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Immigration Newsletter

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This Month's Contents:

Administration Announces Initiatives to Promote Foreign Entrepreneurial Talent: Will This Translate into Nonimmigrant and Immigrant Visa Approvals?

For years, America has sought the best and the brightest from business, academia, science, and the arts. And, U.S. companies have sought to attract key, highly skilled professionals needed to manage, expand, and re-invigorate their operations here. But visa backlogs, limited visa availability, restrictive agency interpretations, and rigid adjudications all have had a chilling effect on those companies who seek to expand and create jobs in the U.S.

through the petitioning of foreign personnel. Entrepreneurs, self-styled capitalists, and other self-employed self-starters, large and small, have experienced particular difficulty and uncertainty when applying

for nonimmigrant or immigrant visa eligibility, never knowing whether their cases would be approved. In many instances, the evidentiary burden as applied to them has been disproportionately onerous; in other instances, the documentary evidence required has been misconstrued and disconnected from real business practices.

It is against this backdrop and a tanking economy that USCIS Director Alejandro Mayorkas and Secretary of Homeland Security Janet Napolitano recently outlined – with much fanfare – "a series of new policy, operational, and outreach efforts" designed to help invigorate the economy and stimulate investment by making it easier for highly-skilled immigrants to start and grow companies and create jobs in the United States. Citing the need to attract foreign entrepreneurial talent of all kinds, immigration officials announced plans that could positively affect immigration visa eligibility in several categories if their plans are more than mere fantasy and hype.

National Interest Waivers (NIWs) for Entrepreneurs

First, the government announced that it "will clarify," presumably with field adjudicators, that immigrant entrepreneurs may obtain employment-based second preference (EB-2) immigrant visas if they satisfy the existing requirements. The law has always provided for such eligibility and perhaps USCIS is instructing adjudicators to merely apply the law. More notably, USCIS makes clear that entrepreneurs can qualify for an EB-2 National Interest Waiver (NIW), and sheds light on how such individuals can demonstrate that their business endeavors will be in the interest of the United States. Significantly, an individual seeking an EB-2 national interest waiver can self-petition; he does not need an employer to hire him.

Historically, the first step in proving EB-2 NIW eligibility, even for entrepreneurs, has been relatively easy. It requires that an individual is a professional holding an advanced degree or possesses "a degree of expertise significantly above that ordinarily encountered," or exceptional ability. The second step, proving that the entrepreneur's investment in a business venture will substantially serve the national interest, has been more challenging. To do so – to qualify for a national interest waiver – the entrepreneur must demonstrate that (1) the proposed employment or work has substantial intrinsic merit; (2) that the benefit to be provided will be national in scope; and (3) that the national benefit is so great that it exempts the individual from undergoing the lengthy and costly process of testing the labor market for U.S. workers through the labor certification process.

In its August announcement, USCIS provides some examples on how an entrepreneur can meet the NIW, or second-step requirements. To establish the national scope of the proposed benefit of the work, for instance, an entrepreneur could, describes USCIS, show a linkage between job creation in a locality and the spinoff of related jobs in other parts of the country. Alternatively, he could show that local job creation will have a positive national impact. USCIS also opines that an individual entrepreneur might be eligible for exemption from the labor certification process if he establishes that the enterprise is creating new job opportunities for U.S. workers or that it otherwise enhances the welfare of the United States. Through these examples and its broader pronouncement, USCIS seems to be signaling a break from current constructions of what is required and setting out new expectations for these kinds of cases.

Immigrant Investor (EB-5) Program

As previously reported, USCIS plans to enhance and streamline the Immigrant Investor (EB-5) Program. Some components of the streamlined program include a fast-track for applications of enterprises that

are fully developed and ready to be implemented, premium processing for certain cases, and the implementation of direct communication between the applicant and USCIS to, among other things, resolve issues without the need for formal requests for additional evidence (RFEs). USCIS is developing a rollout of these changes with the first to be implemented in early September.

Expansion of Premium Processing for Immigrant Multinational Executives and Managers

USCIS also announced that it will expand premium processing service to multinational executives and managers immigrant visa petitions (EB-1-3). Premium processing, which guarantees adjudication in 15 days, is currently available for many other employment-based immigrant visa petitioners, including extraordinary ability foreign nationals and outstanding professors and researchers. However, EB-2 National Interest Waiver petitions remain conspicuously still absent from the premium processing list, an anomaly that is hard to explain. Surely, the certainty of a decision in 15 calendar days through premium processing would encourage a reluctant entrepreneur-petitioner to go forward and invest. We hope USCIS will rethink this and add EB-2 NIW petitions to the list.

Nonimmigrant Visas

On the nonimmigrant side of the ledger, USCIS unfortunately provides little new guidance. It does, however, state that an H-1B beneficiary who is the sole owner (an employee-entrepreneur) of the petitioning company may establish a valid employer-employee relationship for the purposes of qualifying for an H-1B visa. This has long been a gray area and fraught with tremendous uncertainty in adjudication.

