SOME YEAR-END THOUGHTS: CHANGES AND CONSISTENCIES IN IMMIGRATION LAW AND POLICY RELEVANT TO UNIVERSITIES AND ACADEMIC MEDICAL CENTERS

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As this year draws to a close, we are sending this piece to provide a snapshot of the current changes that have been instituted over this past period of time, particularly as they pertain to the academic community.

Immigration has unquestionably become a major, defining issue of the current Administration. In many areas of immigration law and policy, we are currently witnessing a more constricted attitude toward the admission of foreign nationals, the scope of their activities in the United States, and the consequences both toward them and their employers for violations of their immigration status. Indeed, we are currently seeing an unprecedented series of legal challenges to abrupt policy changes as aggrieved parties seek judicial intervention in response to the Administration's hardline approach and Congressional inaction.

It is a bit of a misnomer to assert that the academic community faces an entirely changed immigration situation. The current reality is far more nuanced, consisting of an unchanged basic structure in immigration law and policy to which has been added a wide range of new and largely constrictive initiatives that have created a great deal of uncertainty within the foreign student and scholar community.

In this environment, the academic community should be aware of the following:

- The basic laws and administrative structure remain largely intact in regard to high-skilled workers;
- On an operational level, we continue to receive favorable adjudications on petitions filed for a broad range of high-skilled workers performing research, clinical, and teaching duties within institutions and programs of higher education and training;
- However, we are seeing an unprecedented level of Requests for Evidence (RFE) and delays in adjudications – particularly in cases involving the exercise of discretion by immigration examiners (to wit: HHS waivers, outstanding professor and researcher cases, and extraordinary ability petitions); and
- Despite a logic that would put academic research figures and high-skilled workers in a separate analytical category for immigration policy purposes, there is growing concern the constrictive, enforcement-oriented attitudes now-prevalent under the current Administration will increasingly spread to the academic/academic medical community.

This memo flags a number of emerging (to varying extents) issues of immediate or potential concern to academic/academic medical institutions, including:

- New standards for determining inadmissibility based on public charge;
- Lengthening and cumbersome H-4 extension process and proposed elimination of spousal eligibility to obtain an Employment Authorization Document (EAD) while in H-4 status;
- Addressing the numerical country limitations that have resulted in major backlogs in the immigrant visa quota lines for natives of India and to a lesser extent, China;
- Ongoing legal protection to foreign nationals covered under the Deferred Action for Childhood Arrivals (DACA);
- compliance standards;
- Ongoing concerns regarding the impact of "extreme vetting" to the timely issuance of visas through U.S. Consulates;
- Restrictions disproportionately affecting thus far Chinese scientists related to foreign national involvement in certain research endeavors owing to concerns about national security (export licensing/tech data issue).

To be sure, this is an abbreviated list of the full panoply of immigration-related developments that are currently relevant to university institutions and academic medical centers. Over time, many of these issues may become ameliorated or, conversely, their scope and application might harden and widen. But the paper is intended to identify a number of issues that affect the immigration programs at academic institutions with the goal of facilitating the development of internal programs, culture, and attitudes responsive to these new initiatives.

FOCUS ON PUBLIC CHARGE

The "public charge" provisions of the Immigration and Nationality Act (INA) are not new. But what is of current concern to broad segments of the foreign national community – including patients coming for care and treatment to academic medical institutions – is the Administration's intention to expand the set of criteria that would render a foreign national inadmissible based on a concern that he/she may not be financially viable and as a result would utilize public assistance. (This memo does not deal with the steady erosion of public assistance programs available to foreign nationals.) At present, the Administration's attempts to enlarge the grounds of inadmissibility based on public charge are under court challenge and have, at least for now, been enjoined, but the potential impact of this proposal makes it advisable to understand its implications to institutions of higher education and academic medical centers, as well as to its foreign national community.

