GCI
U.S. Immigration and Nationality Law & Global Migration

GCI Business Immigration Newsletter - March 2013

The March 2013 GCI Newsletter includes:

USCIS on EB-5 Immigrant investor Program

The U.S. Citizenship and Immigration Services (USCIS) has released its memorandum on the EB-5 program. The updated memo clarifies that a material change after filing of an I-526 through admission as a conditional resident requires a new I-526, and that any approved I-526 will be revoked if such a change occurs. The memo also notes that in order to be the investments considered at risk, there should be no guaranteed rate of return on the investment. However, it states that nothing precludes an investor from receiving a return on his or her capital during or after the conditional residence period, so long as the return was not previously guaranteed to the investor and so long as the funds are not a return of the investor's principal.

The memo further clarifies that in the case of an investment in a troubled business, job preservation is allowed in lieu of job creation. That is, 10 jobs must be preserved, created, or some combination of the two for the investment in a troubled business, For example, an investment in a troubled business that creates four (4) qualifying jobs and preserves all six (6) pre-investment jobs would satisfy the statutory and regulatory requirements.

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 have been issued to foreign entrepreneur investors and their qualified family members. However, as the program has been 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.

H-1B Filing Starts April 1

USCIS will begin accepting H-1B petitions subject to the Fiscal Year (FY) 2014 cap on Monday, April 1, 2013. Cases will be considered accepted on the date that USCIS receives a properly filed petition for which the correct fee has been submitted; not the date that the petition is postmarked.

The FY2014 cap is 65,000 & the first 20,000 H-1B petitions filed on behalf of individuals with U.S. master's degree or higher are exempt from the 65,000 cap. Please note that once the H-1B cap is reached, new H-1B visas will not be available until October 2014 as the fiscal year begins on October 1 and ends on September 30. (Please see also GCI February 2013 Newsletter re: the 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. Employers can file H-1B petitions no earlier than six months in advance of the anticipated start date of the employment.

Lower-Skilled Guest Worker Programs - H-2B Visa

There are only few avenues for a worker who is not considered a highly-skilled worker to work in the U.S. The H-2B non-agricultural temporary worker program is one of them, which allows U.S. employers to bring foreign nationals to the U.S. to fill temporary non-agricultural jobs such as restaurant workers, retail clerks, carpenters, plumbers, roofers, manufacturing line workers, hotel service workers, food production workers, landscape workers, and health care aides.

For a U.S. employer to hire an H-2B worker, a multitude of steps must be completed: 1) Recruit U.S. workers under the direction of the State Workforce Agency (SWA) and receive certification that an insufficient number of American workers were willing and able to fill the vacant positions; 2) Apply for certification of need at the federal level from the U.S. Department of Labor; 3) File with the Department of Homeland Security applications and fees for H-2B workers; and 4)

Obtain approval for H-2B visas from the U.S. State Department.

There is a statutory numerical limit, or "cap," on the total number foreign national who may be issued a visa or otherwise provided H-2B status (including through a change of status) during a fiscal year. Currently, the H-2B cap set by Congress is 66,000 per fiscal year, with 33,000 to be allocated for employment beginning in the 1st half of the fiscal year (October 1 - March 31) and 33,000 to be allocated for employment beginning in the 2nd half of the fiscal year (April 1 - September 30). At the end of the work season, the H-2B workers must go home.

OFLC on H-2A Temporary Agricultural Foreign Labor Certification Program

The Office of Foreign Labor Certification (OFLC) of the Department of Labor's Employment and Training Administration recently stated that dairy farmers who perform milking operations are not able to qualify for an H-2A labor certification as the majority of dairy activities, and milk production in particular, "are year-round and therefore cannot be classified as either temporary or seasonal."

OFLC also noted that after a certification has been granted, if the prevailing wage rate for a specific crop in a specific state changes, the agency posts the new prevailing wage rate, in the Agricultural On-Line Wage Library (AOWL) and the Chicago National Processing Center (NPC) sends a letter to all potentially affected employers notifying them of the change.

According to recent statement, an employer may request a pre-occupancy housing inspection well in advance of its date of need. This early contact with the state workforce agency (SWA) will provide the employer with time to resolve potential housing compliance issues without affecting the issuance of the temporary labor certification.

The H-2A nonimmigrant worker visa program enables U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. The Immigration and Nationality Act (INA) authorizes the Secretary of the DHS to permit employers to import foreign workers to perform temporary agricultural labor or services of a temporary or seasonal nature if the Secretary of the U.S. DOL (Secretary) certifies that: (1) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.

New Revised Employment Eligibility Verification (I-9) Form

USCIS has released the newly revised Employment Eligibility Verification form, Form I-9, which employers are required to use in order to verify the identity and employment authorization eligibility of their employees.

Employers are required to maintain Forms I-9 for as long as an individual works for the

employer and for the required retention period for the termination of an individual's employment either 3 years after the date of hire or 1 year after the date employment ended, whichever is later.

