July 2012 Gulf Coast Business Immigration Newsletter

Please find below a copy of the July Business Immigration Newsletter published by the Gulf Coast Immigration Law Center (GCILC). The July 2012 Gulf Coast Business Immigration Newsletter includes:

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If you have questions, please contact Sujin Kim, Esq. at skim@gulfcoastimmigrationlawcenter.us

To meet the growing needs for comprehensive and sophisticated legal services in all aspects of business immigration-related matters in Northwest Florida, South Alabama and Mississippi, the GCILC has been issuing monthly immigration newsletters/updates, quarterly business immigration newsletters, and immigration alerts to announce fast-breaking developments. The GCILC offers guidance, advice, counsel and representation to business and individual clients in matters of immigrant (both employment and family- based) and nonimmigrant working visa petitions and applications, with a subspecialty focusing on the U.S. Immigration Investor Program (EB-5 Program) and foreign investments under the U.S.-Korea Free Trade Agreement. The GCILC also conducts educational lectures/seminars and training for U.S. based academic institutions and businesses on information and developments in the U.S. immigration system, including I-9 Compliance, E-Verify, the EB-5 Program, and Global immigration laws. For further information about GCILC, publications and lectures and seminars, contact us at info@gulfcoastimmigrationlawcenter.us or visit www.gulfcoastimmigrationlawcenter.us

Sincerely,

Sujin Kim, Esq.

If you do not want to receive emails from the Gulf Coast Immigration Law Center in the future, please let us know by writing to us at info@gulfcoastimmigrationlawcenter.us

July 2012 Gulf Coast Business Immigration Newsletter

Employment Creation EB-5 Immigrant Investor Program

The U.S. Congress enacted the Immigration and Nationality Act 1990 ("Immigration Act of 1990") to establish the fifth employment-based preference category, known as EB-5 Immigrant Investor Visa Program (hereafter "EB-5 Program"), for foreign nationals and their families to obtain legal permanent resident status in the U.S. upon satisfying conditions pursuant to Immigration and Nationality Act (INA) § 203(b)(5). Congress intended to attract entrepreneurial immigrants to the United States who would help stimulate the U.S. economy by investing the required capital in the U.S. and creating jobs for U.S. workers in the process. Congress allocated approximately 10,000 immigrant visas (here after "EB-5 visa") annually for this fifth employment-based preference category, including the spouse and minor children of investors. Qualified investors under this EB-5 Immigrant Investor Program (here after "Original EB-5 Program") must: 1) create a new commercial enterprise and actually have invested, or be in the process of investing at least $1 million, (or at least $500,000 if the investment were made in a "targeted employment area"[6] and, as a result, would create required numbers of jobs); 2) benefit the U.S. economy through *directly* creating at least ten full-time jobs or save at least ten jobs in a "troubled business" for qualified U.S. workers. The alien entrepreneurs must meet these requirements and be able to prove the completion of the requirements. They can then apply for lawful permanent resident status.

In an effort to encourage foreign investors' participation in the EB-5 Program, Congress established a regional center pilot program in 1992 and further set aside up to 3,000 of the allocated 10,000 EB-5 visas annually for qualifying foreign investors for regional centers-affiliated commercial enterprises. (here after "Regional Center Program"). A "regional center" is any economic unit, public or private, which is involved in the promotion of local/regional economic growth, improved regional productivity, job creation, and increased domestic capital investment. The immigrant investor pilot program was scheduled to expire on March 6, 2009. It has, however, been renewed a few times and is currently scheduled to expire on September 30, 2012. The Regional Center Program allows qualified foreign investors to count the indirect job creation from their investments, located within the geographic limits of the regional center, and pool their capital investments for large investment projects. This is the most important distinction between the Original EB-5 Program and the Regional Center Program: counting indirect job creation of the investment in meeting at least ten-job creation requirement. While foreign investors under the Original EB-5 Program are required to create jobs *directly*, foreign investors under the Regional Center Program can count both direct and indirect jobs which were created by their capital investment. Regional Center Program investors can demonstrate their indirect job creation through "reasonable methodologies." Due to this relaxed job creation element, many foreign investors prefer the Regional Center Program over the Original EB-5 Program.