USCIS/DHS' Take on the Public Charge Rule

For purposes of determining inadmissibility, USCIS defines "public charge" as an "individual who is likely to become **primarily** dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or the institutionalization for long-term care at the Government's expense." (https://www.uscis.gov/greencard/public-charge)

Under INA Section 212(a)(4), an individual is inadmissible at the time of application for admission or adjustment of status, if they are likely at any time to become a public charge. The public charge rule does not apply in naturalization proceedings.

On October 10, 2018, the Department of Homeland Security issued a Notice of Proposed Rulemaking related to the codification of regulations governing the application of the above-referenced Public Charge rule. The Notice generated 266,000 public comments. The Final Rule was published on August 14, 2019, and a correction to the final rule was published on October 2, 2019.

Under the Final Rule, there are changes to the definitions of public charge and public benefits, which generally cast a wider net in terms of who might qualify as a public charge. More specifically, the Rule makes the following changes to finding of inadmissibility under the public charge definition:

- It makes nonimmigrants (including those in H-1B, O-1 or other work-authorized nonimmigrant statuses) who have received designated public benefits for more than 12 months within any 36-month period generally ineligible for a change of status or extension of stay;
- It gives consular officers reviewing nonimmigrant and immigrant visa applications at Embassies and Consulates abroad enhanced latitude to make a public charge determination to justify the denial of visas into the United States; and
- It imposes additional burdens on all foreign nationals, their employers and other stakeholders, in the form of additional public charge questions on relevant immigration forms.

U.S. Citizenship and Immigration Services (USCIS) website further clarifies that foreign nationals seeking an immigrant or nonimmigrant visa abroad, foreign nationals seeking admission into the United States on an immigrant or a nonimmigrant visa, and foreign nationals seeking to adjust their status to that of a lawful permanent resident within the United States are subject to the public charge ground of inadmissibility.

At present, owing to the public outcry and resulting Federal lawsuits filed, the implementation of the new Public Charge rule has been enjoined. As stated on USCIS' website:

> *Judges before U.S. District Courts for the Southern District of New York (PDF, 68 KB), Northern District of California (PDF, 888 KB), Eastern District of Washington (PDF, 631 KB), Northern District of Illinois (PDF, 137 KB), and District of Maryland (PDF, 498 KB) have ordered that DHS cannot implement and enforce the final rule on the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act. The court orders also postpone the effective date of the final rule until there is final resolution in the cases. Most of the injunctions are nationwide and prevent USCIS from implementing the rule anywhere in the United States.* (https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility)

It is unclear at this time whether the injunction of the Rule will hold, but due to the potential implications of the new rule on the academic community, we would like to outline certain relevant provisions and impacts below for your reference.

According to USCIS' website, determinations of inadmissibility under the public charge provisions will be based on a totality of the foreign national's circumstances, including:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status;
- Education and skills;
- Prospective immigration status;
- Expected period of admission; and
- Sufficient Form I-864, when required under section 212(a)(4)(C) or (D) of the INA.

Regarding the last bullet, in situations in which the foreign national may not in his/her own right be able to establish financial viability, the law in certain instances allows a foreign national to avoid inadmissibility under the public charge provisions through an Affidavit of Support provided under Section 213(A) of the Act that imposes certain financial and legal obligations on the Affidavit's executor. Obviously, an expansion of inadmissibility determinations based on public charge would, in turn, expand the burden to U.S. citizens to ensure that the foreign national does not avail himself/herself of public benefits – possibly even those benefits to which a foreign national may be entitled (largely medical and child oriented).

In all likelihood, the possibility of finding inadmissibility under the public charge provisions has had a chilling effect on the receptivity of many foreign nationals to file claims to government programs to which they are entitled (e.g., WIC claims are down significantly among foreign nationals).

