Immigration Law Update: Spring 2008

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NEW MINNESOTA EXECUTIVE ORDER REQUIRES STATE CONTRACTORS TO USE E-VERIFY

On January 7, 2008, Governor Tim Pawlenty of Minnesota signed Executive Order 08-01, which requires certain Minnesota employers to use E-Verify to ensure that newly hired employees are legally eligible to work in the United States. Specifically, all hiring authorities within the Executive Branch of the State of Minnesota must now use E-Verify for new hires, as well as State contract vendors and employers receiving business subsidies.

The new Executive Order requires that vendors and subcontractors who respond to any solicitation for a state contract which is, or could be, in excess of $50,000, certify their compliance with the federal immigration laws, as of the date services on behalf of the State of Minnesota will be performed, and certify that they are using, or are in the process of implementing, the E-Verify system. An Immigration Status Certification Form must be submitted with a solicitation to the State. The form is available at: http://www.mmd.admin.state.mn.us/doc/immstatcert.doc

E-Verify is an Internet-based system run by the U.S. Citizenship and Immigration Services of the Department of Homeland Security in partnership with the Social Security Administration that allows registered employers to electronically verify the employment eligibility of newly hired employees. E-Verify allows employers to compare certain types of work eligibility documentation required by the federal Immigration Reform and Control Act (IRCA) of 1986, (8 U.S.C. 1101 et. seq.), as amended, with certain records maintained by the Social Security Administration and the Department of Homeland Security. Although E-Verify has been criticized for having an unacceptably high rate of data inaccuracies, the Executive Order notes that E-Verify represents the best technology currently available to employers for complying with federal laws requiring employers to verify legal work eligibility. Please click here for additional information about E-Verify.

Other facets of the new Executive Order include requiring all hiring authorities within the executive branch of state government to be trained in the use of E-Verify, and to conduct annual random audits of appointing authorities in the executive branch to ensure compliance with this Order. The full text of the Governor's Executive Order 08-01 can be found at http://www.mmd.admin.state.mn.us/pdf/execorder08-01.pdf

How Many Employers Have Signed up for E-Verify?

U.S. Citizenship and Immigration Services (USCIS) announced on February 12, 2008 that more than 52,000 employers have voluntarily signed up to participate in E-Verify. The program has been growing by approximately 1,000 new employers each week since last October. Readers may access a Fact Sheet on E-verify here.

USCIS Revises Background Check Policy

On February 4, 2008, the USCIS issued revised guidance regarding security checks required before certain types of applications are approved, including the I-485 Application for Adjustment of Status. Current law requires that three background and security checks (the FBI fingerprint check, the Interagency Border Inspection Services ("IBIS") check, and the FBI name check) be completed and resolved before an I-485 application can be approved.

The revised guidance stipulates that resolution of FBI fingerprint checks and IBIS checks are sufficient background and security checks to ensure the integrity of the immigration process. Therefore, when an FBI name check for an I-485 Application has been pending for over 180 days, and all other aspects of an application's approval have been met including the FBI fingerprint check and IBIS check, the application can be adjudicated. The change should allow for a large number of currently backlogged cases to be completed in a more timely fashion.

The third background and security check - the FBI name check - must still be initiated. However, it is not necessary for it to be resolved before adjudication takes place. To this end, the FBI is committed to providing FBI name check results within the 180 day timeframe. In the unlikely event that FBI name checks result in adverse information, DHS may detain an alien who has been granted permanent residence and USCIS may determine if removal proceedings are warranted.

The revision also includes the adjudication of Form I-601 Application for Waiver of Ground of Inadmissibility, Form I-687 Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, and Form I-698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603).

However, there is no change in the requirements for adjudication of an N-400 Application for Naturalization; for these cases, completion of all three background and security checks are still required.

EB-1 Category for Aliens of Extraordinary Ability

Without exception, the most popular and the most appropriate immigrant visa (green card) category for artists, athletes and entertainers is the EB-1. The first employment-based immigration preference green card

category (EB-1) covers "priority workers" whose skills and talents are important to the United States (i.e., those who possess "extraordinary ability" in their respective fields).

One of the most attractive aspects of the EB-1 category is that U.S. Citizen and Immigration Services (USCIS) will process an EB-1 petition solely on the merits of the individual, bypassing a U.S. Department of Labor certification that there are "no qualified" U.S. workers for a particular position. This makes the time spent processing an EB-1 application much shorter than for categories that do require a labor certification.

The extraordinary ability subcategory does not require a specific job offer if applicants state that they will continue to work in their field in the United States. This means applicants may file petitions on their own behalf, rather than having employers file for them.

