Immigration Law Update: Spring 2007

February 1, 2007

FOREIGN NATIONALS: OPTIONS FOR EMPLOYERS WHO SEEK TO HIRE TEMPORARY WORKERS

There are two common visa classifications that permit employers to bring foreign nationals to the United States as temporary workers to perform a specific job for the employer who sponsors the foreign national.

Foreign Workers with Bachelor's Degree or Higher

H1B Classification: The H1B classification allows professionals to work in the United States on a temporary basis within their profession. The H1B category is designed to attract highly skilled professionals to work in the United States on a temporary basis for a period of six years.

H1B classification is available only to workers in occupations requiring highly specialized knowledge normally acquired through attainment of a four-year college degree. The applicant must possess at least a bachelor's degree, or its equivalent. Equivalency includes substitution of 3 years of experience in the specialized field in lieu of one year of higher education. In some instances, the Immigration Service will permit a self-taught professional with 12 years of experience to secure H1B classification and substitute the experience in lieu of a college degree.

The H1B visa allows specialty occupation workers to enter the US and work in a professional capacity for a maximum period of six years. There are limited ways to extend the classification beyond the six years.

In this category, the employer petitions the Immigration Service for the alien's entry to the United States for purposes of working with that employer. There is no foreign residency requirement, and the alien may apply for permanent residence while she is in H1B status.

Important Deadlines: In order to sponsor a temporary worker in H1B classification, the employer can file the petition as of April 1, 2007 for October 1, 2007 start date. In previous years, the 65,000 visa slots are all used up by end of May 2007. Time is of essence when planning to sponsor a foreign national in H1B classification.

Temporary Seasonal Workers/Skilled and Unskilled Laborers

H2B Temporary or Seasonal Nonagricultural Workers: H2B Classification is the category used for temporary workers or seasonal workers. It is commonly used in the construction, landscaping and similar industries to hire foreign nationals for a short duration of time after establishing to the satisfaction of the Department of Labor that the job for which the foreign national is sought is indeed temporary or seasonal in nature, and that the employer is not seeking to import alien workers for temporary periods to occupy permanent positions. Employers must show efforts to recruit US workers have failed prior to sponsoring a temporary worker in H2B classification. Generally it takes 4 months of planning and recruitment to secure an approval for H2B classification. One benefit in sponsoring H2B workers is that multiple workers can be sponsored in one application. The H2B classification can be given for a total of three years.

Important Deadlines: H2B Classification is provided to foreign nationals twice a year. The deadlines are April 1 and October 1 for the appropriate seasons of work. In each season, 33,000 visas are given to foreign nationals. Because there is a need to show that US workers were unavailable to do the job, plan on starting the process 4-6 months in advance of the filing date. In previous years, all visas were allocated within a week after the filing deadline so planning ahead is essential.

TEMPORARY PROTECTED STATUS

Temporary protected status (TPS) is a temporary immigration status granted to eligible nationals of designated countries who cannot return home because of a crisis in their home country. TPS beneficiaries are not required to leave the United States and may obtain work authorization for the initial TPS period and for any designation extensions. When the Secretary of Homeland Security (SHS) terminates a TPS designation, beneficiaries will return to the same immigration status they had before TPS (unless that status has expired or has been terminated) or to any other status they may have been granted while in TPS.

The SHS may designate nationals of a country eligible for TPS when it is determined that Ongoing armed conflict within the state prevails and the return of nationals to that state would pose a serious threat to their personal safety;
The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, is temporarily unable to adequately handle the return of its nationals and has requested TPS designation; or
Other extraordinary and temporary conditions exist in the state that prevent nationals from returning in safety, unless the SHS finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the U.S.

The following countries are currently designated under the TPS program: Burundi, El Salvador, Honduras, Liberia, Nicaragua, Somalia and Sudan.

A TPS designation is effective for a minimum of six months and a maximum of 18 months. Before the end of the designation period, the SHS reviews the conditions in the country and determines whether the conditions that led to the TPS designation still exist. If the conditions do still exist, the TPS designation will be extended for six, 12 or 18 months. If the conditions that led to the TPS designation are no longer met, the SHS will terminate the designation. Designations, extensions, terminations and other information regarding TPS are published in the Federal Register.