Here are some examples of Cash Benefits, the receipt of which could lead to a public charge finding, according to USCIS' website:

- Any federal, state, local, or tribal cash assistance for income maintenance
- Supplemental Security Income (SSI)
- Temporary Assistance for Needy Families (TANF)
- Federal, state or local cash benefit programs for income maintenance (often called " General Assistance" in the state context, but which may exist under other names)
- Supplemental Nutrition Assistance Program (SNAP, or formerly called "Food Stamps")
- Section 8 Housing Assistance under the Housing Choice Voucher Program
- Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation)
- Public Housing under section 9 the Housing Act of 1937, 42 U.S.C. 1437 et seq.
- Federally funded Medicaid (with certain exclusions)

According to USCIS's website, non-cash or special purpose cash benefits that are not considered for public charge purposes include:

- The receipt of Medicaid for the treatment of an emergency medical condition;
- Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act;
- School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under state or local law;
- Medicaid benefits received by an alien under 21 years of age; or
- Medicaid benefits received by a woman during pregnancy and during the 60-day period beginning on the last day of the pregnancy.

According to USCIS, certain groups are exempt from public charge assessment or can apply for a waiver:

- Refugees
- Asylum applicants
- Refugees and asylees applying for adjustment to permanent resident status
- Amerasian Immigrants (for their initial admission)
- Individuals granted relief under the Cuban Adjustment Act (CAA)
- Individuals granted relief under the Nicaraguan and Central American Relief Act (NACARA)
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)
- Individuals applying for a T Visa

- Individuals applying for a U Visa
- Individuals who possess a T visa and are trying to become a permanent resident (get a Green Card)
- Individuals who possess a U visa and are trying to become a permanent resident (get a Green Card)
- Applicants for Temporary Protected Status (TPS)
- Certain applicants under the LIFE Act Provisions

As noted above, USCIS acknowledges it cannot implement and enforce the new rule on account of several lawsuits, which have effectively enjoined implementation of new rule.

The sections appearing above provide a general background to the current state of public charge inadmissibility determinations. What appears below are some comments on how these provisions, if implemented, might affect specific cohorts of the foreign national community, and the apparent impact the proposed rule has already had on the community.

How might the rule impact physicians, both clinicians and faculty members?

USCIS looks at a totality of the circumstances, including income, so it is unlikely USCIS would find a clinician or faculty member inadmissible as a public charge if that person is now working or will hold a clinical or faculty appointment at your institution.

Although ultimately it is unlikely that any member of the clinical or research faculty will be denied immigration benefits based on the new rule (unless the foreign national impermissibly used in the past a public benefit not available to nonimmigrants), if the new rule is implemented, applicants for nonimmigrant or immigrant visas abroad, applicants for extensions of or changes to nonimmigrant status in the United States and applicants for adjustment of status in the United States could face having to submit additional paperwork and respond to lengthy questions on the public charge issue when completing immigration forms.

Earlier in the year, USCIS released a supplementary questionnaire as part of the adjustment of status process to address the public charge issue. That questionnaire does not appear to be available to the public at this point due to the injunction. Based on the earlier release of the questionnaire, however, some practitioners are estimating that the proposed new immigration forms related to public charge questions could take lawyers and their clients an additional four hours of time to complete.

How might the rule impact Students and Postdoctoral Scholars?

Postdoctoral scholars and their families could face financial challenges that, in turn, could raise concerns regarding public charge inadmissibility. As pointed out by the Homewood Postdoctoral

Affairs department at Johns Hopkins University, benefits programs made available by the US government to aid low-income families living in the U.S. are not generally available to nonimmigrants on F or J status. And when a Postdoc applies for a non-immigrant visa at a U.S. Consulate or Embassy abroad in order to enter the United States, the foreign national must be able to document s/he has the means to support him/herself and any family members accompanying the Postdoc to the United States. (http://postdoc.jhu.edu/postdoc-info/international-postdocs/spousesfamilies/)

We are personally aware of instances in which Postdocs have availed themselves of certain programs of public assistance, such as housing assistance, that could lead to a determination of inadmissibility.

Administrators of public assistance programs do not always have the expertise to understand or assess eligibility based on immigration status and might grant a benefit even if it is not allowed, not understanding the potential impact one's acceptance of a benefit could have on a foreign national's immigration status.

Acceptance of public assistance can lead to a finding of inadmissibility under the "public charge" ground of inadmissibility, and a determination that someone is a "public charge" because he/she has accepted public assistance– could result in a denial of a visa or readmission into the United States following foreign travel. (http://postdoc.jhu.edu/postdoc-info/international-postdocs/spousesfamilies/) If the person is in the United States and trying to extend their status, the extension request could similarly be denied.