E-Verify Employment

The Immigration and Nationality Act prohibits the hiring of individuals who are not authorized to work in the United States. It requires employers to check the immigration status of an employee and

make sure that the identification document submitted by the employee "reasonably appears on its face to be genuine."

E-Verify is run by the U.S. Citizenship and Immigration Services (USCIS), in conjunction with the Social Security Administration (SSA) which is to provide employers with an accurate and easy way to determine employment eligibility. Through E-Verify, the Social Security numbers and alien identification numbers of new hires are checked against SSA and Department of Homeland Security (DHS) databases in order to help employers determine who is eligible to work in the U.S.

E-Verify verifies the employment authorization of new hires based on information provided on the Form I-9. Because a Form I-9 may only be completed after an employee has been offered and accepted employment, E-Verify may not be used to prescreen applicants.

Employers use E-Verify for all new hires (both U.S. citizens and non-citizens). E-Verify cannot be used to verify current employees unless the employer is required to use E-Verify for current employees based on a federal contract containing a Federal Acquisition Regulation (FAR) clause. However, E-Verify cannot be used to re-verify an employee's expired employment authorization.

E-Verify State Laws: AL, GA, LA, SC, and TN

Alabama (the Beason-Hammon Alabama Taxpayer and Citizen Protection)

- Effective January 1, 2012, as a condition for the award of any state contract, every contractor or subcontractor shall enroll in E-Verify and verify the employment eligibility of its new hires. A first offense of the Act can lead to debarment from state contracts, cancellation of state government grants or incentives and suspension or revocation of a business license for up to 60 days. A second offense may lead to permanent revocation of the employer's business license.
- Effective April 1, 2012, every business entity or employer in the state is required to enroll in E-Verify and verify the work eligibility of all new hires. A business entity or employer that uses E-Verify to verify the work authorization of an employee shall not be deemed to have violated this section with respect to the employment of that employee.

Georgia (Illegal Immigration Reform and Enforcement Act of 2011)

- Effective January 1, 2012, all private employers with 500 or more employers are required to enroll in E-Verify and verify the employment eligibility of new hires.
- Effective July 1, 2012, all private employers with 100 or more employees but fewer than 500 employees are required to enroll in E-Verify and verify the employment eligibility of new hires.
- Effective July 1, 2013, all private employers with more than 10 employees but fewer than 100 employees are required to enroll in E-Verify and verify the employment eligibility of new hires.

Louisiana (Act 376 and Act 402)

- Effective January 1, 2012, Act 376 requires that private employers who bid on a public entity project or enter into a contract agreement with a public entity for the physical performance of services, confirm in a sworn affidavit that the company uses the E-Verify system for all new

employees within the United States. If the employer is awarded a contract, he or she is required to E-Verify all new employees in Louisiana hired through the duration of the contract. The requirement applies to both general contractors and their subcontractors.

- Effective August 15, 2011, Act 402 stipulates that all Louisiana employers must confirm the citizenship or work authorization status of new hires through one of two ways. The employer may either: (1) use the E-Verify system; or (2) ensure that each employee has provided a picture ID and one of the following documents (a copy of which must also be retained): U.S. birth certificate or certified birth card; naturalization certificate; certificate of citizenship; alien registration receipt card; U.S. immigration form I-94, with employment authorized stamp.

South Carolina (Act 69)

- Effective January 1, 2012, all employers must enroll in E-Verify to verify the legal status of all new hires within three days. There will no longer be the option of only hiring employees who possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements) in lieu of using E-Verify.

Tennessee (The Tennessee Lawful Employment Act, H.B.1378)

- Effective January 1, 2012, all state and local government agencies must enroll and participate in E-Verify or request and maintain an identity/employment authorization document from a newly hired employee.
- Effective January 1, 2012, all private employers with 500 or more employees must enroll and participate in E-Verify or request and maintain an identity / employment authorization document from a newly hired employee.
- Effective July 1, 2012, all private employers with 200 to 499 employees must enroll and participate in E-Verify or request and maintain an identity / employment authorization document from a newly hired employee.
- Effective July 1, 2013, all private employers with 6 to 199 employees must register and utilize E-Verify or request and maintain an identity / employment authorization document from a newly hired employee.

