumer Credit Act (CCA): ban on aggressive advertising

In the field of consumer credits, aggressive advertising has been prohibited.

The term "aggressive advertising" is intended to be defined in an industrial sector agreement under private law. Whoever infringes the prohibition of aggressive advertising with intent will be sanctioned with a fine of up to CHF 100,000. Furthermore, the revision of the CCA resulted in a limitation of exemptions from its scope of application in order to tackle the problems of express loans. Now, only loans with a repayment window of up to three months are exempt. In addition, the legislator tightened up the credit rating assessment procedure. Also, the Federal Council decided to adjust the mechanism for the calculation of the admissible maximum interest rate as from 16 July 2016 and to tie it to the Libor, with the consequence that the maximum interest rate is expected to be lowered to 10% for cash loans and to 12% for overdraft loans.

6. Extension of the right of revocation for telephone sales

Since 1 January 2016, the right of revocation of door-to-door sales and similar contracts stipulated in Arts. 40a ff. of the Code of Obligations has also been applicable to telephone sales and sales conducted through comparable means of simultaneous oral telecommunication. Furthermore, the revocation period was extended from 7 to 14 days.

7. International double taxation agreements

In the period under review, double taxation agreements with the following countries entered into force for the first time or in an amended version: Norway, Argentina, Iceland, Cyprus, Estonia and Uzbekistan. In addition, tax information agreements with Andorra, Greenland, San Marino and the Seychelles obtained legal force. ■

Dr. Florian S. Joerg, MCJ, is a partner in the Zurich office of Bratschi Wiederkehr & Buob Ltd., one of the largest independent Swiss law firms. He graduated from the University of St. Gallen Law School and obtained a postgraduate degree from NYU Law. His areas of practice include corporate law, M&A and banking law. Florian advises mainly both foreign and domestic companies and banks. He is also a lecturer for private law at the University of St. Gallen Law School. Further, Florian is admitted to the Swiss bars and to the bar in New York (not practising) and he is a member of IBA, ABA, IPBA and NYSBA. Currently, he is also the co-chair of ABA SIL's M&A and Joint Venture Committee, a former co-chair of the Europe Committee and a Fellow of the American Bar Foundation. For questions please contact Florian S. Jörg, +41 58 258 10 00, florian.joerg@bratschi-law.ch.

The Montreal Convention governs all claims on board an international flight—Even complaints about passengers who refuse to turn off their cell phones

BY AHMAD AL DAJANI

The Montreal Convention,1 which replaced the Warsaw Convention, controls all personal injury actions where the harm occurs on board an international flight, or while embarking or disembarking from an international flight. The Montreal Convention limits liability of airline carriers to situations where an "accident" causes a harm which results in bodily injury. The Montreal Convention preempts all state law claims falling within the scope of the convention. *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 171 (1999).

A unique application of the Montreal Convention arose when a passenger on board an international flight refused to turn off his cellphone. The Passenger, Sam El-Zoobi, had boarded an international flight to Beijing, China, from Washington D.C. A flight attendant told El-Zoobi to turn off his cell phone. He was dismissive and said that he didn't have to turn his phone off because he simply put it in airplane mode. When the co-pilot came out to speak with him, El-Zoobi told the co-pilot that he worked for the Federal Aviation Administration. An argument ensued, and El-Zoobi eventually turned his phone off. The flight attendant then asked El-Zoobi to produce his FAA identification card, but El-Zoobi couldn't and instead just gave his work phone number.

After the flight landed in Beijing, the flight attendant sent a complaint about El-Zoobi to the FAA Web site. The trial court decision states that there was some dispute about whether this happened the day after the flight or ten days later.[2] The FAA sent El-Zoobi "a Notice of Proposed Civil Penalty" in the amount of $6,000 but it later withdrew the notice. Sometime later, El-Zoobi was denied a job promotion.

Because he did not get the job promotion, El-Zoobi sued United Airlines in Cook County Circuit Court for tortious interference with a business relationship and for intentional infliction of emotional distress. United Airlines moved to dismiss the action, asserting that the Montreal Convention governs El-Zoobi's claims and that he failed to state a cause of action under the convention. The circuit court granted the motion to dismiss and El-Zoobi appealed.

On appeal, El-Zoobi argued that the Montreal Convention did not apply because his injury (the failure to get a job promotion) was not caused anything happening during the flight, but because the flight attendant filed a complaint with the FAA. United Airlines responded that the complaint was based upon El-Zoobi's actions during the flight, therefore, the Montreal Convention does apply. The court agreed with the airline and affirmed the dismissal of his action.[3]

The Illinois Appellate Court found that

"but-for" El-Zoobi's own conduct on the plane, his "injury" from the complaint filed against him would not have occurred. The court found that the altercation on the plane led the flight attendant to file her complaint, and therefore, El-Zoobi's actions on the plane could not be separated from the flight attendant's complaint. As any alleged "injury" therefore took place aboard the plane, the Montreal Convention applied and displaced any common law claims for tortious interference with business relationships or for intentional infliction of emotional distress. The court could have also found that a lost job promotion was not the kind of in-flight "injury" covered by the Montreal Convention.