There are concerns the rule will hurt low-income graduating students and Postdoctoral scholars, and other employees as their incomes would become a factor when they apply to change or extend their visa status.

While a Postdoc's use of public assistance may have previously gone unnoticed or unadjudicated, DHS' implementation of the new rule and requirement that the nonimmigrant must complete new forms where public charge questions are specifically asked, could expose the individual to greater risk that his/her visa status will not be extended and/or that they will not be granted a green card in the United States.

How does public charge inadmissibility impact patients and patient care?

There are reports from health care networks and organizations that the proposed rule has had a chilling effect on patients seeking care out of fear that their use of heath care assistance programs will render them subject to public charge rule.

There are special concerns about pediatric patients, including that children will refrain from accessing preventative healthcare such as developmental screenings and vaccines or nutritional food programs that support early childhood development. (https://www.phoenixnewtimes.com/news/doctors-new-trump-immigration-rule-public-charge-health-migrants-11345058)

According to a press release from California Attorney General Anthony Becerra's office:

> *More than 2 million Medi-Cal beneficiaries have noncitizen status. These individuals will face the onerous task of determining whether this rule applies to them, and then deciding whether needed healthcare is worth risking their ability to adjust their immigration status.(https://oag.ca.gov/news/press-releases/attorney-general-becerra-trump-administration%E2%80%99s-public-charge-rule-attack)*

Under law, foreign nationals are eligible to seek certain public assistance programs, largely related to child care or medical coverage.

From information set forth by USCIS, it would appear:

- Someone's use of Medicaid appears to count only if used for institutionalized long-term care;
- Use of Medicaid and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services) would not appear to count;
- Use of CHIP cannot be considered; and
- Nutrition programs, including Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs are not considered.

However, USCIS' reassurances have been insufficient and there remains concern that even if enrollment in such programs is allowed, there will be negative immigration consequences for having accessed the programs and/or a finding of inadmissibility either through a misunderstanding of an individual's eligibility for such programs or through the inadvertent application of the rule to any type of recourse to public assistance programs. Regardless, the proposed rule seems to have had the effect of reducing patient access to medical treatment and healthcare.

Even if seemingly exempt from the proposed regulation, foreign nationals are apparently refraining from signing up their children for programs/ benefits because of lack of understanding

about the regulation and fear that new, additional rules regarding children will be implemented and applied retroactively.

There is concern that delayed access to care or lessened access to care could result in an uptick in emergency room visits, a very expensive way to access the healthcare system.

As included in a Joint Statement from Frontline Physicians demanding that the rule be rescinded:

> *Our organizations, which represent more than 597,000 physicians and medical students, are united in expressing our deep concern and opposition to the final public charge regulation issued by the Department of Homeland Security (DHS). The regulation upends decades of settled policy with regard to public charge and makes it much more likely that lawfully present immigrants may not seek health care, whether preventive services or treatment, when faced with illness, since doing so could be used to deny green cards or U.S. visas, or even lead to deportations.*
>
> *Rather than face that threat, impacted patients currently served by our members almost certainly will avoid needed care from their trusted physicians, jeopardizing their own health and that of their communities. Many of our members have already witnessed this chilling effect among their own patient populations, with patients avoiding health services and programs out of fear. The public charge final rule not only threatens our patients' health, but as this deferred care leads to more complex medical and public health challenges, it will also significantly increase costs to the health care system and U.S. taxpayers. Most important, the order puts a governmental barrier between physicians and patients and stands in stark contrast to the mission our organizations share: ensuring meaningful access to health care for patients in need.*
>
> *We urge DHS to rescind the public charge final rule and to work with us to ensure broader access, improved quality, and more affordable care for our patients*. (https://www.aafp.org/media-center/releases-statements/all/2019/joint-statement-of-americas-frontline-physicians-opposing-public-charge-final-rule.html)

Health care organization/physician groups have the responsibility to educate employees and patient populations about the parameters of the proposed rule, explain that the implementation of rule has been enjoined, and work with employees and patients to explore work-arounds to ensure adequate access to care, consulting with social workers and immigration lawyers if necessary to understand the impact of the use of certain benefits on immigration status.

