

GCI Business Immigration Newsletter - February 2013

Entrepreneurs in Residence (EIR)

Since Secretary of Homeland Security Janet Napolitano outlined a series of policy, operational, and outreach efforts to stimulate the nation's economy and create American jobs through immigration/non-immigrant visa programs¹, U.S. Citizenship and Immigration Services (USCIS) has initiated 'Entrepreneurs in Residence' for employment-based and high-skilled visa categories, including H-1B, EB-2, and EB-5.

An H-1B beneficiary who is the sole owner of the petitioning company may establish a valid employer-employee relationship for the purposes of the H-1B nonimmigrant visa application. Foreign entrepreneurs, with talent of exceptional ability or who otherwise can create jobs, may obtain an EB-2 immigrant visa if they satisfy the existing requirements, and also may qualify for a National Interest Waiver if they can demonstrate that their business endeavors will be in the interest of the United States. EB-5 (Immigrant Investor Program) has been further enhanced through transforming the intake and review process, including the extension and the availability of premium processing for certain EB-5 applications and petitions, and implementing direct lines of communication between the applicants and USCIS.

EB-5 Visa Recent Usage: China and South Korea

Created by Congress in 1990, the EB-5 Program stimulates the U.S. economy through capital investment and resulting job creation by immigrant investors. It was estimated, in June 2011, that the program has resulted in more than \$1.5 billion in capital investments and created at least 34,000 jobs.

Congress has allocated approximately 10,000 EB-5 visas annually but this visa has been underutilized due to issues and concerns about the program, including fraud and lack of established regulations. Since the inception of the program in 1993 through fiscal year 2004, only a total of 6,024 EB-5 visas were issued to foreign entrepreneur investors and their qualified family members. However, as the program is being stabilized and developed, the usage has drastically increased. In 2011, for example, 3,463 EB-5 visas were used and in 2012, 7,641 EB-5 visas were used. The top countries by visa usage are China, South Korea, Britain/Northern Ireland, India, Iran, Mexico, Canada, and Russia. China accounted for over 80% and South Korea accounted for over 10% of all EB-5 visas worldwide in recent years.

¹ Nonimmigrant visas are for persons temporarily admitted to the United States for reasons other than permanent residence and immigrant visas are for persons entering the United States to reside permanently.

FY 2014 H-1B Working Visa and Cap Exempt

USCIS will begin accepting H-1B petitions for the fiscal year 2014 H-1B cap on April 1, 2013. Once the H-1B cap is reached, new H-1B visa will not be available until October 2014 as the fiscal year begins on October 1 and ends on September 30.

The 2013 H-1B cap was reached in June 2012 and the 2012 H-1B cap was reached in November 2011. However, some previous years indicate that USCIS could receive H-1B applications far in excess of the annual cap within the first week of filing eligibility. The current annual cap on the H-1B visa is 65,000 (of which about 6,800 visas are set aside each fiscal year for nationals of Chile and Singapore under U.S.-Chile and U.S.-Singapore Free Trade Agreements). Some petitions are exempt from the cap under the advanced degree exemption provided to the first 20,000 petitions filed for a beneficiary who has obtained a U.S. master's degree or higher prior to the filing. With some exceptions, foreign workers, who hold a current H-1B visa and seek a job with certain employers, including a higher education institution or affiliated nonprofit entity, or a nonprofit/government research organization also are not subject to the H-1B cap.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations, which require theoretical or technical expertise and knowledge in specialized fields, such as scientists, engineers, or computer programmers.

- **F-1 Students under OPT**

Foreign nationals with an F-1 student visa who are currently working under Optional Practical Training (OPT) will need an H-1B visa in order to continue working once their OPT expires. In 2008, DHS granted "cap-gap" relief to F-1 students whose OPT expiration dates fell between April 1 and October 1 and whose employers had filed H-1B petitions on their behalf.

