Immigration Law Update: Fall 2006

September 1, 2006

EB-5 IMMIGRANT INVESTORS

The EB-5 immigrant investor visa category was created by the Immigration Act of 1990 in the hopes of attracting foreign capital to the United States while also creating jobs for American workers. The overall advantage of this category is that it allows the beneficiary to engage in commercial enterprise anywhere in the U.S., subject to some restriction in the Pilot Program targeting certain areas. There are 10,000 visas available in the category each year, half of which are reserved for people who participate in the Pilot Program option designed for targeted investments in approved regional areas. Although the investment requirement is smaller, the Pilot Program will expire September 30, 2008.

An applicant for the EB-5 visa must file Form I-526, Immigrant Petition by Alien Entrepreneur with the appropriate U.S. Citizenship and Immigration Services (USCIS) service center. Fees and evidence supporting the application as described in this article must be included.

Three basic requirements to file for the EB-5 visa are:

- The alien must establish a business or invest in an existing business;
- The alien must have invested $1 million in the business (or $500,000 where the investment is being made in a "targeted employment area," which is an area with an unemployment rate that is at least 150% of the national average or a rural area as designated by the Office of Management and Budget); and
- The business must create full-time employment for at least 10 U.S. workers.

Requirements for a qualifying business are:

- The creation of an original business;
- The purchase of an existing business with simultaneous restructuring or reorganization resulting in a new commercial organization; or
- Expansion of an existing business created after November 1990 through the investment of the required amount and the creation of at least 10 new jobs.

Any for-profit entity formed for the ongoing conduct of lawful business may serve as a commercial enterprise, including sole proprietorships, partnerships, holding companies, joint ventures, corporations,

business trusts, etc. Also, the alien must be actively involved in the business and cannot be a passive investor. For a Pilot Program investment, the threshold is a $500,000 capital contribution to a designated regional center that allocates portions of the capital in the form of business loans to small businesses within the targeted area.

Proposals for participation in the Immigrant Investor Pilot Program should be submitted to the Assistant Commissioner for Adjudications and should include the following documentation:

- A description of the regional focus of the regional center and how it will promote economic growth;
- Details on how jobs will be created indirectly through increased exports;
- A description of capital, both sources and amounts, committed to the regional center as well as the promotional efforts employed and projected by the sponsors of the regional center; and
- Forecasts of the positive impact on the regional and national economy.

An EB-5 investor must be engaged in the management of enterprise either through day-to-day managerial control or through policy formulation. As proof of a managerial role, an EB-5 investor should submit:

- A statement of position or title and a description of duties;
- Evidence that the EB-5 investor is a corporate officer or member of the board of corporate officers; and
- Evidence demonstrating the management role of an EB-5 investor if the qualifying enterprise is a partnership.

J-2 EXCHANGE VISITOR STATUS

Like some other visa categories, such as H, L, R, etc., the J-1 exchange visitor visa also has a derivative visa status for the J-1 visa holder's spouse and/or minor children (under age 21), known as the J-2 visa. However, unlike some visa categories with derivative status, the J-2 visa differs because the holder is allowed to work and can be subject to the home residency requirement.

The application procedure for J-2 status is the same as that for the J-1 primary visa applicant. When one applies for a J-1 visa, the exchange program sponsor must approve the accompaniment of the spouse and/or children. Once approved, each J-2 dependent, whether spouse or minor child, must have his or her own DS-2019, just as each has his or her own visa stamp and Form I-94 Departure Record.

The spouse and children of a J-1 visa holder may apply for their J-2 visas at an embassy after the J-1 principal applicant has already traveled to the United States. The J-2 applicants must present the following at the embassy or consulate abroad:

- Form DS-2019 provided by the program sponsor;
- Proof that the J-1 principal applicant is maintaining J visa status;
- Copy of the J-1 principal applicant's visa;
- Proof of relationship to the J-1 principal applicant (marriage certificate, birth certificate, etc.); and
- Proof of finances to cover expenses in the U.S.

Like J-1 visa holders, those with J-2 visas can enter the U.S. up to 30 days before the J-1 applicant's exchange program start date. However, the J-2 dependents may not enter the U.S. before the principal J-1 has entered. The J-2 spouses and minor children of exchange holders can choose to accompany or follow to join the J-1 exchange visitor to the U.S.

A J-2 spouse or holder seeking to engage in employment must obtain authorization from USCIS (U.S. Citizenship and Immigration Services). This is done by submitting a completed Form I-765, the application for the Employment Authorization, with the correct fee to the USCIS office having jurisdiction over the J-1 applicant's U.S. residence. J-2 spouses and dependents are only allowed to work if the money earned is used to support the family's customary recreational and cultural activities. If the J-2's income will be used to financially support the J-1 visitor, the application for employment authorization may be denied by USCIS. Those who accept unauthorized employment are in violation of status and can have their status terminated.

A J-2 visa holder's employment can be authorized for the duration of the J-1 principal's authorized stay or for a period of four years, whichever is shorter. The employment authorization is valid only if the J-1 principal is maintaining his or her lawful status and the relationship to the J-1 visa holder (such as marriage) continues to exist. Once the application is approved, the J-2 holder may engage in any employment.

At the end of the exchange program, the visitor and his or her dependents are expected to return home to share their U.S. experiences. The exchange visitor and his or her dependents have up to 30 days from the end of the program to leave the U.S. This time restriction does not apply if the family has changed visa status or has received extensions of stay.