E visa services at the U.S. Embassy in London

The American Embassy in London advised that the services provided by the E visa office will be very limited with the possibility of some closure during the months of July and August due to the forthcoming 2012 Olympics. This office will be closed from July 16, 2012 through August 17, 2012. All appointments are currently available July 2 to July 13, 2012. Regular services should resume on August 20, 2012. Applicants will be notified of any changes to the advised scheduled.

E visas are for nationals of certain countries with which the United States has a treaty of commerce. Foreign nationals with these visas may carry on substantial trade, including trade in services or technology, principally between the U.S. and the treaty country, or to develop and direct the operations of an enterprise in which the national has invested, or is in the process of investing a substantial amount of capital, under the provisions of the Immigration and Nationality Act.

FY2012 H-2B Cap Count

Cap Type	Cap Amount	Beneficiaries Approved	Beneficiaries Pending	Target Beneficiaries	Total	Date of Last Count
H-2B: 1st Half	33,000	36,609	0	45,000	36,609	3/31/2012
H-2B: 2nd Half	33,000[2]	26,149	2,262	51,000	28,411	6/29/2012

As of 6/29/12, USCIS receipted 28,411 petitions toward the 33,000 H-2B cap amount for the second half of the fiscal year. This count includes 26,149 approved and 2,262 pending petitions. H-2B cap count information for the first half of FY2012 also is available. The H-2B non-agricultural temporary worker program allows U.S. employers to bring foreign nationals to the United States to fill temporary non-agricultural jobs.

Supreme Court Decision on Arizona SB 1070

GCILC is encouraged by the Supreme Court's decision to strike down three out of four of the challenged provisions of SB1070. The decision makes it clear that state law cannot dictate the DHS immigration enforcement policies. We hope this may spur Congress to act on comprehensive immigration reform soon as a patchwork of state laws is not a solution to our broken immigration system. Click here for the ruling.

In April 2010, Arizona enacted S.B. 1070 in response to the rise in illegal immigration in the State. The Department of Justice challenged the constitutionality of S.B. 1070's provisions, arguing that they were preempted by the Supremacy Clause of the U.S. Constitution. A federal district court in Arizona agreed and enjoined Arizona from enforcing the law. The Ninth Circuit Court of Appeals affirmed. The question before the Supreme Court was whether federal immigration laws "preempt" the following four provisions of SB 1070 that were blocked by lower courts:

- **Section 2(B)** requiring state and local police officers to attempt to determine the immigration status of any person lawfully stopped, detained or arrested if "reasonable suspicion" exists that the person is unlawfully present in the United States and requiring state and local authorities to verify the immigration status of the person placed with the federal government before such persons may be released;

- **Section 3** making it a state crime, punishable by up to 20 days in jail and 30 days for subsequent violation, for unauthorized immigrants to violate the provisions of federal law requiring them to apply for "registration" with the federal government and to carry a registration card if one has been issued to them;

- **Section 5(C)** making it a state crime for immigrants who are not authorized to work in the United States to apply for work, solicit work in a public place, or perform work within the state's borders; and

- **Section 6** authorizing state and local police officers to arrest immigrants without a warrant where "probable cause" exists that they committed a public offense making them removable, grounds for deportation, from the United States.

A divided Supreme Court (5-3) struck down Sections 3, 5 and 6. Despite Arizona's arguments that the challenged provisions were not preempted because they mirrored federal immigration law, the Court appears to have rejected the mirror-image theory as well as the notion that Arizona was simply cooperating in enforcement.

In striking down § 3 and 5(C), which criminalizes illegal immigrants for not possessing their federal registration cards while working, applying for work or soliciting work, the Court looked at the text, structure and legislative history of the 1986 Immigration Reform and Control Act ("IRCA") in determining Congressional purpose, rather than relying on the text of the express provision. The Court found that Congress made a "deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment,"

In striking down § 6, the provision allowing state officers to conduct warrantless arrests of persons deemed subject to removal, the Court wrote: "There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." The Court also indicated that if §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, 'diminish[ing] the [Federal Government]'s control over enforcement' and 'detract[ing] from the 'integrated scheme of regulation' created by Congress."