USCIS also announced plans to undertake extensive outreach efforts, including a series of engagement opportunities with stakeholders to seek input and feedback on how to address the unique circumstances of entrepreneurs, new businesses, and startup companies. Certainly, other nonimmigrant work visas that are suitable for those in business – Es, Ls, and Os – will be the subject of such efforts and must be addressed. And, given the fanfare associated with the recent announcement, USCIS must be prepared to lay out its implementation plan in real and concrete terms.

Will New Policy Translate into Nonimmigrant and Immigrant Visa Approvals?

Long advocated for by immigrant practitioners, economists, business, and others, the ideas outlined by Secretary Napolitano and Director Mayorkas are welcome news, even if symbolic. The United States needs capital and talent to jump-start the economy, and foreign investors and entrepreneurs -- natural risk takers – have long sought status in the United States to conduct business here. Moreover, these initiatives require no new visa category to be enacted and no expansion of visa numbers. What these initiatives do require, however, is flexibility and a common sense application of the law by USCIS and State Department adjudicators. Such decision-makers must be instructed and trained to adapt the specific particularities of everyday business practice to immigration visa criteria, and abandon their more widespread rigid, checklist approach to adjudication.

So, will foreign companies that operate and expand operations in the U.S. see fewer hurdles when seeking to transfer their executive and managerial employees? Will self-starters with big ideas, some capital, and job creation prospects secure green cards? Will EB-5 immigrant investors have greater assurance that the conditions on their residence will be removed? Will foreign E-1 traders and E-2 investors – while not specifically addressed – have more confidence in their renewal applications? Most importantly, will these initiatives trickle down to the field? Or, is the Emperor wearing no clothes. Stay tuned….

DOL Prevailing Wage Determinations on Hold; Delays Will Thwart Employers' Ability to File PERM Applications for Employees

The DOL's National Prevailing Wage Center (NPWC) advises that it is not issuing pre-

vailing wage determinations (PWDs), often a necessary beginning step in the PERM labor certification process, as it uses all of it resources to reissue some 4,000 court-ordered H-2B wage determinations. Requests for reconsideration or appeal are also on hold. This means that employers seeking to begin PERM cases must wait, even though certain cases must be filed for their H-1B workers due to AC-21 extension requirements, expiring recruitment, or other reasons. DOL advises employers to submit prevailing wage determination requests at least 60 days in advance of the employer's initial recruitment efforts. As of this writing, it is unclear when DOL will resume PWD processing for new cases and whether any relief will be made available for PERM cases that must but cannot be filed. For now, employers are advised to plan accordingly and build additional time into the application process.

ICE Director Encourages Agency to Use Its Prosecutorial Discretion

Photo: www.ice.gov

Immigration and Customs Enforcement (ICE) Director John Morton recently issued two significant memoranda on the exercise of prosecutorial discretion by enforcement officials, which, if followed, will result in a more humanitarian approach to those compelling cases that deserve favorable treatment. Prosecutorial discretion is the authority that an agency has to determine whether and how to enforce the law with respect to a particular case. Like all other enforcement agencies, ICE has prosecutorial discretion. In the ICE context, prosecutorial discretion governs decision-making such as whom to arrest, detain, grant parole as well as when and against whom to initiate removal proceedings or conduct an investigation. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of its enforcement authority in a case.

The first ICE memo provides broad instructions that establish the agency's enforcement priorities. It also outlines who within ICE has the power to make discretionary decisions as well as what factors should guide that decision-making. The following categories were identified as ICE enforcement effort priorities: (1) noncitizens who pose a danger to national security or a risk to public safety; (2) recent illegal entrants; and (3) noncitizens who are fugitives or who otherwise obstruct immigration controls.

The second ICE memo confirms that cases involving crime victims, witnesses, and plaintiffs require a higher level of prosecutorial discretion, and specifically states that it is generally against ICE policy to initiate removal proceedings against such individuals.

While these recent memoranda are a welcome addition to other agency pronouncements on the subject, foreign nationals and their attorneys who seek prosecutorial discretion have an important role to play in requesting a specific type of favorable action in a case, and advocating for the result.

Employment Authorization Asylum "Clock" Problems

For some time, asylum applicants have encountered problems with the "clock" that determines their eligibility for employment authorization documents (EADs). Under rules that went into effect in 1994, asylum applicants must wait 150 days after filing a completed asylum application before applying for an EAD. The government then had 30 days to adjudicate the EAD application, but could not issue an EAD until the individual's asylum application had been pending for at least 180 days. This waiting period became known as the EAD asylum clock.

During the process of adjudicating asylum applications, asylum officers (AOs) and immigration judges (IJs) have the power to stop the EAD asylum clock for any delay in the adjudication process that the judge or AO determines was requested or caused by the applicant. When IJs or AOs improperly stop the EAD asylum clock, applicants wait much longer than 150 days before they are eligible to apply for work authorization. Often the clock is stopped indefinitely.

As outlined in a report prepared by the American Immigration Council and Penn State Law's Center for

Immigrants' Rights, the administration of the EAD asylum clock has caused excessive delays in asylum applicants receiving their work authorization and in some instances, has resulted in them never receiving one at all.