Elongation of H-4 Extension Applications and Spousal Employment Authorization under H-4 EAD

There have been two developments of concern as they relate to H-4 spouses: 1) the imposition of biometrics, which has the effect of grossly slowing down the processing of H-4 extensions decoupling these applications from the premium processing timeline of the H-1B spouse; and 2) the threatened revocation of eligibility of H-4 spouses for employment eligibility.

One of the most destabilizing realities for many foreign nationals is the disparity between the professional work of the primary visa holder and the inability of his/her dependents to work. This situation becomes particularly concerning in permanent residency matters involving interminably long waiting periods – to wit: EB2 cases for natives of India and China – where the dependent spouse (who oftentimes is quite professionally accomplished) does not have the right to work for a lengthy period of time.

Effective May 26, 2015, certain spouses of H-1B workers are eligible to apply for and obtain employment authorization known as the H-4 EAD. Under the current rule, a dependent spouse in H-4 dependent status can apply for an Employment Authorization Document (EAD) once an I-140 immigrant visa petition has been approved for the primary visa holder. Most specifically, the H-4 EAD is available to H-4 nonimmigrants if the H-1B nonimmigrant spouse: a) is the beneficiary of an approved I-140 immigrant visa petition; or b) has been granted H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act (AC21)(i.e. has filed a petition for an extension of status beyond the 6th year durational limit under AC21).

The Administration has repeatedly declared its intention to abrogate the H-4 EAD program, but to date, it has not made any concrete moves to actualize this intention. As a result, eligible individuals are still able to apply for this benefit and USCIS is still adjudicating such applications. Still, the threat of the program's elimination has remained an issue of significant concern.

The Administration has made it clear it wants to eliminate the program, but as recently as September 2019, DHS indicated the proposed rule to remove H-4 dependent spouses from the class of aliens eligible for employment authorization is not likely to be published before spring 2020 and that this timeline is "highly aspirational." (https://www.aila.org/infonet/dist-ct-save-jobs-usa-v-dhs)

Any proposed rule to remove the program would need to go through a notice and comment period of 30-60 days.

At present, our own belief is that qualifying spouses should continue to file EAD applications. In many instances, the possibility of future revocation of the H-4 EAD program is leading the primary visa holder to move up the timeline for initiating his/her case for permanent residence. We

cannot say dispositively whether a rescission of this program will be retroactive, but hopefully it will be prospective only. Please note: As opposed to various other situations in which a foreign national holding EAD is granted up to a 180-day extension of employment authorization as a new application is being processed, there is no automatic extension provision for timely filed H-4 EAD applications. This means that if an H-4 EAD extension is not approved before the current expiration, there will be a gap in employment authorization.

Addressing the Immigrant Visa Backlog Situation

Under current law, there is a 7% numerical cap placed on the issuance of employment-based visas from any single country. Given the high prevalence in the academic world of scholars from India and China, many foreign nationals from India and China face quite severe backlogs in awaiting availability of an immigrant visa so as to allow them to attain permanent residence. More specifically, EB2 cases for natives of India are currently taking 10+ years; the EB2 backlog faced by natives of China has generally been in the order of 2-3 years. In recent months, we have also seen unnaturally long backlogs in the EB1 immigrant visa lines for natives of India and China, and unusual backlogs in the EB1 quota lines for natives of other countries.

There are a number of measures that could alleviate this backlog include: 1) an overall increase in the number of immigrant visas (i.e., “green cards”) available within the U.S. immigration program; 2) eliminating spouses and children from drawing down the immigrant visa quota allotment; 3) removing or significantly expanding the per country quota allotment. Regrettably, none of these options are currently under active congressional consideration.

Here is what is transpiring at present in the Congress to address this situation.