To Justice Scalia's dissent that individual states have the inherent sovereignty to control their borders, the Court wrote, "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States be able to confer and communicate on this subject with one national government, not the 50 separate states." Justice Kennedy further stated that "the national government has significant power to regulate immigration" and that Arizona or others "may not pursue policies that undermine federal law" which made it abundantly clear that immigration law is a federal matter and states should not interfere.

The Court's decision supports and reinforces the role of Congress, not individual states, as the arbiters of immigration policy saying, "Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders.

However, the Court unanimously upheld § 2 requiring local police to check the immigration status of anyone they have "reasonable suspicion" to believe is in the U.S. The Court read this provision very narrowly, leaving open the possibility of revisiting this particular provision based on racial profiling and other legal violations when it said "At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law… [t]his opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." The Court also signaled to states with the provision similar to S.B 1070's Section 2(B) that arresting and holding someone for the purpose of checking their immigration status is a violation of the Constitution: "Detaining individuals solely to verify their immigration status would raise constitutional concerns."

The Arizona law has served as a model for other state laws. To the extent the provisions of the other states' laws are similar to the provisions of S.B. 1070, they are similarly pre-empted and may not be enforced. Consequently, the Court's decision curtails state and local legislators from seeking to enact immigration enforcement laws at state and local levels.

Deferred Action for 800,000 DREAMers_Update

Certain young people who do not present a risk to national security or public safety and meet specified criteria will be eligible to receive deferred action for two years, subject to renewal, and to apply for work authorization. However, requests for relief are to be decided on a case-by-case basis, and applicants must pass a background check before they can receive deferred action.

Deferred action is a discretionary DHS decision not to pursue enforcement against a person for a specific period. A grant of deferred action does not confer lawful immigration status or alter an individual's existing immigration status. While deferred action does not cure any prior period of unlawful presence, time in deferred action status is considered a period of stay authorized by the Secretary of DHS. An individual does not accrue unlawful presence for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I) while in deferred action status. However, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status. A grant of deferred action can be renewed or terminated at any time.

To establish their eligibility for deferred action under the new memorandum, individuals must provide "verifiable documentation" showing that they:

- are 15-30 years old
- arrived in the United States before age of 16
- have continuously resided in the U.S. for at least 5 years as of June 15, 2012 (the date of the DHS's announcement)
- were present in the United States on June 15, 2012
- are currently in school, graduated or have a general education development (GED), or are an honorably discharged veteran of the U.S. Coast Guard or the U.S. Armed Forces; and
- have not been convicted of a felony, a significant misdemeanor or multiple minor misdemeanors or otherwise pose a threat to national security or public safety

The individual's age on June 15, 2012, will determine eligibility. DHS has indicated in preliminary discussions with stakeholders that the new policy applies regardless of whether an individual's initial entry was lawful. DHS instructed U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) to exercise their discretion to refrain from placing individuals who meet the eligibility criteria into removal proceedings or being removed from the United States.

USCIS will adjudicate deferred action requests for individuals who are not currently in removal proceedings or subject to a final order of removal. USCIS must establish an application process within 60 days of the date of the memorandum, i.e., on or before August 14, 2012. Applicants should not submit applications to USCIS before this process has been established, as they will be rejected. Only individuals who meet all the eligibility criteria will be granted deferred action under the new

memorandum. Family members who do not independently qualify will not receive deferred action pursuant to this process.

Provisional I-601 Waiver_Update

USCIS announced on January 9, 2012, that it intends to change its current process for filing and adjudicating certain applications for waivers of inadmissibility filed in connection with an immediate relative immigrant visa application.

USCIS is currently considering changes that would allow certain immediate relatives (spouse, child, and parent of a U.S. Citizen) who can demonstrate extreme hardship to a U.S. citizen spouse or parent, "qualifying relative," to receive a provisional waiver of the unlawful presence bars before leaving the United States. A person would be able to obtain such a waiver only if a Petition for Alien Relative, Form I-130, is filed by a U.S. citizen on his or her behalf and that petition has been approved. If the waiver is granted, the foreign national must leave the U.S. and apply for and receive an immigrant visa abroad before returning to the U.S. The change will give countless American families a chance to stay together safely and legally.