A nationwide effort is now underway to gather updated information about the EAD asylum clock particularly where an AO or immigration judge improperly stopped, or failed to start (or restart) the clock. Attorneys and individual clients who have been affected are advised to contact the American Immigration Council's Legal Action Center. www.legalactioncenter.org.

Controversial "Secure Communities" Initiative Continues – But Without Agreements with States

Photo: www.ice.gov

In an abrupt change of approach to a key immigration enforcement program, ICE declared in early August that it would continue its "Secure Communities" program but without memoranda of agreements (MOA) with state or local law enforcement agencies because ICE deemed them unnecessary. MOAs already in place were unilaterally terminated. Under the three-year-old Secure Communities program, the FBI shares fingerprint data of people arrested by local (or state) law enforcement authorities with DHS so that it, in turn, can check for immigration law violations. Procedurally, the program has been criticized by some state and local governments for lack of uniformity, inconsistency, and confusion. For example, local authorities have been led to believe that the program is "voluntary" when in fact there is no mechanism for them to opt out. More substantively, the program has been criticized for netting low-level or non-criminal immigration violators – 60% of those arrested are not serious criminals according to ICE statistics – at the expense of local community policing efforts. Indeed, as reported in the Washington Post, Boston Mayor Thomas Menino assessed the program more bluntly, and wrote to ICE Director Morton that "Secure Communities is negatively impacting public safety." Despite the criticisms, ICE plans to have the program in place nationwide by 2013.

Overall Little Movement in September Visa Numbers

As expected, there was little forward movement in visa backlogs as reported in the Visa Bulletin for September. Some notable exceptions are family 2A (spouses and children of permanent residents), which moved forward five months across the board (except for Mexico) to 12/01/2008, and Other Workers (EB-3), which progressed four months (except for China and India) to 08/01/2005. We can expect some forward movement in October when the FY2012 visa allotment becomes available.

States Continue to Carve Out Piecemeal Immigration Law and Policy in Absence of Federal Approach

As previously reported, state and local governments continue to be the staging ground for real action on immigration reform while Congress does nothing. Conservative state legislatures have enacted draconian, restrictive immigration laws (Arizona, Alabama, Utah, Georgia, and South Carolina) that, in some cases, are winding their way through the courts, while other states have moved in the direction of enacting more liberal policies toward immigrants. Most recently, the governors of Illinois and California signed into law "DREAM Act" bills that would allow undocumented immigrants to receive private funds to attend state colleges and universities. The same issue will go before the Maryland electorate as part of a referendum in November 2011. And the courts, state as well as federal, continue to enter the fray. In Texas, a district court recently barred the Texas Department of Public Safety from enforcing rules that denied driver's licenses to immigrants living and working in Texas with valid work authorization. In Georgia, a federal

district court blocked key provisions of that state's "Show Me Your Papers" law, granting a preliminary injunction in the suit filed by a coalition of civil rights groups and individual attorneys.

In the absence of a federal approach to immigration reform and continued congressional inaction which is expected until after the next presidential election, we can expect more of the same from state and local governments as they attempt to regulate immigration and address the strain our broken immigration system causes to their communities.

News in Brief: H-1B Cap Update; DOS Warns of Increased "Lottery" Scamming; More Time Given for Responses to RFEs; Foreign Nationals Reminded to Notify USCIS of Address Change

The following additional items may be of interest to our readers:

H-1B Professional Specialty Worker Cap Update: As of late July, USCIS reports that 22,700 new H-1B cap-subject petitions were receipted and another 13,800 petitions for foreign nationals with advanced degrees. There are 85,000 new H-1B visas available annually, of which 20,000 are designated for advanced degree holders.

DOS Warns of Increased Diversity Visa "Lottery" Scamming: The Department of State advises of a notable increase in fraudulent e-mails and letters sent to Diversity Immigrant Visa program applicants. The scammers are posing as the U.S. government in an attempt to extract payment from lottery applicants. Many of the fraudulent e-mails have elements that make them look legitimate, such as the DOS seal. For more information, see http://travel.state.gov/visa/immigrants/types/types_1749.html.

More Time Given for Responses to Agency Requests for Evidence (RFEs): Applicants and petitioners for immigration benefits often receive requests for additional evidence (RFEs) from USCIS. Discarding a four-year policy of tiered response times for RFEs, USCIS has reinstituted its standard 84-day response time for all form types, except applications to extend/change nonimmigrant status (I-539). USCIS had changed its response time policy in June 2007 in an attempt to give USCIS officials flexibility to determine individual response times commensurate with the case. The additional time is welcome news, especially when foreign national beneficiaries must compile voluminous documentation or obtain requested records from abroad. We hope USCIS will reconsider its new policy and extend the 84-day response time to I-539 applications as well.

Foreign Nationals Are Reminded to Notify USCIS of an Address Change: By law, non-U.S. citizens are required to report to USCIS on Form AR-11 any change in their permanent address within ten days of moving. While U.S. citizens are not required by law to notify USCIS of an address change, USCIS advises that U.S. citizen petitioners do so for pending cases. Form AR-11 can be submitted online (recommended) https://egov.uscis.gov/crisgwi/go?action=coa.Terms or via mail.