A national of a country designated by the SHS for TPS, or one who has no nationality but last habitually resided in a designated TPS country, may be eligible to apply for TPS if
The individual applies during the specified registration period;
The individual has been continuously physically present in the U.S. since the designation began, or since the effective date of the most recent re-designation;
The individual has continuously resided in the U.S. since the date specified by the SHS in the Federal Register; and
The individual is not subject to criminal and security-related bars.

Those who are applying for Initial TPS Registration or Late-initial TPS Registration must submit the following forms and filing fees: Form I-821 (Application for TPS) with a filing fee of $50, Form I-765 (Application for Employment Authorization) with a filing fee of $180 and, if age 14 or older, a biometrics fee of $70. Applicants who do not wish to receive employment authorization should not submit the $180 fee, but are still required to submit Form I-765 for data collection purposes. Applicants must also submit supporting evidence of identity and nationality, produce proof of residence and two identical color photos.

Applicants who are applying for re-registration submit Form I-821 with no filing fee, Form I-765 with the $180 filing fee (if applying for employment authorization) and the $70 biometrics fee during the period stated in the Federal Register notice. Failure to re-register during each period results in the cancellation of TPS. Failure to submit both Forms I-821 and I-765 along with the appropriate fees, will result in the rejection of the application.

CCA REGULATIONS FOR CHILDREN ADOPTED ABROAD

The Child and Citizenship Act (CCA) of 2000 provides U.S. citizenship to certain children born abroad. In 2004, U.S. Citizenship and Immigration Services (USCIS) restructured the processing of Certificates of Citizenship for certain children adopted abroad. These procedures target newly entering IR-3 children, those fully and finally adopted abroad, who are automatically U.S. citizens upon arrival in the United States.

The USCIS implemented a streamlined process for newly entering IR-3 children, which ensures that these children receive the Certificate of Citizenship within 45 days of entering the U.S. A foreign-born child

automatically acquires citizenship on the day that the following requirements are met:

The child must have at least one U.S. citizen parent, whether by birth or naturalization. The parent need not have been a citizen at the time of the child's birth;
The child must be under age 18;
If the child is adopted, the adoption must be full and final; and
The child must be admitted to the U.S. as an immigrant or lawful permanent resident.

Since automatic citizenship is an operation of law on the day the child is admitted to the U.S., no application is necessary.

A child who is a citizen under the CCA permanently residing in the U.S. can receive documentation by applying for the Certificate of Citizenship. The necessary application is Form N-600 (Application for Certificate of Citizenship). The completed form should be submitted to the USCIS office with jurisdiction over the region of residence along with the necessary fees. For adopted children, evidence of a final adoption and evidence that the child is a permanent resident of the U.S. must be submitted.

A child residing abroad can apply for citizenship by filing form N-600K (Application for Citizenship and Issuance of Certificate under Section 322). This application can be filed at any USCIS office or suboffice in the U.S. Children presently outside the U.S. can obtain U.S. citizenship if five requirements are met:

1. The child must have one U.S. citizen parent, whether by birth or naturalization;
2. The U.S. citizen parent must have resided in the U.S. for at least five years, at least two of which must have been after age 14, or have a U.S. citizen grandparent who meets this residency requirement;
3. The child must be under age 18;
4. The child must be residing outside the U.S. in the physical and legal custody of the U.S. citizen parent; and
5. The child must be temporarily admitted to the U.S. in lawful status and must maintain that status until taking the oath of citizenship.

GROUNDS FOR INADMISSIBILITY

The concept of inadmissibility arises in a number of contexts. It is an issue when a visa application is made and the foreign national seeks entry to the United States. It also comes up when a person in deportation proceedings is alleged to have been inadmissible at the time of entry or was not inspected at his or her entry. Inadmissibility can also be a factor if a permanent resident is alleged to have abandoned his or her status. There are 10 basic grounds of inadmissibility.

Health-related grounds: Persons with communicable diseases that are considered significant public health risks are inadmissible. Also, a failure to show documentation of certain vaccinations is a ground of inadmissibility. Persons with a history of physical or mental disorders that have or may in the future pose a threat to the person or others is inadmissible. Finally, people found to be drug abusers are inadmissible.

Criminal grounds: An individual convicted of a crime involving moral turpitude is inadmissible. However, a single offense that occurred before the age of 18 and more than five years before the application for the visa will not be considered, nor will offenses for which the maximum punishment was only one year and the alien was sentenced to six months or less. Engaging in prostitution or commercialized vice, as well as convictions involving controlled substances, are all bases for inadmissibility. One who committed a serious offense in the U.S. and has claimed immunity from prosecution is also inadmissible.