The annual cap on EB-1 visas is 40,000, plus any visas left over from the fourth and fifth employment-based categories. This is more visas than are ordinarily used in the category, so there is no backlog in visa issuance in this category.

USCIS defines extraordinary ability as a "level of expertise indicating that the individual is one of those few who have risen to the top of the field of endeavor." There are two ways to demonstrate extraordinary ability. First, aliens can show that they have received a major internationally recognized award, such as a Nobel Prize or an Academy Award. The second, and more common, method is for aliens to demonstrate three of the following 10 types of evidence:

- Receipt of lesser prizes or awards for excellence in their field of endeavor;
- Membership in associations that require outstanding achievements of their members;
- Published material about the alien;
- Participation as a judge of others in the same or a similar field;
- Original scientific, scholarly or artistic contributions of major significance to the field;
- Authorship of scholarly articles;
- Display of the alien's work at artistic exhibitions or showcases;
- Performance in a lead or critical role for organizations with a distinguished reputation;
- Commanding a high salary compared with others in the field; or
- Commercial success in the performing arts, as shown by box office receipts and sales.

Clearly, measuring the ability of any artist is, by its very nature, highly subjective. In recognizing this reality, USCIS devised the aforementioned set of objective criteria as a means of satisfying this lofty task. Realizing that these 10 categories do not encompass all the evidence that can be used to show extraordinary ability, USCIS also uses a catch-all category allowing submission of other comparable evidence.

While not an official category of evidence, another way to demonstrate extraordinary ability is through comparison with an alien already granted that status. This is possible because USCIS regulations make comparisons with others in the field one of the standards for judging extraordinary ability. Therefore, while it may be difficult to find out how the USCIS has treated someone with similar credentials, such evidence is highly relevant.

Many types of evidence that may technically fit within USCIS regulations are not accorded much weight by the agency. For example, publication by a vanity press, a simple citation to the artist's work without evaluation or a single listing in an index are less influential than more objective and analytical evidence (such as a review). Other types of evidence are considered highly persuasive, including publication in peer-reviewed journals. Finally, some of the most persuasive types of evidence are letters from peers in the alien's field attesting to the alien's important contributions and ability.

National Interest Waivers for Physicians

Aliens of exceptional ability or with advanced degrees may apply for green cards through the second-preference employment category (EB-2). While a job offer and labor certification are generally required for this category, they are waived if an applicant can demonstrate that granting the EB-2 is in the national interest. There are two kinds of national interest waiver (NIW) applications available: the standard case and the physician NIW.

National interest can be demonstrated if the applicant can show that the work will, for example, provide key benefits such as:

- improving the U.S. economy;
- improving wages and working conditions for U.S. workers; or
- improving educational and training programs for U.S. children and underqualified workers.

For physician applicants, national interest can be demonstrated if it can be shown that the work will improve health care and is requested by an interested U.S. government agency.

The Nursing Relief for Disadvantaged Areas Act of 1999 established the rules for physician NIW requests. These regulations became effective October 6, 2000, and were amended on January 23, 2007.

To be eligible, the foreign physician must:

- Agree to work full time in primary care or a subspecialty in a clinical practice for an aggregate of five years (including time preceding the I-140 application, but not including any time in J-1 status). Those who filed the I-140 petition before November 1, 1998, are required to perform only three years of service.

- Serve either in a Health Professional Shortage Area (HPSA), Mental Health Professional Shortage Area (MHPSA—for psychiatrists only), a Medically Underserved Area (MUA), veterans facility or a Physician Scarcity Area (PSA—for specialists only).
- Obtain a determination from a federal agency or a state department of health stating that the physician's work is in the public interest.

The physician should first apply for a letter from either a state department of health (if the physician will be working in a HPSA, MHPSA, MUA or PSA) or from the Department of Veterans Affairs, demonstrating how the work is in the national interest.

The next step is to apply for the NIW with U.S. Citizen and Immigration Services (USCIS). The physician must submit the following evidence with Form I-140 (for physicians who plan to serve at more than one practice site, the following evidence must be submitted for each site):

- A full-time employment contract (issued and dated within six months prior to the date the petition is filed) for the required five- or three-year period of clinical medical practice, or an employment commitment letter from a Veterans Affairs facility.
- If the physician will establish his or her own practice, a sworn statement committing to the full-time practice of clinical medicine for the required period, describing the steps the physician has taken or intends to take to establish the practice.
- Evidence that the physician will provide full-time clinical care either in a designated shortage area or in a Veterans Affairs facility.
- A letter (issued and dated within six months prior to the date on which the petition is filed) from the Department of Veterans Affairs or a state department of health attesting that the physician's work is or will be in the public interest.
- Evidence that the physician has passed a U.S. medical licensing examination and is competent in oral and written English.
- If the physician was a J-1 nonimmigrant who received medical training in the United States, a copy of the USCIS approval notice of the J-1 visa waiver.