The revisions to Form I-9 contain formatting changes and the inclusion of additional data fields for the employee's foreign passport information, telephone, and e-mail address. Employers should begin using the newly revised Form I-9 with revision date 03/08/13 for all new hires and no longer use prior versions of the forms after May 7, 2013.

About U.S. Visa Regulation and Policy

- **B-1/B-2 Visa – Length of Admission**

B-1 business visitors may be admitted for a maximum period of one year; however, the CBP limits the length of stay of a B-1 visa holder to the time needed to accomplish the stated purpose of the visit as the regulations instruct that the B-1 visa holder shall be admitted only for the period of time that is fair and reasonable for completion of the purpose of the trip.

The standard B-2 admission is for six months, while B-2 admissions may be granted for up to a maximum of one year. Eligibility for admission as a visitor is determined by the nature and expected duration of the intended activity in the United States, assuming the B-2 visa holder is otherwise eligible for admission.

- **E Treaty Visas – Length of Admission**

A DHS regulation provides that a nonimmigrant alien applying for admission to the United States with an unexpired E-1 (Treaty Trader) or E-2 (Treaty Investor) visa may be admitted for a period of up to two years from the date of application. The two-year admission period applies to all E-1 and E-2 admissions, regardless of whether it is the first or subsequent admission.

- **L Blanket Visas – Length of Admission**

USCIS may approve a Blanket L petition for an initial period of three years and may also approve a Blanket L extension petition for an “indefinite” period. A DHS regulation states that the beneficiary of an initial blanket petition may be admitted for three years, even though the validity of the initial blanket petition may expire before the end of the three-year period.

In 2012, the U.S. Department of State (DOS) amended the regulations governing the issuance of L visas and now L visas are issued according to the validity period stated on DOS’s Reciprocity Schedule for each country and are not limited to the validity dates on a Blanket L petition. According to current CBP policy, when an alien applies for admission by presenting a valid Blanket L visa, an otherwise admissible alien should be admitted for three years.

"Not Coming to America: Why the U.S. is Falling Behind in the Global Race for Talent"

The Partnership for a New American Economy and Partnership for New York City conducted a comparative study of the immigration reforms which other countries have employed in order to stimulate their economies and attract the high and low-skilled workers needed for continued economic growth.

This report sets out some proposed immigration reforms that the US should adopt today to continue to attract the most talented, innovative, and necessary workers.

April 2013 Visa Bulletin

DOS has released its April 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	01APR08	01SEP04	C	C
3rd	01JUL07	22APR07	08DEC02	01JUL07	08SEP06
Other Workers	01JUL07	01AUG03	08DEC02	01JUL07	08SEP06
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.

State Immigration

- **Alabama**

Beginning on March 15, 2013, young immigrants in Alabama who came to the country as children-also known as DREAMers-will be allowed to apply for state driver's licenses. The decision affects an estimated 10,000 to 20,000 DREAMers who stand to benefit from the federal government's Deferred Action for Childhood Arrivals (DACA) program (See also GCI Alert on Deferred Action for DREAMers.2012.06.19).

With this decision, Alabama joins the following states in issuing licenses to DACA recipients: AR, CA, CO, CT, DE, FL, GA, HI, IL, IN, ID, IA, KS, KY, MD, MA, MI, MN, MS, MO, NV, NM, NH, NJ, NY, NC, OK, OR, PA, RI, SC, TN, TX, VA, WA, WI, UT. Now, there are only two states, AZ and NE, who have announced that DACA recipients will not be eligible for a driver's license.

- **Arizona: Valle del Sol v. Whiting**

On March 4, 2013, the U.S. 9th Circuit Court of Appeals, three-judge appellate panel unanimously sided with day laborers looking for work in Arizona and upheld a lower court injunction that prevents the state from enforcing a provision of SB 1070 that would prohibit motorists from stopping traffic to solicit day laborers.

Global Migration

- **France**

Several visas and permits are available for travel, work or study in France and must be issued in the applicant's country of residence and cannot be renewed or changed after arrival in France. The type of visa required to enter France depends on both the length of stay and the reasons for the visit**.** Please also not that in the French overseas territories, the applicable rules may vary from those applied in Metropolitan France.

- **Schengen Convention**

The Schengen Convention is to eliminate controls at common borders and to promote free movement of people within the Schengen area. It has made traveling between its European member countries easier. The countries covered under the Schengen Agreement include Austria, Belgium, Denmark, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland.

The Schengen visa is a 'visitor visa,' which is issued to citizens of countries who are required to obtain a visa before entering Europe. Schengen visa holders can travel to any (or all) member countries using one single visa, thus avoiding the hassle 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 as a public service for those community organizations and groups interested in learning about U.S. immigration laws and policies. f 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 on 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

Gulf Coast Immigration
P.O. Box 2262
Mobile, Alabama 36652
(251) 379-8065; (251) 387-2544; (251) 219-7182 FAX
info@gcimmigration.com

DISCLAIMERS & REMINDERS