Grenada for H-2A, H-2B Programs

The Department of Homeland Security (DHS) has added Grenada to the list of countries whose nationals are eligible to participate in the H-2A and H-2B programs for the coming year, effective January 18, 2013. Under DHS regulations, USCIS may approve petitions for H-2A and H-2B nonimmigrant status only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the Federal Register. That notice is renewed each year, and countries may be added or deleted. There are currently 59 countries whose nationals are eligible to participate in the H-2A and H-2B programs for the year 2013.

TN Visa – NAFTA Occupations

Canadian and Mexican citizens who will be engaged in certain occupations identified under the North American Free Trade Agreement (NAFTA) may qualify for TN nonimmigrant classification

to work as professionals in the United States.

NAFTA created special economic and trade relationships for the United States, Canada and Mexico and allows qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level under the TN nonimmigrant classification. Among the types of professionals who are eligible to seek admission as TN nonimmigrants are accountants, engineers, lawyers, pharmacists, scientists, and teachers.

To eligible for TN nonimmigrant status, a foreign national must 1) be a citizen of Canada or Mexico and qualify under the regulations; 2) have a position in the United States which require a NAFTA professional; 3) have a prearranged full-time or part-time job with a U.S. employer (but not self-employment); and 4) have the qualifications to practice in the profession in question.

ICE Fines Companies for Hiring Unlawful Employees

U.S. Immigration and Customs Enforcement (ICE) fined, for a total of more than \$173,800, ten employers in the San Diego area during FY 2012 for hiring of unauthorized workers. The fines were imposed after ICE Homeland Security Investigations (HSI) found the businesses had failed to comply with laws prohibiting the hiring of unauthorized workers during the course of auditing the employers' Form I-9s, the document businesses use to verify an employee's eligibility to work. Businesses are required to complete and retain a Form I-9 for each individual they hire.

Nationwide, HSI conducted more than 3,000 worksite audits in fiscal year 2012 as compared to 2,496 the previous year. In fiscal year 2012, the worksite audits and related investigations resulted in the issuance of 495 final fine notices totaling more than \$12.4 million. That compares to 385 civil fines assessed in fiscal year 2011 totaling \$16.3 million.

SEC Acts On EB-5

The Securities and Exchange Commission (SEC) filed a lawsuit against two Chicago-area Regional Centers alleging that they defrauded EB-5 foreign investors, defrauded USCIS, and misappropriated "administrative fees" charged to the EB-5 foreign investors. The complaint alleges numerous violations of US securities statutes.

The SEC alleges that that A Chicago Convention Center (ACCC) and Intercontinental Regional Center Trust of Chicago (IRCTC) fraudulently sold more than \$145 million in securities and collected \$11 million in administrative fees from more than 250 investors primarily from China.

About U.S. Visa Regulation and Policy

- **Automatic Visa Revalidation**

Automatic visa revalidation applies to expired nonimmigrant visas of foreign nationals who have

been outside of the United States for 30 days or less to visit a contiguous territory (Canada or Mexico) or one of the islands adjacent to the U.S. (other than Cuba). The validity of an expired nonimmigrant visa is automatically extended to the date on which the foreign national applies for readmission. However, if the foreign national fail to meet any one of following criteria, they will not be able to automatically revalidate their visa: 1) applied for a new visa and it has not been issued; 2) applied for a new visa and were denied; 3) have a terminated SEVIS record indicating out of status; 4) have been out the United States for more than thirty days; or 5) are a citizen of Cuba, Iran, North Korea, Sudan, or Syria.

- **Nonimmigrant with Criminal Issues**

Nonimmigrant visa applicants with misdemeanor convictions, charges and/or arrests may be subject to secondary inspection for the officer to review the charges, dispositions. If the original charge was a felony, and may have been pled down to a misdemeanor, the CBP will conduct a secondary inspection for admission at the port of entry. They may also be sent to deferred inspection if records are not available, or if the case is ongoing.

Reminder: New Fee for Permanent Residence Took Effect February 1

As of February 1, 2013, USCIS has begun collecting a new immigrant fee of \$165 from foreign nationals seeking permanent residence in the United States. USCIS said the fee will help to recoup costs for staff time to handle, file, and maintain the immigrant visa package, and the cost of producing and delivering the permanent resident card.

