PROPOSED REGULATIONS INCLUDE NEW "GRACE PERIOD" FOR JOB CHANGES AND CLARIFY PERMANENT RESIDENCY PORTABILITY

On December 31, 2015, the U.S. Department of Homeland Security (DHS) published in the Federal Register a long awaited proposed rule to provide guidance for immigration Acts enacted over 15 years ago - the American Competitiveness in the Twenty-first Century Act of 2000 (AC-21), as amended, as well as the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA).

The bulk of the proposed rule changes seek to codify U.S. Citizenship & Immigration Services (CIS) practices that have developed since the original Acts were passed; however, there are also a few new proposed changes that would extend certain benefits to foreign nationals working in the U.S.

Several highlights of the proposed changes include:

- **The implementation of a new 60 day "grace period" for certain nonimmigrant visa holders**. This provision will allow individuals in E, H-1B, H-1B1, L-1, and TN nonimmigrant status that have ceased employment with their sponsoring employer to remain in the U.S. for a period of up to 60 days during the validity period of their previously authorized period of stay, in order to seek new sponsored employment, apply for a change of nonimmigrant status, or wrap up personal affairs in preparation for departure. Currently there is no "grace period", though the CIS has often exercised discretion in cases where individuals lose their jobs but quickly find new sponsoring employers. This new regulation would officially authorize the exercise of such discretion, though the regulation stops short of an automatically awarded grace period.

- **Admission into the U.S. 10 days before the authorized period of employment begins and 10 days after the authorized period of employment ends for individuals in E, L-1, and TN nonimmigrant status**. Current regulations authorize these 10-day periods only for those entering in H-1B status.

- **Automatic extension of Employment Authorization Document (EAD) validity upon timely filing for an EAD card renewal**. Work authorization would be automatically extended in some circumstances for 180 days while the timely filed EAD renewal application is pending. The renewal EAD must be filed while the current EAD is valid and there are other legal requirements that must be met. Previously, only in very limited circumstances could an individual continue working on an expired EAD while an application for a new card remained pending. Simultaneously, the CIS proposes the elimination of the regulatory 90-day deadline for the CIS to adjudicate EAD applications; in other words, under the proposed rule, there would be no requirement for CIS to adjudicate EAD applications within any set timeframe.

- **Expansion of the definition of "affiliated or related nonprofit entities" for H-1B cap exemptions**. CIS has proposed that a nonprofit entity may not be subject to the H-1B

cap if it has a formal written affiliation agreement with an institution of higher education, has an active working relationship with the institution of higher education for the purpose of research or education, and if one of the nonprofit entity's primary purpose is to directly contribute to the research or education mission of the institution of higher education.

- **Clarification provided on portability of an approved I-140 immigrant visa petition, priority date retention, and revocation of an approved I-140**. The proposed rules have several components that may affect individuals who have an approved I-140 and seek to change employers while their adjustment of status (green card) application remains pending. The new rules clarify the ability to retain an individual's priority date unless the I-140 Immigrant Visa Petition approval is revoked due to fraud, misrepresentation, or error. The rule confirms that the employer's withdrawal of an approved I-140 will not impact retention of the priority date; however, the rule does expand the various revocation grounds that would result in a loss of priority date. Another proposed change is that limitations be placed on the automatic revocation of I-140 Immigrant Visa Petition 180 days following I-140 approval, after which time the petition is not automatically revoked at the petitioner's request or if the petitioner goes out of business. However, under the proposed new rules, the portability of permanent residency process to a new employer would be unavailable if a previous employer revokes the I-140 Immigrant Visa Petition prior to 180 days after approval.

- **Guidance regarding the definition of "same or similar occupational classification" for 180 day portability of an immigrant visa**. The proposed rule appears to be more restrictive than the interpretation applied in practice to date. However, we anticipate there might be further guidance provided in response to the comments that will be submitted.

After the 48-day comment period ends on February 29, 2016, the DHS is required to review and consider all comments prior to implementing the final regulation. While not all of the proposed changes may be positive, there are still many unknowns regarding the final version of the regulations after the notice and comment period is complete. Due to the complex nature of any of these proposed regulatory changes, anyone with questions about the final regulations and their applicability to a specific situation should seek legal advice and guidance. As always, Foster will continue to monitor these proposed changes to the AC-21 and ACWIA regulations and will provide additional information in future Immigration Updates© and on our firm's website at www.fosterglobal.com.