However, this provision is not yet in effect and will not be available to potential applicants until a final rule is published in the Federal Register specifying the effective date. Please also note that this proposed provision is separate and distinct from the recent implementation of centralization of I-601 filing for applicants abroad (see below).

Centralized Lockbox Filing

Immigrant visa applicants who are applying for a waiver of a ground of inadmissibility from outside the United States can file the Form I-601, Application for Waiver of Grounds of Inadmissibility, by mail with a USCIS domestic Lockbox facility, rather than with a USCIS international field office, or a U.S. Embassy or Consulate. The Lockbox facility will send all Form I-601 applications submitted by international filers to the USCIS Nebraska Service Center (NSC) for adjudication.

Global Entry Program Expands to All Major Airports in Canada

The CBP issued a press release announcing that all eight preclearance airports in Canada now have Global Entry kiosks which allow pre-approved, low-risk travelers the ability to bypass the traditional CBP inspection process and use automated kiosks to expedite their entry into the U.S.

Matter of Ignacio GUZMAN MARTINEZ, ID 3759, 25 I&N Dec. 845 (BIA 2012)

The Board of Immigration Appeals (BIA) recently held that, pursuant to section 101(a)(13)(C)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(13)(C)(iii) (2006), a lawful permanent resident of the United States may be treated as an applicant for admission in removal proceedings if the

DHS proves by clear and convincing evidence that the returning resident engaged in "illegal activity" at a United States port of entry. Click here the BIA's holding.

July 2012 Visa Bulletin

The Department of State (DOS) has released its July 2012 Visa Bulletin. The Visa Bulletin sets out per country priority date cutoffs that regulate the flow of adjustment of status (AOS) and consular immigrant visa applications. Foreign nationals may file applications to adjust their status to that of permanent resident, or to obtain approval of an immigrant visa application at an American embassy or consulate abroad, provided that their priority dates are prior to the cutoff dates specified by the DOS.

Priority date cutoffs are assessed on a monthly basis by the DOS, based on anticipated demand. Cutoff dates can move forward or backward, or remain static and unchanged. Employers and employees should take the immigrant visa backlogs into account in their long-term planning, and take measures to mitigate their effects.

FAMILY SPONSORED CATEGORIES					
Family-Sponsored	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
F1	08JULY05	08JULY05	08JULY05	08JULY 93	15JUL97
F2A	15FEB10	15FEB10	15FEB10	15FEB10	15FEB10
F2B	01MAY04	01MAY04	01MAY04	01JAN92	22DEC01
F3	15APR02	15APR02	15APR02	22JAN93	22JUL92
F4	22JAN01	08JAN01	22JAN01	08JAN01	01FEB89

First (F1): Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.
Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:
A. (F2A) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;
B. (F2B) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.
Third (F3): Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.
Fourth (F4): Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT BASED CATEGORIES					
Employment-Based	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	C	C	C	C	C
2nd	01JAN09	U*	U*	01JAN09	01JAN09

3rd	22JUL06	22SEP05	22SEP05	22JUL06	08JUN06
Other Workers	22JUL06	15JUN03	22SEP02	22JUL06	08JUN06
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers and Pilot Programs	C	C	C	C	C

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.
Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.
Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".
Fourth: Certain Special Immigrants: 7.1% of the worldwide level.
Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

*Continued heavy demand for numbers in the Employment Second preference category has required the establishment of a worldwide cut-off date for the month of July. This action has been taken in an effort to hold number use within the annual numerical limit. Should there be an increase in the current demand pattern, it may be necessary to make this category completely "unavailable" prior to September 30, 2012. The China and India Employment Second preference categories are already "unavailable" and will remain so for the remainder of the fiscal year.

Click here for July 2012 Visa Bulletin in its entirety.

Immigration Processing Times

USCIS Service Center & District Office processing times online: Click here
Nonimmigrant Visa Waiting Times: Click here
Department of Labor processing times and information on backlogs: Click here

Public Broadcasting Service (PBS) Documentary on Immigration in America

Homeland: Immigration in America is a three-hour documentary series that explores one of the most polarizing issues facing America today. Click here to view.

Gulf Coast Immigration Law Center
P.O. Box 2262
Mobile, Alabama 36652
(251) 379-8065
(251) 219-7182 FAX
info@gulfcoastimmigrationlawcenter.us

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