March 2013 Visa Bulletin

DOS has released its March 2013 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.

EMPLOYMENT BASED CATEGORIES

Employment- Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C

2nd	C	15FEB08	01SEP04	C	C
3rd	01MAY07	22JAN07	22NOV02	01MAY07	01SEP06
Other Workers	01MAY07	01JUL03	22NOV02	01MAY07	01SEP06
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.

Immigration Reform and U.S. Economy

Immigration reform is moving quickly. Thus far, the concrete immigration reform proposals include earned legalization with a path to U.S. citizenship for unauthorized immigrants who have already lived in the United States. This would permit unauthorized immigrants to come forward and obtain a provisional legal status that would lead to lawful permanent residence after paying taxes, proving they understand English and civics, and passing all criminal and other background checks. Once they become Lawful Permanent Residents (LPRs), they may be naturalized.

According to a report from the University of Southern California, it is estimated that, if the current 8.5 million LPRs in the United States are naturalized, their earnings would rise somewhere between \$21 billion and \$45 billion over the next decade. This would amount to an increase in Gross Domestic Product of somewhere between \$37 billion and \$52 billion.

State Immigration: Alabama

On behalf of four Latino immigrants in Montgomery County who were arrested for allegedly fishing without a license, a misdemeanor offense in Alabama, a coalition of civil rights organizations filed a lawsuit in the U.S. District Court for the Middle District of Alabama Northern Division to stop a portion of Alabama Immigrant Law HB 658 requiring state officials to post an online list of immigrants who may be undocumented.

Section 5 of HB 658 requires the state to compile and post on a public website the names and other information clearly identifying certain immigrants unable to prove their legal status when they are detained on any state charge, no matter how minor, and appear in state court. The law doesn't provide them with any way to contest their inclusion in the database. The plaintiffs in this case would fall within this requirement and be added to this "blacklist."

Global Immigration: Germany

Foreigners are required to have a visa to visit and stay in Germany. Under German law (section 71 (2) of the Residence Act), responsibility for issuing visas lies with the missions of the Federal Republic of Germany for the area in which the applicant has his/her ordinary residence or domicile. Applicants must submit visa applications, along with all necessary documents, in person at the German mission responsible for their place of residence. Germany issues Business Visas, Employment Visas, Permanent Residence Visas, Relatives/Friends Visas, Study Visas, and Tourist Visas.

Germany is a member of the Schengen Convention whose purpose is to eliminate controls at common borders and promote free movement of people within the Schengen area. The Schengen Convention has made traveling among its member countries and between its European member countries much easier and less bureaucratic. Schengen visa holders can travel to any (or all) member countries using one single visa, thus avoiding the process and expense of obtaining individual visas for each country. If a traveler intends to visit more than one of the Schengen visa countries, he or she must apply for the visa with the country where he or she intends to spend the most time. If a traveler does not have a main country to visit, he or she must apply for the visa with the country he or she plans to enter first.

About Gulf Coast Immigration

Immigration and Global Migration are one of the most complex and dynamic areas of law and policy affecting America's social and economic composition. A well-functioning immigration system is critical to America remaining strong and vibrant. To contribute to this goal and 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, GCI has been issuing monthly business immigration newsletters/updates and immigration alerts to announce fast-breaking developments.

GCI 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.

GCI offers a free evaluation service for individuals who intend to apply for nonimmigrant and both employed- and family-based immigrant visas as to their immigration options and the likelihood of a successful case. To be considered for -the free evaluation service, please e-mail

info@gcimmigration.com, reference "Free Evaluation" in the subject line and include contact information.

GCI conducts free seminars for those community organizations and groups interested in learning about U.S. immigration laws and policies as a public service. If you would like to have GCI present a free seminar please visit www.gcimmigration.com for more information.

GCI also conducts fee-based educational lectures/seminars and training for U.S. based academic institutions and businesses on information and developments in the U.S. immigration law and policy, including I-9 Compliance, E-Verify, and the EB-5 Program. For further information about GCI, publications and lectures and seminars, contact us at www.gcimmigration.com

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