Fairness for High Skilled Immigrants Act – Proposed elimination of 7% ceiling

The US House of Representatives passed Fairness for High Skilled Immigrants Act of 2019 (H.R. 1044) in July 2019, but the prospects of final passage in the Senate are quite dim. This Act seeks to eliminate the per-country limit on employment-based immigrant visas (i.e., “green cards”) and instead, treat all foreign nationals “equally.”

As noted above, at present, nationals of any single country can receive no more than 7% of the total number of available employment-based green cards, which serves to the disadvantage of natives of backlogged countries – to wit: India and China.

If the Act were to pass, all employment-based applicants would be subject to one wait list for each employment-based immigrant visa preference category. It is projected that individuals from India and China would see an immediate decrease in green card wait time, but that all others would face an immediate backlog in visa availability. Those already in the queue from China and

India would be processed before new applicants. The preliminary estimates are that new applicants might expect to wait 6-7 years.

The Bill was moved to the Senate in July 2019 and referred to the Committee on the Judiciary of the Senate on September 17, 2019. No further action has been taken as of November 5, 2019. (https://www.jdsupra.com/legalnews/anticipated-changes-to-employment-based-90458/; https://www.congress.gov/bill/116th-congress/house-bill/1044)

RAISE Act - Proposed reduction of legal immigration to the United States by 50%, halving the number of green cards issued

This Bill was introduced in the Senate in February 2017 and then a revised version of the bill was referred to the Senate Committee on the Judiciary in August 2017. The 2017 bill did not receive a vote in the Senate. A separate republican-led bill to restrict legal immigration was also defeated.

The RAISE Act was reintroduced in 2019 in the House. In May 2019, the Bill was referred to the Subcommittee on Immigration and Citizenship. There have been no further actions as of November 2019.

"The bill would cut legal immigration by half, reducing the number of green cards from more than 1 million to about 500,000. The bill would also remove pathways for siblings and adult children of U.S. citizens and legal permanent residents to apply for permanent lawful residency status in the U.S., limiting the family path to spouses and minor children. The bill would also impose a cap of 50,000 refugee admissions a year and would end the visa diversity lottery." (https://en.wikipedia.org/wiki/RAISE_Act#cite_note-7).

The Bill would also create a points-based employment-based immigration system. 140,000 points-based immigrant visas would be issued per fiscal year with spouses, children being counted toward the overall limit. Points would be awarded based on the following criteria: Age; education; language proficiency; extraordinary achievement; compensation; investment into the United States.

For a variety of reasons, neither of the aforementioned bills is expected to be passed this session of Congress.

DACA – Deferred Action for Early Childhood Arrivals

The benefit known as DACA – Deferred Action for Early Childhood Arrivals – is still available but its use is limited, and the program continues to face possible extinction. According to the SCOTUS blog:

> *In 2012, the Obama administration established a program known as Deferred Action for Childhood Arrivals (DACA), which allows undocumented young adults who came to the United States as children to apply for protection from deportation. Applicants who meet a variety of criteria – for example, who have graduated from high school or served in the military and do not have a serious criminal record – must pay a fee of nearly $500 in total, submit (among other things) their fingerprints and home address and undergo a background check. In the past seven years, nearly 800,000 people have obtained protection from deportation under DACA, which permits them to work legally in this country and gives them access to other benefits like health insurance and driver's licenses.* (https://www.scotusblog.com/2019/11/argument-preview-justices-to-review-dispute-over-termination-of-daca/)

On September 5, 2017, the Administration issued a policy memorandum entitled, *Rescission of the June 15, 2012 Memorandum Entitled Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"* which was intended to initiate the orderly phase out of DACA. Following that memo and in response to Federal Court cases filed in the Eastern District of New York and in the Northern District of California which enjoined the agency from completely rescinding the program, USCIS resumed accepting requests to renew a grant of deferred action under DACA in 2018. Since the September 2017 memo, however, USCIS has not been accepting new DACA applications.

The *Regents of the University of California* case and the lawsuit filed in the Eastern District of New York centered on the plaintiffs' claim that the Trump Administration's decision to terminate DACA was arbitrary and capricious and therefore unlawful under the Administrative Procedures Act.

