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Foreign Investors – A Welcome Mat?

You would think that foreign investors trying to invest money in the U.S. and create jobs might be welcomed with open arms in such difficult economic times, but many investors decide to go to other countries due to the complexity and unpredictability of our immigration laws. On August 2, the director of United States Citizenship and Immigration Services ("USCIS"), Alejandro Mayorkas, announced several administrative changes meant to encourage start up investors and other investment in the U.S. by foreign nationals. http://blog.uscis.gov/. He was joined in his announcement by the Secretary of the U.S. Department of Homeland Security, Janet Napolitano, in emphasizing the seriousness of this effort to encourage foreign investment in the U.S. http://tinyurl.com/3e56gw9.

The primary developments are as follows:

1. Sole Shareholders/Employees and the H-1B category – The H-1B category requires the establishment of an employer/employee relationship for H-1B beneficiaries. A USCIS memorandum had drawn into question further the ability of any H-1B employer controlled by the beneficiary being able to obtain an H-1B petition approval, because of the difficulty in meeting the required employer/employee relationship. The clarification provided by USCIS confirms that there must be a right to control established by the petitioner over the employment of the H-1B beneficiary. USCIS further notes, however, that "if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise, or otherwise control the beneficiary, the petitioner may be able to establish an employer-employee relationship with the beneficiary."

2. EB-2 Immigrant Entrepreneurs and the National Interest Waiver – The EB-2 immigrant visa category may be used by foreign nationals with exceptional ability to avoid the normal permanent labor certification process of the Department of Labor ("DOL"). This option is referred to as Schedule A, Group II precertification. The USCIS clarification provided, however, focuses on the national interest waiver option of the labor certification available in the EB-2 immigrant visa category for those with qualifying exceptional ability. The main benefit of the clarification provided may be to encourage adjudicators to be more accepting of the argument that the creation of jobs for U.S. workers may qualify applicants for a national interest waiver. The jury is certainly out on this particular "benefit."

3. Expand Premium Processing – Those applicants attempting to acquire permanent residence as multinational managers or executives under the EB-1-3 immigrant visa category will apparently become eligible to request premium processing of their I-140 petitions.

4. Streamline the EB-5 Immigrant Investor Process - The EB-5 immigrant visa category for individual

investors as well as for those investing in an approved Regional Center has been unpredictable and confusing, and the process is lengthy. USCIS proposed accelerating its processing time for applications via the extension of premium processing and improving the expertise of adjudication teams.

5. Improve Stakeholder Input with USCIS - USCIS will be holding more public engagement with communities concerning economic development and the EB-5 immigrant investor category.

The Texas Two Step for Foreign Physicians

Texas legislators managed to send out quite a different message concerning foreign physicians with the passage of SB-189, which modifies Chapter 163 of the Texas Medical Board ("TMB") Rules. The bill becomes effective on September 1, 2011 and the Texas Medical Board rules related to this provision will become effective as to "initial" applications to practice medicine made on or after September 1, 2012. The bill basically reduces the state's competitiveness to attract foreign physicians because non-U.S. citizen or legal permanent resident applicants for a license to practice medicine in Texas will have to show that they have practiced medicine full-time or have signed an agreement to practice medicine full-time as a condition for licensure for at least three years in Texas exclusively in either a medically underserved area (MUA) or a health professional shortage area (HPSA) designated by the U.S. Department of Health and Human Services. This bill does not prohibit, however, the issuance of licenses to non-citizens/legal permanent residents, who will practice in graduate medical education programs not located in a MUA or HPSA according to the TMB.

It appears that Senator Jane Nelson's (bill sponsor) intent regarding SB 189 was to add a requirement for H-1B visa holders to practice for three years in a MUA. Unfortunately, the way the bill was drafted, it will apparently apply to other types of nonimmigrant visa categories as well. Thus, for example, in Texas, a physician who meets the extraordinary ability requirements to obtain an O-1 visa may be unable to obtain a license without committing to the three year period of service in a MOU or HPSA, which would not necessarily be required in other states. Just last month, the Second Circuit Court of Appeals issued a decision in *Kirk v. New York State Department of Education*, upholding an award of attorney's fees related to a case challenging the New York State Education Law on equal protection grounds, which restricted professional veterinarian licenses to U.S. citizens and lawful permanent residents. The true impact of this bill is still under development, but is a very important issue to monitor.

Other relevant Texas legislative changes modified the current medical training requirement for graduates of foreign medical schools (IMGs) from three years to two years pursuant to HB 1360.

Travis County District Court Enjoins TX DPS from Denying Driver's Licenses to Foreign Nationals Legally Working and Living in Texas

Mexican American Legal Defense and Educational Fund (MALDEF) Secures Travis County District Court Ruling to Stop Texas Department of Public Safety (TX DPS) from Denying Driver's Licenses to Foreign Nationals Legally Working and Living in Texas

On July 27, 2011, the 345th District Court in Travis County granted a declaratory judgment and enjoined the TX DPS from enforcing its recently adopted anti-immigrant rules and policies that deny driver's licenses to foreign nationals who live and work in Texas with authorization from the federal government. DPS has prevented thousands of foreign nationals across Texas from receiving standard-issued licenses even though they possessed valid immigration documents issued by the federal government.