Lawyers engaged in any litigation involving international flights should remember that the Montreal Convention is the exclusive remedy for any claims arising during an international flight or in the process of embarking or disembarking an international flight. Lawyers and their clients should also remember to turn off their cell phones and obey safety instructions from the flight attendant. ■

Ahmad Al Dajani is a student at The John Marshall Law School, set to graduate in May, 2018. He received his undergraduate degree in Politics and Government at North Park University in Chicago, Illinois, followed by a Master of Sciences in Conflict Prevention and Peacebuilding at Durham University in the United Kingdom. Mr. Al Dajani hopes to build his career in international law. He may be reached by email at ahmad.m.aldajani@outlook.com.

1. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309 (the "Montreal Convention").

2. Because the flight had crossed the international dateline, a complaint filed the next day would actually have been filed on the same day as the flight arrived.

3. *El-Zoobi v. United Airlines, Inc.* 2016 IL App (1st) 150813.

DHS publishes new STEM OPT Rule with effective date of May 10, 2016

BY SONGHEE SOHN

On March 10, 2016, the Department of Homeland Security published the new STEM Optional Practical Training ("OPT") final rule in the Federal Register. The effective date of this new final rule is May 10, 2016, the date that the existing STEM OPT rule expires due to a federal court injunction. This rule applies to F-1 status foreign national students who are completing degree programs in certain designated Science, Technology, Engineering, and Mathematics (STEM) fields at a DOE-accredited and SEVP-certified U.S. educational institution. The rule governs the employment authorization these students can receive at the conclusion of their educational program and extends the employment authorization period beyond the initial 12-months that all F-1 students who complete a degree program in the United States receive.

As we describe below, this new rule makes far-reaching changes to the existing program and contains both opportunities and responsibilities for U.S. employers that employ recent foreign national graduates.

Summary of the new STEM OPT Rule

Most significantly, the STEM OPT extension will now allow for 24 months of employment authorization as opposed to the current 17 months.

Another very significant change is the creation of a new "Mentoring and Training Plan" obligation imposed on employers and employees, coupled with DHS' enhanced ability to verify the employer's compliance with OPT program requirements. We describe these changes in greater detail below:

- **Training and Mentoring Plan (Form I-983)**: Employers and foreign workers must create a Training and Mentoring Plan identifying learning objectives and a plan to achieve these objectives within the 24 month STEM OPT period. This training plan must address the following key points:
  - The employer has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity;
  - The student will not replace a full or part-time, temporary or permanent U.S. worker; AND
  - The opportunity will help the student achieve his or her training objectives;
- **Site visits**: DHS has extended its authority to conduct site visits to verify the employment of OPT workers and the employer's compliance with the training and mentoring plan requirements as represented by the employer in Form I-983. While DHS will normally provide 48-hour notice before conducting a site visit the agency reserves the right to conduct a visit without notice if "a complaint or other evidence of noncompliance with the STEM OPT extension regulations triggers the visit." This is an ominous sign for employers, who must treat their obligations as described in their Form I-983 with the utmost seriousness.
- **Reporting Requirements**: The student and employer must report annually on their compliance with the training plan. Additionally, a mid-point evaluation must also be provided during the first 12-month interval, and a final evaluation must be completed prior to the conclusion of the STEM OPT extension. This results in a total of four (4) evaluations that must be provided during the 24-month period, including the initial Form I-983.

However, some OPT practices remain

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DHS publishes new STEM OPT Rule

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unchanged from the existing rule:

- A U.S. employer must be **registered with E-Verify** to employ a foreign worker with a STEM OPT extension;
- The **"cap-gap"** will continue to provide an automatic extension of employment authorization and/or "duration of status" (D/S) through October 1 to a student if he/she is the beneficiary of a timely filed H-1B petition and change of status request that is pending with or approved by USCIS. The practical impact is that employers can continue to employ, through October 1 of any given year, a student whose OPT authorization expires between April 1 and October 1.

Analysis and Insights

On one hand, the new OPT STEM rule provides great opportunities to employers seeking to hire international STEM workers who have been educated at accredited and SEVP-certified U.S. educational institutions. On the other hand, the new rule significantly increases the regulation of employers hiring OPT STEM trainees. Due to the scope and significance of these regulations, and the upcoming May 10, 2016 deadline, we recommend that employers hiring international STEM workers quickly determine and develop a process for creating and maintaining the Mentoring and Training Program (Form I-983) and determine how to comply with new reporting requirements. Much like I-9 responsibilities, it is essential that individuals designated with the Form I-983 responsibility familiarize themselves with the form and the various reporting requirements. DHS has already published the Form I-983. The new final rule also provides a compelling reason for employers, who may have a need for international talent in STEM fields, to consider enrolling in E-Verify to benefit from this program.

On April 21st, 2016, Franczek Radelet is offering a complimentary program on the new OPT STEM rule featuring the Director of the International Student Services Office at the University of Illinois in Urbana Champaign, Mr. Martin McFarlane, and immigration counsel, Tejas Shah. ■

Songhee Sohn received her J.D. from Loyola University of Chicago School of Law, an M.S. from New York University and a B.S. in Industrial and Labor Relations from Cornell University. She served as an intern with the U.S. Attorney's Office, Northern District of Illinois and a Judicial Extern for the Honorable Mary Anne Mason in the Circuit Court of Cook County, Illinois and the Honorable Young B. Kim in the Northern District of Illinois. She may be reached by email at sws@franczek.com.