The U.S. Supreme Court heard oral arguments on November 12, 2019. According to a number of media outlets including the *New York Times* and *Forbes*, the Court appears ready to sunset the Program. However, a decision on the matter and the future of DACA is not expected until summer 2020.

I-9 compliance

Starting in March 2019, the Social Security Administration revived the old practice of sending Social Security No Match letters to employers. The purpose of the No Match letters is to put an employer on notice that there is a discrepancy or discrepancies between the name and social security number combination on a filed W-2 and SSA records so as to raise the implication that the employee may not be authorized to work.

In its letters, the employer is asked to look into the discrepancy, fix any mistakes and report back to the Social Security Administration. The letters inform employers not to take any immediate

adverse action against employees, but the letters signal to the employer and the employee that there may be a problem with the employee's social security number and/or identity and/or work authorization.

According to some reports, as of May 2019, more than 575,000 employers had been sent such letters. (https://news.bloomberglaw.com/daily-labor-report/social-security-no-match-letters-worry-immigrants-bosses)

Nothing suggests that SSA is actively collaborating with the Department of Homeland Security on these No Match letters, but the issuance of the letters combined with some recent ICE raids in the Southern part of the United States after many years of inactivity should be taken as a sign of renewed interest by the current administration in I-9 compliance and enforcement.

Form I-9 verifies "identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must ensure proper completion of Form I-9 for each employee. This includes citizens and noncitizens. Both employees and employers (or authorized representatives of the employer) must complete the form. On the form, an employee must attest to his or her employment authorization. The employee must also present his or her employer with acceptable documents evidencing identity and employment authorization. The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and to relate to the employee and record the document information on the Form I-9." (https://www.uscis.gov/i-9_)

Although academic institutions may not be a primary target for I-9 enforcement action, now would be a good time to ensure your institutions have solid and consistent I-9 practices and policies in place and that I-9 compliance is strictly adhered to.

Extreme Vetting

In response to Presidential Proclamation 9645 (September 2017) and Executive Order 13815 (October 2017), among others, U.S. Embassies and Consulates abroad and the U.S. Refugee and Admissions Program (USRAP) have further intensified the vetting process of certain foreign nationals and refugees applying to enter the United States.

New security procedures for refugees entering the United States include increased data collection to deepen investigation of applicants; enhanced information sharing between agencies to identify threats; new training for government officials to increase ability to detect fraud and deception; additional in-depth vetting and case-by-case analysis of refugees from 11 countries (mostly predominantly Muslim countries).

In February 2018, the President directed the establishment of National Vetting Center to introduce additional mechanisms to identify and prevent from entering the United States individuals who may pose a security threat to the country.

In March 2018, Department of State published a 60-day notice in the Federal Register indicating its interest and intent to ask visa applicants to provide social media identifiers, telephone numbers, email addresses used in the past 5 years, potential family connections to terrorism, among other information to assess "eligibility" for visa issuance. In addition, applicants from countries where Female Genital Mutilation is prevalent would be directed to a website ensuring they are aware the practice is illegal in the US.

The American Immigration Lawyers Association (AILA) joined privacy, civil rights, civil liberties, and immigrants' rights organizations in a joint comment opposing DOS proposal to collect social media information and FOIA requests were filed to understand how such extreme vetting initiatives are being implemented.

There is anecdotal evidence that applicants' social media accounts are already being searched and cross checked against immigration applications.

While this program has been in existence since the fall 2018, it remains a principal cause for the delay in the issuance of visas through U.S. Consulates. Quite possibly, there has been a number of foreign nationals at your institution who have been delayed in getting their visas and/or who need to factor in the possibility of visa delay or denial in their international travel plans. We know anecdotally that individuals from Middle Eastern countries are being targeted, even those not subject to the travel ban.

Are F, J, and M visa applicants subject to the travel ban?