Thomas A. Saenz, MALDEF President and General Counsel, stated, "As a nation of immigrants, our tradition, too often violated historically and today, is to welcome immigrants and incorporate them into our society, cognizant of the enduring contributions immigrants have made and continue to make. The

unlawful DPS attempt to deny licenses to immigrants violated our national tradition and aspiration, so we welcome the court's wise ruling."

"We are very pleased that the Court halted DPS from implementing its own arbitrary, misguided policies that denied licenses to hardworking immigrants living in the United States with permission," said David Hinojosa, MALDEF Southwest Regional Counsel and lead attorney in the case. "These irrational policies have not only affected those immigrants and their families, causing them to suffer from discrimination, but also impacted hundreds of Texas businesses who legally employ immigrants, and we are glad to put an end to the senseless action."

Among other things, DPS had implemented policies to issue non-standard licenses in a vertical format that identified foreign nationals as "TEMPORARY VISITORS" and included their "status date." The Texas Legislature never passed a law authorizing DPS to implement these policies, which did not take into consideration the multitude of circumstances where a foreign national can be lawfully present in the U.S. and lawfully able to work, but for less than one year, or lawfully present in the U.S., but unable to work. For example, people in the following circumstances would be denied a driver's license:

1. Business visitors or tourists admitted for less than one year;

2. Spouses of certain nonimmigrants authorized to work, such as H-4 dependents of H-1B specialty occupation nonimmigrants, E-1 treaty trader dependents, and E-2 treaty investor dependents.

3. A nonimmigrant who is lawfully in the U.S. waiting for the results of a timely filed application to extend nonimmigrant status. For example, an L-1 intracompany transferee can be admitted for three years initially and be eligible for two - two year extensions. As long as a timely filed extension application is submitted to U.S. Citizenship and Immigration Services and the applicant is in status to apply for an extension, the person can remain working in the U.S. while the extension is being adjudicated for up to 240 days or the date of adjudication, whichever is earlier. If approved, the person can continue to work in the U.S. for another two years.

4. A lawful permanent resident with an expired green card (I-551), because the expiration of the I-551 does not reflect any loss of status in the US.

5. Refugees and asylees lawfully in the U.S., but who have not received documentation of a status validity period.

6. A pending adjustment applicant for legal permanent resident with an I-485 receipt notice, but without documentation to show any period of validity.

You may view a copy of the decision, click here.

Change of Address Procedures for Federal Immigration Agencies

Changing your address with the various Federal immigration agencies is more difficult than one might expect, and the failure to properly make an address change can have serious immigration consequences, such as a denial of your pending application for immigration benefits. The U.S. Citizenship and Immigration Services (USCIS), the Executive Office for Immigration Review (EOIR), and the U.S. Department of State (DOS) each have separate requirements for properly making an address change. Mail forwarding at your local post office is insufficient, because this action does not provide the required notice to these agencies, and does not protect you against an allegation of failure to provide notice of an address change. In addition, because the U.S. Postal Service does not forward most USCIS correspondence, you may not receive important information sent to you about your case.

USCIS, DOS, and EOIR have separate procedures, filing locations, forms, and timeframes for the timely submission of a change of address notification. A change of address should be reported for each application type, petition, case, and family member with each government agency from which an

immigration benefit is being sought. Applicants should use the most permanent address available. Please visit http://tinyurl.com/3o3gttd to see a detailed chart of who should file, which form must be used, as well as how and when notice must be provided to the USCIS, DOS, and EOIR.

Additional information for providing notice of a change of address to USCIS may be found online at:

- USCIS Customer Guide on How to Change An Address - http://www.uscis.gov/USCIS/Resources/F2en.pdf
- USCIS Change of Address Information - http://tinyurl.com/26mfos8 (this link provides information on the AR-11 change of address form, including links to file online with USCIS. You have the option of mailing your AR-11 form to USCIS, although filing online is recommended by USCIS.

If you file by mail, note that as of April 1, 2011 all Change of Address forms must be sent to:

Department of Homeland Security
Citizenship and Immigration Services
Attn: Change of Address
1344 Pleasants Drive
Harrisonburg, VA 22801

Note penalty: Willful failure of a non-U.S. citizen to give written notice to USCIS of a change of address within 10 days is a misdemeanor crime, punishable by fine or imprisonment and/or removal from the U.S. and could also jeopardize the ability to obtain a future immigration benefit. If you have a case pending with USCIS, U.S. and non-U.S. citizens can report a change of address online via USCIS Online Change of Address or by calling 1-800-375-5283, but if you are a non-U.S. citizen, you will still need to complete the AR-11 form noted above even if you notify USCIS by phone. Be sure to have the case number(s) ready when you call.

Additional information for providing notice of a change of address to DOS may be found online at:

- DOS Visa Contact Information - http://tinyurl.com/3nxxsyu (provides additional links to contact specific Embassies and U.S. Consulates)

Additional information for providing notice of a change of address to EOIR may be found online at:

- EOIR Forms - http://www.justice.gov/eoir/formslist.htm (this link provides downloadable change of address forms)

Contact Us

Our immigration compliance group looks forward to assisting you with any questions. Please contact Kathleen Campbell Walker or Lisa Rios with questions. (kwalker@coxsmith.com – lrios@coxsmith.com).

www.coxsmith.com
Cox Smith Matthews Incorporated
221 N. Kansas Street | Ste 2000
El Paso, Texas 79901
915.541.9300
915.541.9399