Some exchange visitors are required to return to their home country for a minimum of two years upon completion of their exchange program, known as the home residency requirement. If this applies to a J-1 exchange visitor, then it will apply to his or her spouse or children. If the family would like to apply to waive the home residency requirement, the J-2 holders may be included in the J-1's application.

There are several instances when a J-2 visa holder can apply for a waiver separately from the J-1 principal. In these cases, the U.S. State Department may sponsor the waiver. These exceptions include:

- A J-2 spouse whose marriage to a J-1 exchange visitor has terminated either by death or divorce; or

- If a J-2 child marries, turns 21 or leaves the household.

OBTAINING PERMANENT RESIDENCY THROUGH A SPOUSE

The spousal relationship is one of the most common bases for immigration to the United States. U.S. citizens can petition for foreign-born spouses as immediate relatives, meaning the spouse will have an immediately available visa number. Generally, if your noncitizen spouse is in the U.S. (through a lawful admission or parole) at the time you file Form I-130, Petition for Alien Relative, your spouse may file a Form I-485, Application to Register Permanent Residence or Adjust Status at the same time.

Lawful permanent residents can also petition for their spouses but the petition falls into the second-preference family category. There is an annual limit of 114,200 visas in this category, plus whatever visas are unused in the first preference. In this category, spouses and children receive 77% of the visas. Spouses are also eligible to immigrate as derivative beneficiaries of a married adult child of a citizen and siblings. However, these categories are backlogged for several years.

To apply for lawful permanent-resident status, whether the petitioning spouse is a U.S. citizen or lawful permanent resident, there are three standards the marriage must meet:

1. Was the marriage valid at the time of performance?

- For a marriage to be valid, there are two primary requirements:
  - Each party must have been legally able to marry, and
  - The marriage ceremony must be considered legal under the laws where it was performed (there are certain exceptions to this, such as in the case of same-sex marriages or polygamous marriages).
    - In cases where one of the parties had previously been married, the divorce must be final and valid. Common-law marriages can be valid for immigration purposes if the laws of the place of residence, or last previous residence, legally recognize them. Also, customary marriages, those performed according to local custom but not licensed by civil authorities, may, at times, be valid for immigration purposes. Marriages conducted in the U.S. are almost always valid, unless one of the parties was under the age of consent, or if the family relationship between the spouses was too close. Divorces obtained in the U.S. are also almost always valid as well.

2. Is the marriage still in existence?

- For a person to immigrate through the spousal relationship, the marriage cannot have been legally terminated. Furthermore, if the parties are separated and do not plan to live again as husband and wife, the petition will be denied. In places with no-fault divorce laws, where a legal separation can mature into a divorce, the period of separation will most likely not be considered to still be in existence.

3. Was the marriage entered into for immigration purposes?

- A foreign-born spouse who has been married to the petitioner for less than two years is given conditional permanent residence for two years. While this conditional status is, for the most part, the same as regular permanent residence, it is designed to provide assurance that the parties did not marry for immigration purposes by allowing for the conditional status to be revoked if the marriage does not last after two years.
- It is important to note that it is not against the law to consider immigration in deciding to get married. Considering immigration benefits will only be a problem if that was the only reason to marry and there are no other legitimate reasons behind the marriage. Therefore, it is important to know what factors will make the agency suspect marriage fraud. Some of the most obvious of these are if the couple did not know each other for very long or had seen each other only a few times before marrying. Also, if the couple does not live together, the U.S. Citizenship and Immigration Services (USCIS) will be very suspicious, even more so if they have never lived together.
- Additionally, marriages between couples from different backgrounds, especially those that lack a common language, may be viewed with suspicion. USCIS is also very suspicious of marriages entered into after one of the parties is placed in removal proceedings or is being investigated by USCIS. There are a number of supporting documents that can be presented to show that the marriage is bona fide including, but not limited to, evidence of the parties' joint ownership of property and their cohabitation, evidence of children born in the marriage, and joint finances, as well as affidavits from friends and family testifying to the authenticity of the marriage.
- Lawful permanent residents who obtained their status through marriage as the spouse of a U.S. citizen or permanent resident are precluded for a period of five years from getting approval for a second-preference visa petition filed for a new spouse. The bar does not apply if the petition can show by "clear and convincing" evidence that the earlier marriage was not entered into for purposes of getting a green card. It also does not apply if the first spouse died.

LEGISLATIVE UPDATE: PRIVATE IMMIGRATION BILLS

Over the past year, Congress has introduced about 10 private immigration bills to grant permanent residency to a small number of individuals. Private bills are a rare form of relief from immigration laws and are generally reserved for the most compelling cases, when all other immigration options have been exhausted. In the legislative process, private bills are treated like any other law, going through the committee process to a vote by the full Congress. However, getting a private bill introduced is not easy. The immigration subcommittees in both the House of Representatives and the Senate have detailed rules on what is required for the introduction of such a bill. The most essential step in obtaining a private bill is, of course, finding a member of Congress willing to sponsor it. Following the introduction of the bill, detailed information about the person it will benefit needs to be supplied to the chair of the immigration subcommittee by the member of Congress sponsoring it. The procedure from there is much the same as it is with other legislation, except once passed by both houses of Congress and signed by the President, the bill becomes a private, not

public, law. The members of Congress who support private bills do a tremendous amount of work to ensure their passage and, without their efforts, those who benefit from the bills would most likely be forced to leave the U.S.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.