Security grounds: If a consular officer or U.S. Citizenship and Immigration Services (USCIS) inspector has reasonable ground to believe that the person is coming to the U.S. to engage in espionage or sabotage, or to violate any law relating to prohibitions on exports from the U.S., this renders one inadmissible. Members of designated terrorist organizations are inadmissible, as are those engaged in terrorist activities.

If it is determined that the alien's presence in the U.S. would have negative foreign policy consequences, the person can be denied admission. Current or former members of the Communist Party or other totalitarian organizations, people who assisted in Nazi-era persecution and/or those who have engaged in genocide are inadmissible.

Public charge grounds: A person who is likely to become a public charge is inadmissible. The effect of this is that family-based immigrants must have a valid affidavit of support.

Labor certification grounds: A person coming to the U.S. to work must have a labor certification, unless he or she qualifies for another employment-based immigration category. People coming to the U.S. to work as physicians must pass parts I and II of the National Board of Medical Examiners Examination or its equivalent. Other health care workers must present certification from designated entities.

Undocumented entry and immigration status grounds: Anyone coming to the U.S. without permission from the USCIS or the State Department is inadmissible. Failure to attend removal proceedings without a good reason makes a person inadmissible for five years, as does violating the terms of a student visa. Anyone who engages in fraud or misrepresentation in an effort to enter the U.S. is inadmissible, including those who have made a false claim of U.S. citizenship.

Documentation grounds: An applicant for entry who does not possess a valid immigrant or nonimmigrant visa is inadmissible.

Ineligibility for citizenship grounds: A person permanently barred from obtaining U.S. citizenship is inadmissible. This category includes those who evaded military service based on their status as an alien and those who left the U.S. to avoid the draft.

Previous removal or unlawful presence grounds: After a first deportation, an individual is inadmissible for five years; after subsequent deportations, the period of inadmissibility is 20 years. A person deported because of an aggravated felony is permanently inadmissible. Those who have been unlawfully present in the U.S. for more than 180 days, but less than one year, are inadmissible for three years. Unlawful presence of more than a year leads to inadmissibility for 10 years.

Miscellaneous grounds: Those who are coming to the U.S. to engage in polygamy, those who are required to assist another person who is inadmissible, those who have detained a U.S. citizen child outside the U.S. (until they comply with any court order (s) regarding the child's custody) and former U.S. citizens who renounced their citizenship for tax purposes are all inadmissible.

THE VISA WAIVER PROGRAM

Started as a pilot program in 1986 and made permanent in 2000, the visa waiver program (VWP) allows citizens of designated countries to enter the United States as business or tourist visitors for up to 90 days without requiring them to obtain a visa. Millions of people use the program each year.

Currently, 27 countries participate in the program: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. The applicant for entry under the VWP must be a citizen of the participating country, not merely a permanent resident. In the case of the United Kingdom, the person must be a British citizen, not a British overseas citizen or citizen of a Commonwealth nation.

Under the program, the participation of designated countries must be reviewed every five years. To continue participation, the rejection rate of applications for B-1/B-2 visas for that country cannot be over three percent. Also, the country must allow U.S. citizens to visit under the same terms as the U.S. allows that country's citizens to enter the U.S. on the VWP. When the program was made permanent in 2000, a provision was included that allowed for the immediate termination of a country in the event of an emergency such as war or economic collapse.

The applicant for entry must have a machine-readable passport, if the passport was issued prior to October 26, 2005. Passports issued or extended between October 26, 2005, and October 25, 2006, must contain a digital photograph printed on the data page or an integrated chip with information from the data page.

Passports issued on or after October 26, 2006, must be electronic passports, containing the integrated chip.

Additionally, applicants must show that they have the financial resources to support themselves during their stay in the U.S. Those who arrive by boat or plane must have a return ticket. Upon arrival, applicants complete an I-94W form. On this form, applicants indicate that they waive the right to a hearing in the event they are ordered deported and that they understand they cannot apply for an extension or change of status in the U.S. Therefore, if the purpose of a person's visit to the U.S. is to investigate possible employment or education, he or she should obtain a traditional B-1/B-2 visa.

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.