A physician can simultaneously file for adjustment of status to that of lawful permanent resident when filing the I-140 petition, and the application may be submitted even while a physician is working off his or her J-1 service period. Spouses can also file for adjustment of status and, importantly, permission to work. The physician and family may also apply for advance parole so they can travel outside the United States while the adjustment applications are pending.

USCIS will not make a final determination on any adjustment of status application submitted by a physician practicing medicine full time in an MUA until the physician has had the opportunity to prove that he or she has worked full time as a physician for an aggregate of five or three years, depending on the application filing date.

Under USCIS regulations, physicians with the five-year service requirement must submit evidence of their compliance with the regulations no later than 120 days after the second and sixth anniversaries of the approval of the I-140 petition, showing that the physician is in the process of completing or has completed the service requirement. Physicians with a three-year requirement must submit evidence within 120 days of completing the three years.

Immigration Options for Gays and Lesbians

Individuals in gay or lesbian relationships face difficulties staying together when coming to the United States either as immigrants or nonimmigrants. In 1996, Congress enacted the Defense of Marriage Act (DOMA), which states that a qualifying "marriage" for the purposes of federal law exists only between a man and a woman. Accordingly, a U.S. citizen cannot petition for a green card for a same-sex partner. This is true even if the couple has entered into a legally binding arrangement, such as a civil union or other similar domestic partnership found in other countries.

However, there are ways those in a same-sex relationship can stay together in the United States.

Student Visas

Assuming they otherwise qualify, the foreign national can enter the United States on a student visa. He or she must, of course, comply with the terms of the visa, and the visa will eventually expire, meaning that the person must either leave the United States or find another visa status.

Work Visas

Work visas allow a person to live and work in the United States for, in some cases, an indefinite period of time. The primary drawback to most common work visas is that they allow the person to live in the United States only for a limited period of time. For example, the time limit for H-1B visas is six years and for L visas, five or seven years. There are some work visas that may be renewed indefinitely. The O visa, for people of extraordinary ability, can be issued in three-year increments for an indefinite period of time, as long as the visa holder is doing work in the area of his or her extraordinary ability. The E visa, for people making an investment to start a business in the United States, can be issued in five-year increments for an indefinite period. TN visas, for Canadian and Mexican professionals, can also be renewed without limit.

Regardless of how long a person can live and work in the United States on a work visa, however, the fact always remains that he or she is not a permanent resident and could be separated from a loved one on the whim of an employer or a downturn in economic conditions.

Green Cards

Because a U.S. citizen in a same-sex relationship with a foreign national cannot file for his or her immigration under the current laws, the foreign national has to seek a green card through another route. If

he or she has a qualifying family member (for example, a U.S. citizen parent or sibling), the family member can apply for the relative. However, this is a long process. Permanent residents can file for their adult children, but these cases involve an even longer wait.

Often, a quick way of obtaining permanent residence is through an employer who is willing to sponsor the foreign national. The foreign national can also apply for a green card through the diversity visa lottery if he or she comes from a qualifying country. Given that only 50,000 visas are available each year and the fact that there are millions of applicants, this is by no means a sure way of getting a green card.

A final way the foreign national in a same-sex partnership can remain in the United States is through an asylum application. In recent years, courts have approved asylum cases submitted by gays and lesbians, a recognized social group, who show past persecution or well-grounded fear of persecution due to sexual orientation in the individual's home country.

I Visas for Foreign Media and Press

The I visa is a nonimmigrant visa for representatives of the foreign media temporarily entering the United States to engage in their profession. The I visa has a few key advantages over other visa categories.

- There is no need to get U.S. Citizen and Immigration Services (USCIS) approval before applying at a consulate.
- Admission is granted on a "duration of status" basis and, as long as the media representative continues working for the sponsoring employer, no extensions of stay in the United States are needed.
- The amount of documentation required to secure I visa status is much less than in other visa categories.

To qualify for an I visa, the applicant must be engaged in qualifying activities for a media organization having its home office in a foreign country. The activity must be essentially informational and generally associated with news gathering and reporting on actual current events.

Each applicant must submit the following at a U.S. Consulate:

- Nonimmigrant Visa Application, Form DS-156;
- Supplemental Nonimmigrant Visa Application, Form DS-157;
- A passport valid for travel to the United States;
- One 2 × 2 photograph;
- Proof of employment, such as a letter from the employer; and
- Nonimmigrant visa application processing fee.

*If you have questions about these or other immigration-related matters, please call Mark Mathison, Casey Nolan, or another member of the Gray Plant Mooty Employment Law Practice Group.

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