SPRING 2013

VISA SOLUTIONS

An Update from the Immigration Practice Group

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VISA SOLUTIONS

An update from the Immigration Practice Group

SPRING 2013

WILL COMPREHENSIVE IMMIGRATION REFORM HAPPEN?

By Kirk A. Carter, Esq.

Since November, nearly everyone has put immigration reform at the top of the list of things Congress could accomplish this year. The president has encouraged it, Republicans have softened their opposition, organized labor and the Chamber of Commerce are coming together, and a bipartisan group of key legislators is working behind the scenes to draft a bill that achieves comprehensive solutions built upon significant compromise. It's taken more than twenty-five years to get here, but here are the key issues to watch for when the bill is rolled out in the coming months:

Border Security

Over the past decade resources allocated to border enforcement have increased exponentially, and interdiction and removal are now at a record highs. While significant progress has been made in securing the border, the border will never be 100% secure, because the biggest draw is the potential to work here in the US. While US employers have been required to verify the employment eligibility of each new hire since 1987, the use of fraudulent documents has allowed many people to circumvent the rules. To combat this problem USCIS developed a program known as E-Verify, which allows employers to electronically verify the employment status of new workers through the USCIS database. All government contractors are required to utilize this system. Some states, such as Arizona, require all employers to utilize it, and a growing number of employers are utilizing it nationwide. Look for all employers to be required to use E-Verify as a way to remove a substantial economic incentive to overstays and undocumented entrants.

Pathway to Citizenship

While President Obama and the Democrats would prefer that the 11 million undocumented immigrants be provided a reasonable path to legalization and citizenship, Republicans refuse to reward those who broke the law and refuse to put them in line ahead of those who have played by the rules and are waiting patiently. The Democrats acknowledge this and have agreed to an unspecified waiting period – how long is the question. For example, the waiting list for siblings being sponsored by US citizens is 10-12 years! In the meantime, both sides agree that the undocumented should be given a status that allows them to remain in the US and work legally. In exchange for this status they will be expected to: pay a fine; demonstrate that they can speak, read and write English; know a little about our history; and show that they have paid taxes on their prior earnings for some period of time.

There is likely to be a two-track system: a shorter track for "dreamers," those younger immigrants (typically under 30) brought here before they were 14 by their parents; and a regular track for all others. The big areas of dispute are how long they remain in this "temporary" state and when they get to "activate" this status. Most Republicans don't want the pathway provisions to be activated until there is some certification that the border is "secure" – what the standards are for this and who makes that determination are unclear. I suspect that E-Verify will be a key component of that certification.

Visa Availability

One of the reasons our system is broken is that it was designed in 1952, so it doesn't appropriately address the current economic needs of our nation. Despite economic changes over the past sixty years, the decline in birth rates and the increase in demand for workers with various skill sets, our immigration law relies upon an antiquated priority system that distributes too few visas in, some would say, a nonsensical manner. As a result, certain citizens have to wait up to 10 to 12 years to get a visa for their loved one. Companies that go through a complicated process to show that they can't find

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IMMIGRATION PRACTICE GROUP

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- Nonimmigrant Visas
- NAFTA
- Permanent Residence
- Deferred Action for Childhood Arrivals (DACA)
- Applications under the Diversity Visa Lottery
- Labor Certification/PERM
- Naturalization
- Deportation Defense
- Employer Compliance
- Business Advice/Counsel

STATESIDE PROVISIONAL WAIVERS BECOME REALITY

By Isabel I. Rybalnik, Esq.

Effective March 4, 2013, certain waiver applications previously available only by application made outside the US are available on a provisional basis here in the US. The new law benefits family members of US citizens (particularly spouses and unmarried children under age 21) who are ineligible to receive green cards within the United States because they face a three- or ten-year bar on their reentry to the US due to the fact that they previously spent 6 months or more in the US without authorization and/or did not make a legal entry when they last entered the US.

Such family members are able to receive green cards outside the US only after the US citizen obtains an approved immigrant petition and a special waiver has been approved. To obtain a waiver an applicant must demonstrate that the US citizen spouse or child will suffer an extreme hardship if the family member is not allowed to return to the US during the period that he or she is barred. Under prior law, the waiver could be applied for only after the family member had departed the US, and the process could take up to a year, during which time the applicant was required to wait outside the US. If the waiver were denied, the family member was prohibited from reentering the US legally for anywhere from three to ten years. As a result, few people risked returning home, creating a class of relatives stuck in a form of immigration limbo.

The law that now exists allows the US citizen to submit the waiver application while the foreign national relative is still in the United States, and the relative can wait in the US until a decision on the waiver is reached. If the waiver is approved, the relative is still required to leave the US to obtain a green card abroad but with the benefit of knowing that the waiver application has already been provisionally approved. To take advantage of the new law, called the provisional waiver process, the US citizen must first have filed and obtained approval of an immediate relative petition from USCIS and started the immigrant visa process through the US consulate in his or her home country.

Those who were already near the end of their consular processing as of January 3, 2013, are ineligible for the provisional waiver and must file the waiver under the prior law, i.e., after they have departed the US. Other requirements of eligibility for the provisional waiver are that the foreign national must be present in the US at the time the waiver application is filed and must have fingerprints taken through USCIS. Those who are in deportation proceedings must have the proceedings closed before they are eligible to apply. It is important to note that those foreign nationals who are ineligible to receive a green card for a reason other than unlawful presence in the US (such as a criminal conviction or misrepresentation) are not eligible for the provisional waiver and must follow the regular waiver process as it existed under the old law.