Different restrictions apply for each country:

1. Iran – F, M, Js are not subject, *but subject to enhanced screening*;
2. Libya – F, M, Js are not subject;
3. N Korea – F, M, Js (along with all other immigrants and nonimmigrants) are subject;
4. Somalia – F, M, Js not apparently subject, *but all nonimmigrants are subject to enhanced screening*;
5. Syria - F, M, Js (along with all other immigrants and nonimmigrants) are subject;
6. Venezuela – F, M, Js not apparently subject; *no mention of enhanced screening;*
7. Yemen – F, M, Js not apparently subject; *no mention of enhanced screening.*

See also, following snip from an American Immigration Lawyers Association Practice Pointer (17092638)

Iran	Suspends the entry of immigrants and all nonimmigrants, except F (student), M (vocational student) and J (exchange visitor) visas, though they are subject to enhanced screening.
Libya	Suspends the entry of immigrants and temporary visitors on business or tourist visas (B-1/B-2).
North Korea	Suspends the entry of all immigrants and nonimmigrants.
Somalia	Suspends the entry of immigrants, and requires enhanced screening of all nonimmigrants.
Syria	Suspends the entry of all immigrants and nonimmigrants.

AILA Doc. No. 17092638. (Posted 6/27/18)

Venezuela	Suspends the entry of certain government officials and their family members on business or tourist visas (B-1/B-2).
Yemen	Suspends the entry of immigrants and temporary visitors on business or tourist visas (B-1/B-2).

What about applications from dual nationals in which one country of nationality falls on the Travel Ban?

Dual nationals of a designated country who are traveling on a passport issued by a non-designated country are exempt from the travel ban.

Export Licensing / Tech Data Concerns

According to the *New York Times,* the NIH and FBI have started investigating scientists – particularly those of Chinese descent - for allegedly stealing biomedical secrets (scientific ideas, designs, devices, data and methods that may lead to new treatments and tools) for China.

The investigations have focused on 71 institutions (including highly prestigious institutions) and 180 individual cases as of the date of the article on November 4, 2019.

“So far the NIH has referred 24 cases in which there may be evidence of criminal activity to the inspector general’s office of the Department of Health and Human Services, which may turn the

cases over for criminal prosecution." "Vast Dragnet Targets Theft of Biomedical Secrets for China," *The New York Times*, November 4, 2019.

According to the article, NIH claims that some of the researchers have obtained patents in China on work funded by the US and owned by US institutions; others are allegedly setting up labs and companies in China, duplicating US research; yet others are allegedly accepting funding from the Chinese government.

The NIH requires researchers to disclose payments, funding and appointments from abroad. The Thousand Talents Program seems to be improperly funding Chinese researchers in the United States and asking researchers to sign contracts that require them to provide the Chinese Government with research results obtained in the US.

According to the *Times, o*thers say Chinese scientists are being unfairly scrutinized over others and targeted for simple mistakes on account of US-China relations. And the surge in investigations into Chinese researchers has resulted in US based Chinese researchers feeling threated and could make it difficult to recruit and retain Chinese students and scholars.

Institutions are clamping down on the free flow of data; NIH is recommending measures including, the monitoring of foreign travel and frequent publishing with colleagues outside of the United States. Per the article, the National Science Foundation has made it clear its employers are prohibited from participating in programs like China's Thousand Talents Program; the FBI has given institutions tools to scan emails for keywords in Mandarin to tip off university administrators to breaches.

Investigation into espionage could result in loss of grant funding or termination but also render someone inadmissible into the United States and/or could result in the denial of a green card application. Espionage is also a ground for deportation for nonimmigrants and US permanent residents alike.

Conclusion

Immigration law relative to institutions of higher education and academic medical centers remains essentially unchanged, but implementation of the law and the adjudicative environment continues to evolve under the current Administration. The topics briefed above are also subject to change with the evolving environment, but we hope the information contained herein provides you with a snapshot of some of the challenges and themes foreign nationals, academic/academic medical employers and other immigration stakeholders face today. Should you have any questions about the contents of this memo, or related topics or themes, please do not hesitate to reach out to our Team. We consider it an honor to be of service.

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