Having an approved provisional waiver does not give the foreign national any lawful status in the US and does not mean that a green card can be obtained within the US. The new law also does not change any of the existing standards for granting a waiver, and extreme hardship must still be shown in order to get a waiver approved. Even after approval of a provisional waiver within the US, it is still possible that a foreign national may not receive a green card if, at the time of the consular interview, other factors of inadmissibility to the US are discovered.

The waiver process is a complex and nuanced area of immigration law. We suggest that you consult with an experienced immigration attorney prior to commencing the immigrant process for your family member. **FT**

DID YOU KNOW?

- **The H-1B season for Professional Workers begins April 1, 2013,** when 65,000 visas become available for the government year beginning October 1, 2013. Prior years' demand has always exceeded supply, and the same is expected this year. We recommend starting the H-1B paperwork in early to mid-March for the best chance of obtaining an H-1B.

- **A new fee is in effect for immigrant visas as of February 1, 2013.** Persons who receive an immigrant visa through any US consulate overseas must now pay an additional $165 on top of previously paid immigrant visa fees. The fee must be paid in order to receive a green card. Adopted children are exempt from the fee.

- **Massachusetts public universities have announced they will grant in-state tuition** to those undocumented youths who have been approved under Deferred Action for Childhood Arrivals (DACA) and obtained employment authorization cards. **FT**

FEDERAL GOVERNMENT ISSUES NEW FORM I-9

The United States Citizenship and Immigration Service (USCIS) has issued a revised Employment Eligibility Verification Form I-9 to be used by all public and private employers in the United States by May 8, 2013. The form is used to verify an employee's identity and authorization to work in the United States. Changes found in the new Form I-9 include new fields, reformatting to reduce errors, and clearer instructions to both employees and employers. Employers may download the new form from the USCIS website: www.uscis.gov. **FT**

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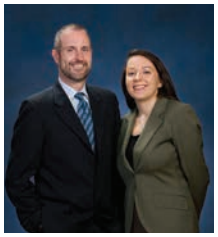
NAVIGATING THE PERM PROCESS



By Kirk A. Carter, Esq. & Isabel I. Rybalnik, Esq.

The employment-based green card process (also known as "PERM" or "labor certification") enables an employer to sponsor a foreign national for permanent residence in the United States. The process requires the employer to demonstrate that there are no "US workers" available for the job being offered to the foreign national.

Step One – Foundation of PERM Success

The first step to a successful PERM application is to properly craft the job description for the position. This must be done with great care, because this will dictate the wage that must be paid and the standards by which all candidates will be measured, including the individual you are seeking to sponsor.

Step Two – Ensuring the Salary Meets the "Prevailing Wage"

The PERM regulations require that an employer submit a request for a prevailing wage determination prior to initiating recruitment under the PERM program and before filing an application for labor certification online. The Department of Labor maintains wage data for more than 1,200 job categories in every metropolitan area in the country. Anticipating what that wage might be while crafting the job description is an important part of the PERM process.

Step Three – Recruiting for 60 Days

Once we are certain that the wage being offered falls within the prevailing wage, we next move on to strategizing a plan of recruitment. This plan must follow the strict guidelines, which dictate where advertisements must be placed and the duration and permissible language of advertisements.

Once the recruitment has been completed, we contact the employer to determine whether a qualified candidate has been found as a result of the recruitment conducted. To be disqualified, an applicant must fail to meet all the minimum requirements of the position as outlined in the job description. Assuming that a minimally qualified candidate has not been found, we prepare a recruitment report detailing the steps that have been followed to date.

Step Four – Filing the PERM Application with the US Department of Labor

The PERM Application, which is submitted electronically, contains a series of questions that are geared toward testing whether or not the employer properly tested the labor market. Strict adherence to the regulations is required in order to successfully achieve an approved labor certification. Some cases are subject to audit, but most are processed within a three-to-six-month period of time.

Step Five – Filing the Immigrant Petition

Once the US Department of Labor has certified that the position qualifies as a shortage occupation, the next step is for the employer to sign that Certification and then file a Petition for Immigrant Worker with USCIS. The purpose of this petition is to establish that the employer is a legitimate business entity that has the financial ability to pay the wage offered in the PERM application.

In addition, the petition seeks to qualify the employee in one of the employment-based preference categories – typically Employment-Based 2 (EB-2) or Employment-Based 3 (EB-3). The employment-based category for which an employee qualifies usually dictates how long he or she will have to wait for an available visa, because employment-based visas are distributed through a preference-based system.

Step Six – Applying for Green Card

Assuming that we have an approved Labor Certification, an approved Employer Petition (I-140) and an available visa number, we may now file the employee's and his or her family's individual Applications for Permanent Residence. In order to file these here in the US, the employee must be in the US in valid status. If he or she is not in the US, he or she may be processed for a green card through the US consulate in his or her home country. **FT**

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qualified US workers to perform a job here in the US often have to wait 8 years before they can get a green card for that employee. It is no wonder why people break the law and enter the country illegally when they are faced with separation from their loved one.

As part of immigration reform, look for the return of common sense in a few areas. There seems to be some consensus that the best and brightest who gain an advanced degree (particulary in engineering or the sciences) from one of our colleges or universities should not be forced to leave and should instead be offered a green card; that more H-1B visas should be made available for specialty workers, particularly in the technology sector; and that a guest worker visa should be available to Mexican nationals that allows them to come to the US to work for a period, particularly in the agricultural field, which would allow them to return home and would not put them on a path to citizenship.

While my crystal ball remains cloudy as to the full details of what Congress might ultimately pass, in my nearly twenty-five years of following this issue, I have never been more confident that we are approaching a resolution and that immigration reform will be enacted in 2013. **FT**